



Strathmore University

Law School

In Defence of the Formal Recognition of the Doctrine of Odious Debts:
A Study on African Debts

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Declaration

I, **IMANI PAIGE JAOKO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Supervisor: **Dr. John Osogo Ambani**

Signed:.....

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DEDICATION

To the current and future generations of African citizens and taxpayers who continue to bear the unjust burden of odious debt— may debt relief be in the near future for you.

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ABSTRACT

The doctrine of odious debt provides that sovereign debt incurred without the consent of the people and not benefiting the people should not be transferable to a successor government, especially if creditors were aware of these facts in advance. African nations have incurred and continue to incur such debts. However, this concept has not been legally and formally recognised and applied in international law. The objective of the study was to discover whether recognising the doctrine in international law would offer much needed debt-relief to African nations.

The research was exclusively desk research. The sources of information used included books, journal articles, reports and working papers, financial and budgetary documents issued by the government of African countries and international financial institutions such as the World Bank and the IMF.

The study justified the use of the doctrine via three conceptual lenses: intergenerational equity, sovereignty of the people and transitional justice. These formed the conceptual framework of the study. The study undertook any analysis of the African debt situation by comparing the volume of debts incurred to issues of governance and levels of corruption on the continent, and found that there are odious debts in Africa.

The study also considered the manner in which the doctrine can find acceptance in international law. While appreciating the body of practice that exists where states have invoked or attempted to invoke the doctrine in the past, the study concluded that treaty making is a better avenue for the doctrine to be considered as a legal concept. The study considered the manner in which the doctrine would be operationalized namely, the way in which a debt could be considered odious and the body that would make this decision. The study concluded by recommending that the African Union form a working group to investigate the debts of the continent and that an international treaty on sovereign debt relief be drafted.

LIST OF ABBREVIATIONS

European Union (EU)

Illicit Financial Flows (IFFs)

International Financial Institutions (IFIs)

International Monetary Fund (IMF)

United Nations (UN)

United Nations Conference on Trade And Development (UNCTAD)

United Nations General Assembly (UNGA)

United Nations Security Council (UNSC)

Chapter One

Introduction

1.1 Background

The doctrine of odious debt provides that sovereign debt incurred without the consent of the people and not benefiting the people should not be transferable to a successor government, especially if creditors are aware of these facts in advance.¹ According to the doctrine, the borrowing country has the right to repudiate such a sovereign debt. Alexander Nahum Sack coined the term odious debt in 1927 when he stated:

‘If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State. This debt is not an obligation for the nation; it is a regime’s debt, a personal debt of the power that has incurred it, consequently it falls with the fall of this power.’²

Sack’s definition comprises three elements: absence of consent, absence of benefit, and creditor awareness of both.³ Over time, the term odious debt has come to represent various types of

¹Kremer M and Jayachandran S, ‘Odious Debt’ 39 *Finance and Development* (2002), 1.

²Sack A, *The Effects of State Transformations on their Public Debts and Other Financial Obligations*, 1929 as quoted in Howse R, ‘The Concept Of Odious Debt In Public International Law’ *UNCTAD Discussion Paper* (2007), 2.

³King J, ‘The Doctrine of Odious Debt in International Law: A Restatement’, *Social Science Research Network* (2007), 17.

illegitimate debt⁴ including war debts, subjugated or imposed debts, regime debts⁵, hostile debts and corrupt debts⁶ among others.

On the one hand the doctrine is justified by the fact that making countries pay for such debts is morally unacceptable and economically unsustainable.⁷ The doctrine is in line with the wider calls for debt relief for developing countries. By continuing to enforce illegitimate debts, creditors place developing countries in a vicious debt cycle yet the benefits of these loans never materialised. By giving debt relief it would release countries from unfair obligations and potentially free up resources to be used for development and poverty reduction. Further, if put into practice, the doctrine would punish irresponsible lending because creditors would be precluded from enforcing debts where it is clear that the conditions of the loan were questionable.

On the other hand, the exact parameters of what constitutes odious debt are too ambiguous to allow countries to default *en masse* without causing serious financial instability in the international lending market.⁸ For instance, it is difficult to distinguish between the ratio amount of the loans that were used for beneficial purposes and those that were not; it is also difficult to determine the meaning of “for the benefit of the people.” To avoid mass defaulting, debts would possibly need to be considered on a case-by-case basis. However this too could cause instability arising out of uncertainty given that no one debt is identical to another.⁹ Further the doctrine could also discourage creditors from lending for fear that it would be difficult to enforce even legitimate loans if they are declared odious after the money has been lent.¹⁰ This would be

⁴Michalowski S, ‘Understanding the Concept of Illegitimate Debt’ in Mader M and Rothenbuhler A (eds), *How to Challenge Illegitimate Debt: Theories and Case Studies*, Aktion Finanzplatz Schweiz-Dritte Welt, 2009, 17.

⁵Sacks’ original categories

⁶Gray D, ‘Devilry, Complicity, And Greed: Transitional Justice And Odious Debt’ 70 *Law and Contemporary Problems* (2007), 139.

⁷Posner E and Choi A, ‘A Critique of the Odious Debt Doctrine’ *Coase-Sandor Institute for Law and Economics* (2007), 3.

⁸Nehru V and Thomas M, ‘The Concept Of Odious Debt: Some Considerations’ *World Bank Economic Policy And Debt Department Discussion Paper* (2008), 3.

⁹Howse R, ‘The Concept Of Odious Debt In Public International Law’, 7.

¹⁰Buchheit LC, ‘The Dilemma of Odious Debts’ 56 *Duke Law Journal* (2007), 1225; Kremer M and Jayachandran S, ‘Odious Debt: When Dictators Borrow, Who Repays the Loan?’ *Brookings Institute* (2003) <http://www.brookings.edu/research/articles/2003/03/spring-development-kremer> on 15 March 2016.

counterproductive for developing countries in need of such funds and could shut down the international debt market.

There is also the question of whether the doctrine can properly be considered a principle or norm in international law. For this to occur, two elements are necessary: state practice and *opinio juris*.¹¹ State practice requires that there be constant and uniform usage¹² of the doctrine or that its use should have been both extensive and virtually uniform.¹³ While there have been some cases where the concept of odious debt has been used to forgive or repudiate debt in transitional contexts,¹⁴ this practice does not seem to have reached the level of state practice.¹⁵ *Opinio juris* refers to the psychological factor of the act, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way.¹⁶ This would mean that states individually where debts are bilateral, and collectively where they are multilateral (International Monetary Fund (IMF), World Bank, European Union (EU) and so on) repudiate or forgive odious debts because they believe that they are legally required to do so. This too does not seem to exist at the moment.¹⁷

Therefore, as it stands now countries continue to repay debt even if it is odious since to default on them would cause the country to suffer reputational loss with lenders and potentially have their assets seized.¹⁸ However such a system maintains the *status quo* without addressing the problem. There is therefore a need to clarify the doctrine and formally and legally recognise it in

¹¹Article 38 (1) (b), *Statute of the International Court of Justice*

¹²*Asylum Case (Columbia v Peru)*, Judgment, ICJ Reports, 1950.

¹³*North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, ICJ Reports 1969, 77.

¹⁴For instance after the Spanish- American war, Spain ceded sovereignty of Cuba to the United States which then refused to assume Cuban debt to Spain on the grounds that the debt was not incurred for the benefit of the Cuban people; After the Russian Revolution in 1917, the Soviet government repudiated Tsarist debt arguing that those debts personally enriched the Tsars and not the nation; After annexing Austria, Germany repudiated Austrian debts arguing that the practices by the American and British lenders were not sound and the debts were not incurred in the interests of the people. See more in Howse R, 'The Concept Of Odious Debt In Public International Law', 10-16.

¹⁵Paulus C, 'The Evolution of the "Concept of Odious Debts"' *Max Planck Institute for Comparative Public Law and International Law* (2008), 415-417; Howse R, 'The Concept Of Odious Debt In Public International Law', 7.

¹⁶Shaw M, *International Law*, 6 ed, Cambridge University Press, 2008, 75.

¹⁷For instance, even in the case of America repudiating Cuba's Spanish debt on the grounds of its illegitimacy, the American Commissioner did not provide a detailed legal analysis of odious debt doctrine and instead seemed to rely on moral arguments. See: Michalowski S, 'Understanding the Concept of Illegitimate Debt', 17.

¹⁸Kremer M and Jayachandran S, 'Odious Debt', 3.

public international law and international finance in order to provide debt relief for these countries in a manner that is just to both parties.¹⁹

In order to do this, it is important to appreciate the current discussions that surround the issue. The discussion of the doctrine has largely moved from simply being about the debts themselves but also the entire system within which they operate.²⁰ This includes questions as to the nature of sovereign lending and the role and duty of lending institutions. There is also the question of whether to classify specific debts as odious or to classify regimes as odious.²¹ By declaring a regime to be odious it would mean that lenders would operate on the presumption that all debts incurred by that regime are odious and that the regime is acting in its own self-interest.²² This would be a preventive measure as odiousness would be determined beforehand. However, this raises several questions that are difficult to practically answer, for instance: what are the necessary and sufficient conditions of an odious regime? Can a debt be partly odious and partly benign? Can a representative government ever contract an odious debt? Can a despotic government ever contract a benign debt? Who makes all of these decisions?²³ On the other hand, by classifying a debt as odious it would mean that each loan contract would be scrutinized on its own standing, which is limiting.²⁴ Other discussions have revolved around the possibility of applying private law²⁵ and the law of agency²⁶ in solving the problem of illegitimate debt.

Having considered the theory of the doctrine, it is important to look at the current African debt situation it is proposed to apply to. Estimates and on-going audits suggest that at least 20 per cent of developing country debts (more than 500 billion US dollars) can be described as odious. This means that the original loans were made to corrupt or despotic regimes where the money was

¹⁹Kremer M and Jayachandran S, 'Odious Debt', 3.

²⁰Hanauer A, 'The Odious Debt System' Master's Theses, University of San Francisco, 2012, 29.

²¹Buchheit LC, 'The Dilemma of Odious Debts', 1225.

²²Buchheit LC, 'The Dilemma of Odious Debts', 1225.

²³Buchheit LC and Gulati G, 'Responsible Sovereign Lending and Borrowing' *UNCTAD Project Promoting Responsible Sovereign Lending And Borrowing*, 2009, 4.

²⁴Hanauer A, 'The Odious Debt System', 29.

²⁵For instance principles of insolvency. See: Dickerson M, 'Insolvency Principles And The Odious Debt Doctrine: The Missing Link In The Debate' 70 *Law and Contemporary Problems*, 2007, 53-79.

²⁶DeMott D, 'Agency by Analogy: A Comment on Odious Debt' 70 *Law and Contemporary Problems*, 2007, 157-169.

likely to go missing.²⁷ Between 2007 and 2014, global government debt grew by 25 trillion US dollars.²⁸

From 1972 to 1983 the volume of loans to developing countries significantly increased.²⁹ This was informed by several factors. Firstly, during the Cold War, Eastern and Western countries, keen to gain political influence, competed to give financial aid. This meant that any nation, no matter how seemingly geo-politically irrelevant, could attract funds.³⁰ Secondly, favourable oil prices at the time yielded surplus money in the international economy, which was invested in Third World countries with little concern as to whether the money would yield returns.³¹ Thirdly, International Financial Institutions (IFIs) were keen to disburse their funds as failure to use funds allocated in the budget could result in budget appropriation.³² This mentality resulted in an emphasis on loan quantity and not quality. Commercial banks were not left behind and disregarded rules of prudent banking and due diligence of lenders leading to a substantial misallocation of resources.³³ Lastly, Structural Adjustment Programs (SAPs)³⁴ offered by the World Bank and International Monetary Fund (IMF) in the 1980s, while postponing the debt crisis, deepened it.³⁵

Despite the dubious conditions of these debts, African countries continue to service them today. Debt service, which is a nation's annual payment of both interest and principal, further weakens an economy by diverting money away from important domestic priorities, including health,

²⁷Hanlon J, *Defining Illegitimate Debt and Linking its Cancellation to Economic Justice*, Open University, June 2002

²⁸McKinsey Global Institute, *Debt and (not much) Deleveraging*, February 2015, at 5

²⁹Bulow J and Rogoff K, 'Sovereign Debt: Is To Forgive To Forget?' *Working Paper No. 2623 National Bureau Of Economic Research*, 1988, 1.

³⁰Hanauer A, 'The Odious Debt System', 6.

³¹Carty A, 'The Third World Debt Crisis: Towards New International Standards for Contraction of Public Debt' 19 *Law and Politics in Africa, Asia and Latin America* (1986), 402

³²Hanauer A, 'The Odious Debt System', 22.

³³Raffer K, 'Odious, Illegitimate, Illegal, Or Legal Debts—What Difference Does It Make For International Chapter 9 Debt Arbitration?' 70 *Law and Contemporary Problems* (2007), 222.

³⁴This was a system of lending instituted by the World Bank. Instead of funding only specific projects, the World Bank began providing what are known as "structural adjustment loans". These loans, which now account for approximately one-quarter of all World Bank lending, are supposed to help less-developed make market-oriented adjustments to their economies. See: Adams P, 'The World Bank and the IMF in Sub-Saharan Africa: Undermining Development and Environmental Sustainability' 46 *Journal of International Affairs* (1992), 103.

³⁵Adams P, 'The World Bank and the IMF in Sub-Saharan Africa: Undermining Development and Environmental Sustainability', 101.

education, and infrastructure development. Factors that indicate a likelihood of odious debt include wealth accumulation by political elite and state bureaucrats, largely unproductive public spending and or investment and capital flight all of which are present in many African countries.³⁶

In 2009, with an external debt of around 300 billion US dollars, African countries spent about 16 per cent of the continent's export earnings on servicing their external debt.³⁷ In contrast, in 2001 African governments committed to spend roughly the same amount (at least 15 per cent) of their national budgets on national health care.³⁸ In 2014, debt service stood at 10 per cent, an improvement, but still dubious in light of the nature of the debts. A 2013 report by the Africa Progress Panel on Illicit Financial Flows (IFFs)³⁹ from the continent found that from 2008 to 2010, Africa recorded an annual average of 38.4 billion US dollars in trade mispricing and 25 billion US dollars in illicit funds, which, when combined, exceeded the continent's development aid and foreign direct investments for the same period. Put simply, Africa could double aid by eliminating trade mispricing.⁴⁰

For instance, in 2013, Kenya's debt service on external debt that was publicly guaranteed⁴¹ stood at around 46 billion shillings⁴² and debt servicing was a dominant item for non-discretionary spending in Kenya's budget.⁴³ Debt service was equal to 20 per cent of the aid it received the same year.⁴⁴ Kenya's struggle with corruption has long been documented. A report by the

³⁶Birdsall N, Williamson J and Deese B, *Delivering on Debt Relief: From IMF Gold to a New Aid Architecture*, 124.

³⁷ NEPAD, 'External Debt in Africa' *Policy brief No.3* October 2010

³⁸ The Abuja Declaration: Ten Years On, *WHO* <http://www.who.int/healthsystems/publications/Abuja10.pdf> on 17 March 2016

³⁹ These are illegal movements of money or capital from one country to another. Movement is classified as an illicit flow when the funds are illegally earned, transferred, and/or utilized.

⁴⁰ Africa Progress Report: Geneva, *Equity In Extractives: Stewarding Africa's Natural Resources For All*, 2013, at 65.

⁴¹ Public and publicly guaranteed debt service is the sum of principal repayments and interest actually paid in currency, goods, or services on long-term obligations of public debtors and long-term private obligations guaranteed by a public entity.

⁴² Kenya, *World Bank Data* <http://data.worldbank.org/country/kenya> on 14 December 2015

⁴³ Institute of Economic Affairs, *Budget 2012/13, Laying the Foundation for Devolved System of Government: Marathon or a Sprint*, 2012, 10.

⁴⁴ <http://www.one.org/international/issues/debt-cancellation/> on 26 January 2016

Auditor General concerning the period ending June 2014⁴⁵ found that, out of total revenue recorded during the 2013/2014 financial year of just over 960 billion shillings, only revenue amounting to 36 billion shillings (3.8 per cent) was collected and fairly recorded and therefore had an unqualified audit opinion.⁴⁶

The case of the Democratic Republic of Congo is perhaps the best illustration of the complicity of creditors in the system of odious debts. The United States was a key player in installing Mobutu Sese Seko to power in the DRC with a CIA backed coup ousting Patrice Lumumba.⁴⁷ Given that Mobutu was a key ally of the United States in opposition to communism, Western was pumped money into the DRC economy. This continued even after it became increasingly, even outrageously, clear that the debts incurred by his country were being funnelled to private pockets. By the time Mobutu was forced out of power in 1997, the DRC's debt burden stood at \$14 billion.⁴⁸ More recently, it was reported that from 2010 to 2012 the government lost an estimated 1.36 billion US dollars from illegal mining deals and concessions, which amounted to almost twice the country's budget for education and health.⁴⁹

⁴⁵Office of the Auditor General Kenya, *Summary Of The Report Of The Auditor-General On The Financial Statements For Ministries Departments, Commissions, Funds And Other Accounts Of The National Government For The Year 2013/2014*, May 2015, 52

⁴⁶The Auditor General audited one hundred and one financial statements. Only twenty six financial statements (or 26%) had a clean (unqualified) audit opinion which is expressed when the auditor has concluded that the financial statements give a true and fair view or are presented fairly, in all material respects, in accordance with the Government Financial Regulations and Procedures and Public Finance Management Act, 2012 and public funds have been applied lawfully and in an effective manner. Fifty (or 50%) had qualified audit opinion, which is given when the misstatement or limitation on the audit is not as material and pervasive as to require an adverse opinion or a disclaimer of opinion. Sixteen financial statements (or 16%) had an adverse opinion, which is given when audit matters on the financial statements are so material and pervasive that the auditor has concluded the financial statements are misleading or incomplete. Nine (or 9%) had a disclaimer of opinion which is given where the auditor was not able to express an opinion where the possible effects of limitations on the audit were so material and pervasive that they were unable to obtain sufficient appropriate audit evidence and accordingly unable to express any meaningful audit opinion on the financial statements.

Office of the Auditor General Kenya, *Summary Of The Report Of The Auditor-General On The Financial Statements For Ministries Departments, Commissions, Funds And Other Accounts Of The National Government For The Year 2013/2014*, May 2015, 14.

⁴⁷ Stephen Weissman, 'What Really Happened in Congo The CIA, the Murder of Lumumba, and the Rise of Mobutu' *Foreign Affairs* (July/August 2014) <https://www.foreignaffairs.com/articles/democratic-republic-congo/2014-06-16/what-really-happened-congo> on 13 March 2016

⁴⁸ Hanauer A, 'The Odious Debt System' Master's Theses, University of San Francisco, 2012, 91.

⁴⁹ Africa Progress Report: Geneva, *Equity In Extractives: Stewarding Africa's Natural Resources For All*, 2013, at 55.

In Nigeria, it is estimated that General Sani Abacha of Nigeria diverted an estimated 4.3 billion US dollars from the Nigerian Central bank, which is largely unrecovered today.⁵⁰ This is considered the world's largest case of known government corruption. The Arab Spring also exposed the offshore assets of African leaders. In Tunisia, president Ben Ali's family had hidden an estimated 18 billion US dollars from Tunisian authorities⁵¹ while Libya's Muammar Gaddafi had hidden assets whose conservative estimate value stands at 200 billion US dollars.⁵² However, these countries continue to pay these debts. In 2014, Africa's total debt service stood at 7.3 per cent of her of exports of goods, services and primary income.⁵³

1.2 Statement of The Problem

Africa is paying billions of dollars to service external debts whose origins and legitimacy is questionable and whose supposed benefits were never felt in the continent and instead remained in the hands of private individuals. Debt service diverts funds from sectors such as healthcare, education and general poverty alleviation. Africa needs relief from these debts and so there is a need to more seriously consider the doctrine of odious debts as possible solution.

1.3 Hypothesis

Some of Africa's debt could be considered to be odious and if the doctrine of odious debt were to be formally recognised by the international community and applied to these debts, it could offer much needed relief to these countries.

⁵⁰ David Pallister and Peter Capella, 'British banks set to freeze dictator's millions' *The Guardian*, 18 July 2000, <http://www.theguardian.com/uk/2000/jul/08/davidpallister?INTCMP=ILCNETTXT3487> on 14 March 2016

⁵¹ Eileen Byrne, 'Tunisia struggles to trace up to £11bn hidden abroad by Ben Ali regime', *The Guardian*, 13 January 2012 <http://www.theguardian.com/world/2012/jan/13/tunisia-11bn-hidden-funds-ben-ali> on 13 March 2016

⁵² Tom Bawden and John Hooper, 'Gaddafis' Hidden Billions: Dubai Banks, Plush London Pads and Italian Water,' *The Guardian*, 22 February 2011; Paul Richter, 'As Libya Takes Stock, Moammar Kadafi's Hidden Riches Astound,' *Los Angeles Times*, 21 October 2011 <http://articles.latimes.com/2011/oct/21/world/la-fg-kadafi-money-20111022> on 12 March 2016

⁵³ World Bank, World Development Indicators: External Debt <http://wdi.worldbank.org/table/6.8> on 16 March 2016

1.4 Research Questions

The main question of the research is, “Can the doctrine of odious debt be formally recognized and applied to African debts?” In order to arrive at an answer, the research also considered these supplementary questions: What are the conceptual underpinnings of the doctrine? Are there odious debts in Africa? Is the doctrine of odious debt able to provide debt relief? What are the impediments to formally recognising the doctrine of odious debt and how may these be overcome? In what way can the doctrine be applied?

1.5 Justification of the Study

This study is justified by the fact that the African continent has significant public debts and also struggles with corruption and dictatorship. The nexus between these issues, if not queried and solved, will continue to burden future generations of Africans with unjust debts and will lock them in a never-ending cycle of debt. This doctrine could be a significant help in providing debt relief.

1.6 Conceptual Framework

There are three justifications for the doctrine of odious debt that this dissertation explored: intergenerational equity, sovereignty of the people and transitional justice.

1.6.1 Intergenerational Equity

International law has traditionally focused on the relationship between members of the same, present generation or the relationship of present generations to past generations. However, the concept of intergenerational equity, which emphasizes the relation of present generations to future generations, is an equally important concept that has been recognized as such.⁵⁴ While the

⁵⁴ Weiss EB, ‘Intergenerational Equity and the Rights of Future Generation’ in Weiss EB (ed) *Environmental Change And International Law: New Challenges And Dimensions*, United Nations University Press, 1992, 71.

idea has mainly been used in the discourse on environmental responsibilities, it has permeated beyond that and is increasingly used in areas such as healthcare,⁵⁵ sustainable development⁵⁶ and pertinent to this dissertation, public debt.⁵⁷

In the discourse on public debts, it has been noted that there exist intergenerational tensions.⁵⁸ This arises from the simple fact that the generation that borrows the funds is not the one that has to pay it back. This seemingly goes against one of the principles of justice that the person who commits the act should pay for its consequences. Consider also the fact that politicians and decision makers are constantly trying to gain favour with the present generation (the voters at the time) and hence are unlikely to increase taxes to finance loans and would instead prefer to push the payments to future generations, then the possibility of public debt snowballing and crippling future generations becomes clearer.⁵⁹

The rules of personal debt are structured to ensure that children do not inherit the excesses of their parents. Therefore, most societies require debts to be extinguished upon settlement of the debtor's estate. Societies that allow debts to be passed on to future generations are condemned by the United Nations for practising a form of debt bondage.⁶⁰ In contrast to this, sovereign debts survive governments and sometimes even states.⁶¹ This obligation is based on the notion of *pacta sunt servada*⁶² meaning that every treaty in force is binding upon the parties to it and must be performed by them in good faith. The critical presumption being the element of good faith, which presupposes that due consideration has been given to full past, present and future ramifications. This means that debt that the current generation of a country acquires will be paid back by future generations of the country. This is done, more often than not, through taxes. The

⁵⁵Sheiner L, 'Intergenerational Equity and Healthcare', *Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs Federal Reserve Board* (2009)

⁵⁶Beder S, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics', 4 *New Zealand Journal of Environmental Law* (2000) 227-243.

⁵⁷Catrina I, 'Intergenerational Equity of Public Debt' 9 *European Journal of Science and Theology* (2013) 167-174.

⁵⁸Buchheit LC and Gulati M, 'Promoting Responsible Sovereign Lending And Borrowing Responsible Sovereign Lending And Borrowing', 5; Buchheit LC, 'The Dilemma of Odious Debts', 1204.

⁵⁹Buchheit LC and Gulati M, 'Promoting Responsible Sovereign Lending And Borrowing Responsible Sovereign Lending And Borrowing', at 5.

⁶⁰Adams P, *Odious Debt*, Probe International, 1991, 9.

⁶¹This is the doctrine of state succession in Public International Law

⁶²Article 26, *The Vienna Convention on the Law of Treaties* (1969)

higher the national debt, the more future generations will have to pay.⁶³ For this reason, ensuring intergenerational equity should be one of the long-term fiscal objectives of a country.⁶⁴ Faced with a high tax burden due to accumulated debt, future generations might decide to sell off public assets or they could (conceivably) decide to repudiate debt.⁶⁵ The doctrine of odious debt would constitute a limitation on this obligation to repay the sovereign debt.⁶⁶ For the odious debt doctrine to practically be applied, creditors should not be able to enforce the debts.

However, this is not as straightforward as it seems. One question that must be answered is: does intergenerational equity apply across nations? A significant amount of debts are incurred from one nation to another. In the context of intergenerational equity, this would mean that some rights would accrue to the future generations of developed nations desirous of enforcing payment of such the debts against the future generations of developing nations. However some would argue that intergenerational equity would only apply across generations in the *same nation*. This begs the question; do future generations in developed nations owe it to future generations in developing nations not to enforce debts? In addition, one would have to ask what the obligation current generations in the lending countries have in holding their states more accountable for lending to “odious” states or enforcing past debts that are odious?

1.6.2 Sovereignty and Public Debt

Debts incurred by a country are referred to as sovereign debts. Sovereignty is understood as the full right and power of a body or polity to govern itself without any interference from outside sources or bodies.

The traditional focus on sovereignty has been territorial sovereignty and political sovereignty. The United Nations (UN) Charter calls for all members of the UN to refrain in their international relations from the threat or use of force against the territorial integrity or political independence

⁶³Auerbach A, ‘Long-Term Objectives for Government Debt,’ *University of California Berkeley*, 2008, 2.

⁶⁴Auerbach A, ‘Long-Term Objectives for Government Debt’, 1.

⁶⁵Osberg L, ‘Meaning and Measurement in Intergenerational Equity’, *Department of Economics Dalhousie University*, 1997

⁶⁶Howse R, ‘The Concept Of Odious Debt In Public International Law’, 4.

of any state.⁶⁷ At the time, physical invasion, unwanted political pressure⁶⁸ and the denial of the right to self-determination were seen as the greatest threats to a country's autonomy.⁶⁹ However, as the world economy becomes increasingly integrated with each country being economically dependent on another in one way or another, the question has begun to shift towards ensuring economic autonomy. Economic sovereignty has possibly gained equal footing with territorial and political sovereignty and is now a legitimate front on which autonomy of a country can be seriously jeopardized.⁷⁰

The notion of sovereignty encompasses the will of the people. Mutakha Kangu argues that the will of the people cannot be based on the subjective individual will of the representatives but instead; it has to be objectively determined.⁷¹ He argues that if the representatives will, on the behalf of the people, something that is obviously opposed to their welfare, such will may lack the objective quality necessary to qualify it as the will of the people.⁷² Further, the consent of the people can only be said to have been secured if, when subjected to objective standards, it represents the interests of the people.

The principle or notion that debts incurred in the name of the people must benefit them is

⁶⁷Article 4, The UN Charter (1945).

⁶⁸For instance the West versus East tensions during the Cold War when The United States and Russia each tried to win over various states to capitalism and socialism respectively.

⁶⁹The world had just emerged from a period of war in which countries were repeatedly invaded, annexed and/or occupied. During the Second World War Nazi Germany occupied a large part of Europe including the kingdoms of Belgium, Norway, France, Denmark, Poland, Austria, Greece, Italy, Netherlands and Romania. See: <https://web.archive.org/web/20130330193920/http://www.britannica.com/EBchecked/topic/648813/World-War-II/53572/German-occupied-Europe> on 12 February 2016

⁷⁰Consider for instance the Greek debt crisis of 2015. Some of debate as to whether Greece should repay the EU loans or default on them revolved around democracy and the sovereignty of the Greek people. Some sentiments were that the European Commission, European Central Bank and the IMF ("the troika") strong-armed Greece to accept the deals it was offering. Such pressure seemed to take away Greece's fiscal sovereignty. All bailout agreements required Greece to implement certain fiscal changes under the keen watch of the troika. For instance, the agreement reached at the Euro Summit in July 2015 required Greece to streamline her VAT system, carry out pension reforms, and privatise her electricity transmission network among other reforms. The pressure led to a rise in nationalistic sentiment in Greece with many feeling that the EU was undermining the independence of Greece. This surge in nationalism led to the election of the anti-austerity Syriza party with Greek voters standing up against external control over their country. The Greek Prime Minister hailed the win of the party as a "victory of the people". See: <http://america.aljazeera.com/opinions/2015/7/invasion-of-the-sovereignty-snatchers.html>; <http://www.theguardian.com/business/2015/jul/12/greek-crisis-surrender-fiscal-sovereignty-in-return-for-bailout-merkel-tells-tsipras>; <https://www.socialeurope.eu/2015/02/crisis-of-sovereignty/>; <https://www.socialeurope.eu/2015/02/crisis-of-sovereignty/>; <http://www.bbc.com/news/world-europe-34307795>

⁷¹ Kangu, M "We the People" as the Sovereign in the Theory and Practice of Governance' *I Moi University Law Journal* (2006), 213.

⁷² Kangu, M "We the People" as the Sovereign in the Theory and Practice of Governance', 213.

probably closely linked to the old adage “no taxation without representation”⁷³. In other words, governments cannot expect to raise funds either from citizens or other agencies for their own enrichment. The deployment of such funds form part of the democratic principles of delegated authority. When incurring debts, the government is required to do so in the name of and interest of the people. However, debts incurred in the name of the people that do not actually benefit the people should not be considered sovereign debts. Therefore odious debts are an affront to sovereignty in so far as those who incur them abuse the will and consent of the people.

1.6.3 Odious Debt As A Branch of The Jurisprudence of Transitional Justice⁷⁴

Some authors have suggested that, rather than looking at odious debt as a self-standing legal doctrine, it might be regarded as a *lex specialis*⁷⁵ of transitional justice in a wider discussion about the legal issues associated with a transition.⁷⁶ Therefore any treatment of odious debts must be consistent with the broader programs of transitional justice in which they are situated.

Transitional Justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses and massive failure of governance institutions. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.⁷⁷ Transitional justice asks what successor regimes, committed to human rights and the rule of law, can and should do to seek justice for widespread and institutional human rights violations perpetrated by and under their predecessors.⁷⁸

Further, following a transition, the new regimes face financial pressure, as most inherit crippled and/or corrupt economies. They need to ensure peace, achieve stability, reform public

⁷³ United States Library of Congress <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/no-taxation-without-representation.html> on 14 January 2017.

⁷⁴Howse R, ‘The Concept Of Odious Debt In Public International Law’, 7.

⁷⁵A law looking at a specific subject matter

⁷⁶Howse R, ‘The Concept Of Odious Debt In Public International Law’, 7.

⁷⁷Definition used by the International Center for Transitional Justice

⁷⁸Gray D, ‘Devilry, Complicity, And Greed: Transitional Justice And Odious Debt’, 143.

institutions and in some cases restart the economy.⁷⁹ These demands make transitions difficult. Therefore, forgiving the debts of odious regimes can help these countries free resources for these activities.⁸⁰

1.7 Methodology

The research was exclusively desk research. The sources of information included books, journal articles, reports and working papers, financial and budgetary documents issued by the governments of various African countries, financial documents issued by international financial and monetary institutions such as the World Bank and the IMF among other documents.

1.8 Chapter Breakdown

a) Chapter One- Introduction

This is the introduction of the study. It discusses the arguments in favour of the doctrine, those in opposition to the doctrine, the limitations of the doctrine, as well as defines the parameters of the study and the methodology to be used.

b) Chapter Two- Conceptualising The Doctrine of Odious Debts

It conceptualises odious debt by exploring the justifications and need for the use of the doctrine including intergenerational justice, transitional justice and sovereignty.

c) Chapter Three- Africa As The Net Creditor of The World

This chapter explores the public debt situation in Africa and the relationship between public debt, capital flight, corruption and dictatorship. It establishes whether there are debts that so closely nested in these issues as to be considered odious. It also considers the role that creditor awareness plays in the determination of odiousness.

⁷⁹Some of the elements of a comprehensive transitional justice policy according to the International Center for Transitional Justice

⁸⁰Gray D, 'Devilry, Complicity, And Greed: Transitional Justice And Odious Debt', 143.

d) Chapter Four- Operationalizing The Doctrine of Debt

It considers the legal recognition and application of the odious debt doctrine. It considers the manner in which the doctrine could be formally recognised as a legal concept in international law. It also explores the manner in which the doctrine could be operationalized.

e) Chapter Five- Conclusion and Recommendations

It concludes the study and gives recommendations.

1.9 Limitations

The study limits itself to a discussion of the legal applicability of the doctrine and not the economic dimensions of the same.

Chapter Two

Conceptualizing the Doctrine of Odious Debt

2.1 Introduction

Over the years there have been a range of responses to the mounting public debt problem in the world (both developed and developing countries). These responses have included fiscal austerity measures¹, debt write-offs², debt rescheduling and debt-restructuring programs³ among others. These approaches have received varied success with a number of them failing to achieve the desired result.⁴ The doctrine of odious debt is yet another possible approach that can be piled with the others. Hence, the question remains, why odious debt? On what grounds is this particular approach justified?

As noted in chapter one, proponents of the doctrine of odious debt argue in its favour on moral grounds. They argue that to make future (and current) generations of citizens repay debts that did

¹See Cherif R and Hasanov F, 'Public Debt Dynamics: The Effects of Austerity, Inflation, and Growth Shocks', IMF Working Paper 12/230, 2012 –<<https://www.imf.org/external/pubs/ft/wp/2012/wp12230.pdf>> on 11 January 2017.

²Khan M, 'The biggest debt write-offs in the history of the world' The Telegraph, 2 February 2015, <<http://www.telegraph.co.uk/finance/economics/11383374/The-biggest-debt-write-offs-in-the-history-of-the-world.html>> on 11 January 2017.

³See International Monetary Fund, *Sovereign Debt Restructuring—Recent Developments And Implications For The Fund's Legal And Policy Framework*, 2013 –< <https://www.imf.org/external/np/pp/eng/2013/042613.pdf>> on 11 January 2017.

⁴For a comprehensive survey of pertinent issues on sovereign debt restructuring including the outcome of the restructuring, see Das U, Papaioannou M, and Trebesch C, 'Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts' IMF Working Paper 12/203, 2012 available at: <https://www.imf.org/external/pubs/ft/wp/2012/wp12203.pdf>;

For an analysis of the effect of austerity measures on public debt, see Hasanov F and Cherif R, 'Public Debt Dynamics : The Effects of Austerity, Inflation, and Growth Shocks' IMF Working Paper Series 12/230, 2012 available at <https://www.imf.org/external/pubs/cat/longres.aspx?sk=26268.0>;

not benefit them would be morally repugnant and unjust.⁵ While this is undoubtedly true, the fact is that moral arguments do not often hold sway or are not considered independently academically valid in present-day legal discourse. There is a need to supplement the moral justifications with others founded in legal or quasi-legal concepts that are perhaps more agreeable to a legal mind.

The hypothesis of this dissertation is that if the odious debt doctrine is formally recognised and applied, it could offer much needed debt-relief to African countries. However, why should this debt-relief come in the form of odious debt doctrine and not any other method? What are the conceptual underpinnings of the doctrine? This chapter seeks to answer this question.

In this respect, the chapter conceptualizes the doctrine of odious debt as one founded in three principles⁶: intergenerational equity, sovereignty and transitional justice.

2.2 Intergenerational Equity

The American president Herbert Hoover opined, ‘blessed are the young for they shall inherit the national debt’.⁷ This was a sarcastic rendition of one of the beatitudes of Christ found in the Bible, ‘blessed are the meek for they shall inherit the earth’.⁸ Mr. Hoover’s comment was intended to criticize his successor Franklin Roosevelt’s economic plan known as the New Deal, which he believed would significantly increase America’s debt.⁹ Mr. Hoover was of the opinion that to saddle future generations with that amount of debt would be to mortgage their future away.

The principle of intergenerational equity is drawn from the wider principle of sustainability and sustainable development.¹⁰ The Brundtland Report of the United Nations Commission on the Environment and Development provides perhaps the most widely accepted definition of sustainability, which is ‘development that meets the need of the present generation without

⁵ Posner E and Choi A, ‘A Critique of the Odious Debt Doctrine’, 3; Bolton P and Skeel D, ‘Odious Debts or Odious Regimes’ 70 *Law and Contemporary Problems*, 2007, 85.

⁶ Needless to say these are simply the ones chosen by this author, other justifications for the doctrine exist.

⁷ Address to the Nebraska Republican Conference, Lincoln, Nebraska, 16 January 1936.

⁸ Matthew 5:5, The NIV Bible

⁹ Hendrickson J, ‘Herbert Hoover and the transformational election of 1932’ Public Interest Institute, Policy Study Number 13-8, November 2013; See also: <https://www.whitehouse.gov/1600/presidents/herberthoover> on 20 May 2016

¹⁰ Beckwith T.J., *Environmental law*, Sweet & Maxwell, 2004, 46.

compromising the ability of future generations to meet their own needs'.¹¹ The principle of sustainability originated from discourses in international environmental law but has now crossed over to other disciplines.¹² The derivative principle of intergenerational equity is the notion that the human species holds the natural environment of our planet in common with other species, other people, and with past, present and future generations.¹³ Further, all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system.¹⁴ This has come to be considered true not only for the natural system but for other resources as well. Present generations in a country therefore hold the wealth of their nation as a trust for future generations.

The effect of public debt on future generations has been argued and contested amongst economic scholars for a long time. On the one hand some argue that the real burden of public borrowing is not shifted from one generation to the next because the borrowing generation makes adjustments to pay off the debt, for instance an increase in taxes.¹⁵ On the other hand, some scholars argue that the burden does shift and falls on the shoulders of future generations.¹⁶

Granted, some debt is good. Credit is recognized as one of the foremost important foundations for economic prosperity. It allows people and groups to access funding that they otherwise would have been unable to. This is no different for governments, which need sovereign debt in order to finance their budget. This is especially true for African countries that do not readily have large

¹¹ United Nations Commission on Environment and Development, *Our Common Future*, 1987, 43. This definition was accepted and formalized at the United Nations Conference on Environment and Development at Rio de Janeiro in 1992.

¹² United Nations Resolution A/RES/70/1 of 25 September 2015 listed some Sustainable Development Goals (SDGs), which spanned 17 topics including climate change, energy, education, poverty, infrastructure and industrialization, hunger, and food security among others.

¹³ Weiss E, 'In fairness to future generations and sustainable development' 8(1) *American University International Law Review*, 1991, 21.

¹⁴ Weiss E, 'In fairness to future generations', 21.

¹⁵ This was the prevailing argument in the late 50s and 60s amongst economists. Bowen W, Davis R and Kopf D 'The public debt: A burden on future generations?' 50 (4) *The American Economic Review*, 1960, 701-706. In modern times (2010s) leading economists such as Dean Baker and Paul Krugman support this argument. See: Krugman P, 'Debt Is (Mostly) Money We Owe to Ourselves' *The New York Times*, 28 May 2011 http://krugman.blogs.nytimes.com/2011/12/28/debt-is-mostly-money-we-owe-to-ourselves/?_r=0 on 23 May 2016

¹⁶ James Buchanan was one of the few economists in the 50s and 60s to argue that the burden of debt *could* shift to future generations in his book *Principles of Public Debt*. In present times, economist Don Boudreaux supports Buchanan's argument. See: Boudreaux D, 'Let's Not Talk Past Each Other on the Burden-of-Public-Debt Issue', May 2012 <http://cafehayek.com/2012/01/lets-not-talk-past-each-other-on-the-burden-of-public-debt-issue.html> on 23 May 2016

amounts of capital needed to fund large-scale infrastructure and development projects. Alexander Hamilton, the first US treasury secretary is quoted as saying, ‘a national debt, if it is not excessive, will be to us a national blessing.’¹⁷ In his farewell address to the American people¹⁸, George Washington (the founding president on the United States), while reminding the nation to cherish public credit as an important source of strength and security, warned them to use the credit as sparingly as possible in order to avoid the accumulation of the debt and most important (to this dissertation at least), not to ‘ungenerously throw upon posterity the burthen, which we ourselves ought to bear.’ That is, not to unfairly and excessively burden the future generations with debt. He particularly extolled the American people to pay off any national debt accumulated in times of war as quickly as possible in times of peace so that future generations would not have to take on the financial burdens that others had taken on themselves.

While opinions vary on the effect of public debt on future generations, what is undeniable is the intergenerational tension it creates simply because the generation that borrows the funds is not always the one that pays it.¹⁹ While some public debts end up being beneficial to the future generations such that the benefit gained outweighs the burden of having to repay²⁰, those that are excessive and/or odious have no such offsetting effect.

¹⁷ ‘Past & present: Alexander Hamilton and the start of the national debt’ US News, 8 September 2008, <http://www.usnews.com/opinion/articles/2008/09/18/past-present-alexander-hamilton-and-the-start-of-the-national-debt> on 20 May 2016.

¹⁸ George Washington’s Farewell Address (17 September 1796), find transcript at: https://en.wikisource.org/wiki/Washington%27s_Farewell_Address#1

¹⁹ Buchheit L and Gulati G, ‘Responsible Sovereign Lending and Borrowing’ *73 Law and Contemporary Problems* 2010, 69.

²⁰ In his book ‘Cost and Choice: An Inquiry in Economic Theory’ James Buchanan referred to this as the opportunity cost of public debt. That is, what had to be sacrificed or foregone. Consider for instance debts incurred to build an extensive, rapid underground transport system for a growing metropolis that is constructed with the guidance of a proper, future-looking town plan. While the repayment of the debt may be high and/or lengthy, the future generation is able to benefit from such a resource and is saved the burden of having to build such a system for themselves in arguably less conducive conditions. The past generation is possibly in a better position to construct such a system, as the metropolis has not yet grown to a size that would make construction difficult. However, if the future generation must construct, it is more difficult as structures have taken root, population is higher and the work becomes more disruptive. In such a situation, it is a more attractive option for the future generation to simply pay the debt than to have to take on the project themselves. To make this example more concrete, consider developed subway systems built in cities such as London and Washington DC. These metros were constructed before human traffic ballooned to the size they are now- in 1863 and 1946 respectively. The current and future generations are only required to maintain and if needed expand the system but the important foundations have already been laid. In such a situation repaying a debt is the lesser evil than having no system and having to construct it. In contrast consider a city like Nairobi that has no such system. To put one in place at this stage is much more complicated than it would have been 50 years ago before population and structures ballooned. In such a case the current generation of Nairobians would arguably have rather paid off any debts related to

Therefore, it must be clear that in this dissertation the negative intergenerational effect of public debt is in reference to odious debt and not legitimate public debt. This is because, while there are some arguments to be made for the benefits of legitimate public debt, there are none to be made for the benefits of odious debt. Odious debt without doubt and without exception has a negative effect on future generations. This is simply because the would-be benefits of this debt are non-existent. At least with legitimate public debt, there are debates to be had about the success or otherwise of the use of credit for public initiatives; with odious debt this is completely non-existent as the ‘initiatives’ are personal gain. Simply put, there can be no reasonable economic benefit to public money being misappropriated. If there is some credence to the notion that some legitimate debt may have a negative effect on future generations, then this can only be amplified in the case of illegitimate debt. Odious debt subjects future generations to ‘double jeopardy’ since they will not only suffer from the lack of present development (the funds having been rerouted for personal gain), but will also be burdened with the sovereign debt which the present generation accumulated for them.²¹ This is the situation that current African generations find themselves in.

What then is the duty of current and future borrowers and lenders to ensure this intergenerational equity? On the one hand there is the national/internal duty. The current generations of African countries owe it to their future generations to borrow responsibly and to use the proceeds of borrowing for legitimate purposes. The current generations in lender/developed countries also have a duty to their *own* future generations. If lender nations were to forgive odious debts, this would be recorded as a bad loan and hence a loss.²² Setting aside for a moment the argument that it is the developing nations that suffer more and that the conditions and circumstances of these loans were dubious in the first place, let us for a moment allow the argument that ‘the rich also cry’; and hence the loss suffered to these developed, lender countries is unfortunate. Current generations in lender countries would lose out on interest payments and would be unable to recover what was lent²³ yet it is the past generations in their country that lent money recklessly. Therefore it is clear that, even within lender countries, the current generation owes a duty to the

constructing such a system but having the benefit and use of it rather than the situation they find themselves in, which is having no system and having to try to construct one in a congested and unplanned city that it is now.

²¹ Ogbodo S, ‘The International Responsibility of Maintaining a Sustainable Sovereign Debt in Nigeria’ 8 (3) *Manchester Journal of International Economic Law*, 201, 3.

²² Birdsall N, Williamson J and Deese B, *Delivering on Debt Relief: From IMF Gold to a New Aid Architecture*, 56.

²³ Birdsall N, Williamson J and Deese B, *Delivering on Debt Relief*, 56.

future generations to lend money in a transparent and sustainable way in order to avoid, as far as possible, giving loans that could in time come to be considered odious and as a result could be written off.²⁴

In addition to this, there is international consensus that developed countries owe an intra-generational duty of assistance to developing countries. The UN Charter of Economic Rights and Duties of States²⁵, adopted by the UN General Assembly, is one such indication. Through the Charter, developing countries sought a legally binding commitment that developed countries will make a good faith effort to assure a more equalized distribution of the profits and rewards from global trade and resource utilization.²⁶ Article 17 of the Charter provides that:

‘International co-operation for development in the shared goal and common duty of all States. Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.’

The more complicated question at hand is whether this duty is inter-generational. That is, do current generations in developed nations owe future generations in developing nations a duty?²⁷ This would seem ideal in some respects. Consider for instance the fact that lenders in the 1970s not only knew that African countries would not be able to pay these debts but also that their leaders at the time were misappropriating the proceeds of the loans, yet they continued to lend the money.²⁸ Would it have been preferable for these lenders to exercise some restraint if only in

²⁴ In some respects, it is possible to consider international financial institutions proxies of developed and donor countries. While these institutions are somewhat autonomous and not direct agents of these countries, what is obvious is that they are overwhelmingly funded by these donor nations. Therefore, citizens in developed nations bankroll loans from these institutions. When these institutions lose money from bad debts, these countries by extension lose money. Therefore, in some ways, when considering losses on bad loans those from these institutions could be counted as losses for these countries as well.

²⁵ UNGA, Res. 3281(xxix), 1974

²⁶ Vanzant J, ‘Charter on Economic Rights and Duties of States: A Solution to the Development Aid Problem?’, 4 *Georgia Journal of International and Comparative Law*, 1974, 441.

²⁷ Or, did past generations in developed nations owe the current generation of African (and developing countries) a duty when dishing out loans?

²⁸ Erwin Blumenthal an IMF analyst appointed to liaise with the (then) Zaire Central Bank in 1978 stated that “there is no chance, I repeat no chance, that Zaire's numerous creditors will ever recover their loans.” Shortly after this

favour of the future generations of their debtors? Perhaps. Admittedly, it is not hard to imagine that attempts to do this would be considered paternalistic and neo-colonial no matter how well intentioned. However, does such a duty exist in theory at least? While the international community owes a duty across borders in respect of trade²⁹ and shared resources such as the environment in which sovereign borders are not an excuse to avoid cooperation,³⁰ public debt management has remained a national matter.³¹ However, if one considers that sovereign debt, incurred in the global financial markets, is part of and plays an important role in international trade relations, it can then be argued that the duty to assist and ensure equity in international trade could possibly extend to debt-relief and debt-restructuring efforts. In this way, the intergenerational duty in public debt management would not remain limited to the duty of generations *within* one country but would extend to the duty of generations between different countries.

Therefore, the doctrine of odious debt is justified by the need to provide current and future generations relief from an unfair, intergenerational transfer of public debt.

2.3 Sovereignty

The United Nations (UN) Charter provides that one of the organization's purposes is the development of friendly relations among states based on the 'principle of equal rights and self-determination of peoples'.³² Today it is clearer than ever that self-determination encompasses that of a political, social, cultural and economic kind.

In the recent past, the question of economic sovereignty has been most heatedly debated in the context of trade and loan agreements between member states of the European Union (EU).³³

report the IMF gave Zaire the largest ever loan given to an African country. See: <https://journal.probeinternational.org/2009/07/06/imf-world-bank-lending-institutions-agents-promoting-poverty-or-development/> on 29 April 2016.

²⁹ UN Charter of Economic Rights and Duties of States, 1974.

³⁰ Mendis C, 'Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamudram Ship Channel Project', 2006.

³¹ Consider for instance that the IMF and World Bank's, 'Guidelines for Public Debt Management' refer only to the duties of the government at hand and contain no instructions for lenders or donors. In contrast, handbooks on environmental management refer to national and international efforts.

³² Article 1.2, The United Nations Charter, 1945.

³³ Economic sovereignty was at the heart of Greek and Icelandic debt crises and was a key topic in the run up to Britain's referendum to decide whether to stay in the EU or to exit (Brexit, as it was termed). In the context of

Granted, repayment of debts within an economic and political union such as the EU has certain idiosyncrasies not replicated elsewhere; the nuances of the discussion are instructive in as far as they illustrate the importance of economic sovereignty. While the traditional focus on sovereignty has been independence of a political and territorial nature, economic integration and the global economy are putting pressure on economic independence in a way not experienced before.

While sovereignty entails the will of the people, what has been accepted is that it is impossible for each and every one of ‘the people’ to be involved in deciding and exercising this will on a day to day basis. Hence there are representatives who act on behalf of the people. This method assumes that indeed these people will act, to the best of their ability, on behalf of and in the interest of the people they represent. For this reason, when cabinet secretaries and heads of states sign treaties or trade agreements, this act is legitimate under international law.³⁴ Further, by signing the document these officials do not bind themselves personally but bind the state.³⁵ When state representatives sign economic agreements, they do so on behalf of the entire nation. This is acceptable and legitimate.

However, in the case of odious debts there are two significant barriers, which bring into question whether the debts incurred are sovereign debts or personal debts. The first is political legitimacy. This refers to the level of acceptability or justification of an authority- why its use of power is acceptable.³⁶ In *Political Liberalism*, John Rawls argues that if the conditions for legitimacy are not met, the acts of the institution are illegitimate and unjustifiable and there is no obligation to obey commands they issues.³⁷ The sovereign’s authority hinges on whether they are legitimate or not. When leaders who take office in dubious ways they struggle to acquire legitimacy. Yet,

Brexit, exiting the European union was touted as a way to release British taxpayers from a foreign authority that was exerting too much influence on the nation’s economic decisions. The topic is more deeply explored in the paper ‘Shared Economic Sovereignty: Beneficial or Not and Who Decides?’ written by John W. O’Hagan for the Economic Sovereignty Symposium hosted by the Institute of International and European Affairs in Dublin 31st May 2013. Paper available here: <http://www.iiea.com/blogosphere/new-iiea-publication-by-professor-john-ohagan-on-economic-sovereignty> on 21 May 2016.

³⁴ Article 7 of the Vienna Convention on the Law of Treaties refers to ‘full powers’ which allows a state to designate a person as a competent authority to represent the state. Under this article, heads of state, heads of government and ministers of foreign affairs are considered to have full powers for the purpose of all acts concerning the performance of a treaty.

³⁵ Article 12, *The Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.

³⁶ ‘Political Legitimacy’, Stanford Encyclopaedia of Philosophy.

³⁷ As discussed in ‘Political Legitimacy’ Stanford Encyclopaedia of Philosophy.

many African leaders who incurred odious debts came to power by way of military coups.³⁸ How then can they be said to be proper representatives of the people?

The second issue is what is termed in political philosophy as ‘the consent of the governed’. Article 21 of the Universal Declaration of Human Rights states that ‘the will of the people shall be the basis of the authority of government’. If the representatives will, on the behalf of the people, something that is obviously opposed to their welfare, such will may lack the objective quality necessary to qualify it as the will of the people.³⁹ When incurring debts, these officials are considered to be agents of the people.⁴⁰ The law of agency provides that the agent owes a fiduciary duty to the principal- this is the highest form of duty.⁴¹ This means that the agent must do all that is possible to act in the interests of the principal. In this case, the duty is to incur debts for the benefit of the people and to use the funds in the same way. Debts incurred for personal gain cannot be objectively said to have been incurred with the consent of the people and hence cannot be said to be the will of the people.⁴²

Therefore, odious debts are not sovereign debts but instead are personal debts because the sovereignty of the people has not been properly exercised. Hence, they cannot be enforced against the state.

2.4 Transitional Justice

Transitional justice programs have traditionally been focused on internal healing and restoration of a country through remedying violations of civil and political rights. Typical agendas include truth commissions, institutional reforms with a focus on institutions such as the judiciary, military and police (often the most wounded casualties under despotic regimes), trials and prosecutions as well vetting and re-vetting of candidates for public offices among other

³⁸ Since 1960 there have been over 200 military coups on the continent, counting both successful and failed attempts. Barka H and Ncube M for African Development Bank, *Political Fragility in Africa: Are Military Coups d’Etat a Never-Ending Phenomenon?*, 2012, 1.

³⁹ Kangu, M “‘We the People’ as the Sovereign in the Theory and Practice of Governance”, 213.

⁴⁰ Buchheit L and Gulati G, ‘Responsible Sovereign Lending and Borrowing’, 70.

⁴¹ Buchheit L and Gulati G, ‘Responsible Sovereign Lending and Borrowing’, 70.

⁴² Sacks’s original argument.

measures.⁴³ The aim of transitional justice is to allow the current generation to move forward without being shackled to the dark past of the nation.

However, there is a need to more seriously include economic dimensions to the discussion on transitional justice that have previously been ignored by transitional justice processes.⁴⁴ These economic crimes have an external factor in that external enablers contributed to these violations. Applying the doctrine of odious debt would require that the nation must also be able to relieve itself of debt repayments tied to the previous regime and would be in line with the wider aims of transitional justice. This is because, even if internal reforms are successful, when nations remain saddled with debt from the despotic regime, they are unable to truly move forward. Even if civil and political reforms are achieved, if economic reform is not equally successful, a nation will stagnate. By including economic crimes in the discussion of transitional justice, this is recognition of the fact that human rights violations and corruption are mutually enforcing crimes⁴⁵ each in need of serious consideration. Further, by including debt relief from external creditors as part of the discussion it is recognition of the fact that external agents have a part to play in allowing transitions. When examining accountability for past injustices and abuses, it would be important for a transitional State to examine the actions of the international financial community.⁴⁶

Most African countries went through a period of transition in the 90s when the so-called “third wave of democratization”⁴⁷ swept the continent. Both political and economic transitions were attempted. As earlier mentioned in chapter one, the attempts by the IMF and World Bank to restructure debts and assist African countries through Structural Adjustment Programs were disastrous and only served to delay, if not deepen, the debt crisis the continent was facing.⁴⁸ Therefore, transitional justice in an economic sense has not been successful.

⁴³ International Centre for Transitional Justice -- <https://www.ictj.org/about/transitional-justice> on 24 May 2016.

⁴⁴ Carranza R, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’ 2 *The International Journal of Transitional Justice*, 2008, 312-316.

⁴⁵ Carranza R, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?’ 2 *The International Journal of Transitional Justice*, 2008, 311.

⁴⁶ Howse R, ‘The Concept Of Odious Debt In Public International Law’, 8.

⁴⁷ The term was coined by Samuel P. Huntington, a political scientist at Harvard University who published a book ‘The Third Wave: Democratization in the Late Twentieth Century’ in 1991.

⁴⁸ Adams P, ‘The World Bank and the IMF in Sub-Saharan Africa: Undermining Development and Environmental Sustainability’, 101.

One difficulty in this rationalization must however be admitted. This is the fact that transitional justice on the political and civil front is equally unsuccessful. While many African countries no longer have ‘excessively’ dictatorial and despotic regimes⁴⁹, many African leaders and governments are still not close or to or just meet a minimum threshold of accountability and transparency.⁵⁰ The attempts at political reforms have been half-hearted at best. Many countries boast new constitutions or significant constitutional amendments⁵¹ but constitutionalism is yet to catch up; many hold relatively regular elections but few are free, fair and transparent or peaceful⁵²; and political instability is still the order of the day in many African countries, even those that would pose a veneer of stability.⁵³ Hence, the word transition must be used loosely- to speak of a successful or complete transition is still difficult for many African states.

Then, does the failure of transitional African countries to seriously pursue an internal political reform agenda disqualify them from now seeking external economic reform by way odious debt? The answer supplied here is that debt relief by way of declaring debts odious must still remain on the table. It is admittedly difficult to identify many current African governments ‘deserving’ of relief from debts of their predecessors if only because they themselves are very likely also incurring such odious debt. However, it remains that the intended beneficiaries of the relief are the citizens of the counties. Therefore, in order to allow transitional justice to be successful, the role of external actors and the economic aspect of human rights violations must be considered more carefully, something the doctrine of odious debt aims to do.

⁴⁹ In the sense that extreme and eccentric figures such as Mobutu Sese Seko, Idi Amin, Kamuzu Banda and Sani Abacha are on the decline, or at least are less visible.

⁵⁰ Transparency International Corruption Perception Index 2015. Available at: <http://www.transparency.org/cpi2015> on 20 May 2016.

⁵¹ Since 2010 alone the African countries that have undergone a constitutional review process to significantly amended or overhaul their constitution include Kenya, Angola, Central African Republic, Tanzania, Guinea, Libya, Morocco, Namibia, Niger, Rwanda, South Sudan, Tunisia and Zimbabwe. Data is from The Comparatives Constitute Project, which tracks constitutional changes around the world: <https://www.constituteproject.org/?lang=en> on 11 January 2017.

⁵² International Peace Institute, *Elections in Africa: Challenges and Opportunities*, 2011 – <https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_elections_in_africa_2_.pdf> on 11 January 2017.

⁵³ Kenya is the perfect example of this. Considered a stable country in comparison to her peers, and premier economic hub of the East African region, she plunged into post-election violence in 2007.

2.5 Conclusion

The doctrine of odious debt is one that has justification beyond morality. It is justified on the basis of equity, sovereignty and fairness.

This chapter has argued that sovereign debt is intergenerational and is carried down over the years. Current generations owe future generations the duty to manage resources, such as public debt, with the good of the future generation in mind. While future generations are justifiably saddled with repaying debts that benefited them, it is not equitable for them to incur the same burden for debts that were squandered with no benefit whatsoever being enjoyed by them. They should be allowed to repudiate such debts. This duty carries even across borders with the developed countries bearing duties to developing countries, duties that could extend to offering odious debt relief.

The chapter has also argued that odious debts are an abuse of sovereignty. Leaders who incur odious debts do so at the expense of and in defiance of the sovereignty of the people. Such debts should therefore not be considered those of the nation but should be considered personal debts of those who incurred them.

Lastly, the chapter has argued that odious debt lies in tandem with wider calls for transitional justice. The economic aspect of transitional justice has not been fully considered with the focus often being on political and civil transitions. Therefore, the doctrine of odious debt shines the spotlight on the fact that, in order to fully transition and advance, nations recovering from dictatorial and abusive regimes require debt relief.

Having illustrated the justifications for the doctrine of odious debt, and having proven that the push to apply the doctrine to African countries has basis, it is now important to identify whether there are any debts incurred by the continent that could be qualified as odious. Chapter three will therefore explore the debt situation in Africa in order to prove that odious debts existed and continue to exist.

Chapter 3

Africa As A Net Creditor To The World¹

3.1 Introduction

It goes without saying that the doctrine of odious debt can only be applied if indeed there are odious debts to apply it to. Having considered the theoretical underpinnings of the doctrine of odious debt in chapter two, it is now important to illustrate that these kinds of debts exist in Africa. It is only after this is ascertained that the modalities of applying the doctrine can be properly considered. The research question this chapter seeks to answer is: are there (or have there been) odious debts in Africa?

As already stated, odious debts are those sovereign debts incurred without the consent of the people and not benefiting them.² These debts are lost to corruption. Absence of consent stems from absence of benefit. That is, it is assumed that the people would not consent to that which does not benefit them.³ For odious debts to exist there must be proof that the funds are being diverted and that future generations will continue to service these debts since they are considered legitimate. Further, creditor awareness of these diversions supports the conclusion of odiousness. Creditors should not be able to recover these debts, as they were complicit in their misuse.

To interrogate whether odious debts are present, the approach this chapter takes is to consider the debts that African countries have accumulated over the years (both individually and collectively) and then to consider the amounts reported to have been lost in corruption and capital flight.⁴

¹This term is borrowed from Ndikumana who coined it to refer to the fact that Africa's private external assets exceed its public external liabilities. See Ndikumana L, 'Capital Flight from Sub-Saharan Africa: Linkages with External Borrowing and Policy Options' 25(2) *International Review of Applied Economics*, 2011, 149-170.

² Kremer M and Jayachandran S, 'Odious Debt' 39 *Finance and Development* (2002), 1.

³ Kangu, M "'We the People" as the Sovereign in the Theory and Practice of Governance', 213.

⁴ This is defined as unrecorded capital outflows. It is measured as the missing residual in the balance of payments, after corrections for underreported external borrowing and trade mis-invoicing. Capital flight is illicit by virtue of illegal acquisition, transfer, holding abroad, or some combination of the three. See Boyce J 'Capital Flight from Africa: What is to be Done?' Statement to the Joint Meeting of the United Nations General Assembly and the

Given that capital flight and external borrowing are intertwined and reinforce each other (with capital flight encouraging borrowing⁵), it is safe to draw the conclusion that in countries where corruption is rampant and yet government borrowing is high then some of the debts being incurred are odious. Further, given that corruption and capital flight in Africa is an open secret, this chapter argues that on some level there is creditor awareness that loaned funds are not used for the intended purpose.

3.2 Terms Defined

It is important to first define and explain some economic terms before going forward as these will give a better understanding of what exactly is at issue here.

External debt is that owed to non-resident creditors and is repayable in both foreign and domestic currency.⁶ While domestic debt (that owed to resident creditors) is also crippling and squandered, the focus of this dissertation will be external debt. This is because the problem of odious debt is one that finds its relevance in an international context between parties of different sovereignties, and hence international borrowing is of more concern to solving it.

Public debt is that which is publicly guaranteed- owed by the government.⁷ Private debt does not form part of this inquiry as it does not affect national sovereignty and thus cannot be odious. In all, this dissertation focuses on public external debt.

Debt sustainability refers to the ability of a country to meet its debt obligations without requiring debt relief or accumulating arrears and without compromising growth.⁸ A Debt Sustainability Analysis (DSA) is a structured examination of a country's debt that debt experts from the IMF

Economic and Social Council on Illicit Financial Flows and Development Financing in Africa, 23 October 2015, 1.

⁵ Ndikumana L, 'Capital Flight from Sub-Saharan Africa: Linkages with External Borrowing and Policy Options', 150.

⁶ World Bank Group, *International Debt Statistics 2016*, 154.

⁷ OECD, Glossary of Statistical Terms <<https://stats.oecd.org/glossary/detail.asp?ID=2193>> on 8 December 2016.

⁸ 'Debt Sustainability' Development Finance International <<http://www.development-finance.org/en/topics-of-work/debt-strategy-information/debt-sustainability.html>> on 7 December 2016

and World Bank conduct regularly in low-income and middle-income countries. It is a tool that is used to help guide countries and donors in mobilizing critical financing for low-income countries, while reducing the chances of an excessive build-up of debt.⁹ To make such a determination, economists rely on projections of intended borrowings and economic variables over a maximum 20-year period, and then use ratios comparing debt stock, present value or service on the one hand with GDP, exports or budget revenue on the other hand, to assess payment capacity.¹⁰

3.3 Lessons from the African Debt Crisis of the 80s

Africa has already experienced one debt crisis which occurred in the 1980s and 90s.¹¹ As previously stated, from 1972 to 1983 the volume of loans to developing countries significantly increased.¹² This credit boom was influenced by factors such as the Cold War,¹³ increased oil production and the careless lending policies of International Financial Institutions (IFIs) that favoured loan quantity over loan quality.¹⁴ Unsurprisingly, this era ended in disaster and at the end of 1990, African countries were saddled with a debt of 270 billion US dollars, with Sub-Saharan debt standing at 163 billion US dollars.¹⁵

Following this crisis, Western donors attempted to institute debt-relief programs through the Paris Club.¹⁶ This was an informal group of officials from major creditor countries whose role was to find sustainable solutions for payment of debts by debtor countries.¹⁷ However, these programs were fraught with political considerations. African countries received less timely and

⁹ ‘Debt Sustainability Analysis (DSA)’ World Bank Group <<http://www.worldbank.org/en/topic/debt/brief/dsa>> on 10 December 2016

¹⁰ ‘Debt Sustainability’ Development Finance International <<http://www.development-finance.org/en/topics-of-work/debt-strategy-information/debt-sustainability.html>> on 7 December 2016

¹¹ Mistry P, *African Debt Revisited: Procrastination or Progress?* Forum on Debt and Development (FONDAD), 1991, 9.

¹² Bulow J and Rogoff K, ‘Sovereign Debt: Is To Forgive To Forget?’ National Bureau Of Economic Research, Working Paper No. 2623, 1988, 1.

¹³ Hanauer A, ‘The Odious Debt System’, 6.

¹⁴ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 10.

¹⁵ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 18.

¹⁶ Boughton J, *Silent Revolution: The International Monetary Fund 1979–1989*, International Monetary Fund, 2001, 653 and 658.

¹⁷ Paris Club –< <http://www.clubdeparis.org/en>> on 15 December 2016.

less favourable debt rescheduling deals than more politically important countries like Eastern European ones that faced debt crises in the same period.¹⁸ Further, even within Africa, countries were treated differentially with North African countries like Egypt, which as the time was instrumental to the West during the Gulf War crisis,¹⁹ receiving faster and better debt relief. These actions illustrate that the issue of debt is a political one not solely governed by objective financial and economic considerations and motivations.²⁰ This brings into question the soundness of these programs in general. Moreover, the success of these debt-rescheduling programs is contested. While Sub-Saharan African countries showed a considerable reduction in public and external indebtedness,²¹ the programs are still considered to have had an overall adverse effect.²² Some of the points of failure include the fact that these programs were tied to International Monetary Fund (IMF) Structural Adjustment Programs which largely failed²³ and the fact that the terms and periods of the rescheduling were considered patently unrealistic.²⁴

Therefore after already contributing to plunging African countries into the debt crisis, western donors pushed them further into the abyss with flawed debt-restructuring problems.

3.4 New Trends in Borrowing, Same Chains

While a lot of the literature dedicated to the discussion of odious debts on the continent focuses on the debts incurred in this period of time (80s to 90s), current trends in borrowing indicate that

¹⁸ After having repeatedly said that there were no public resources to devote to dealing with the African debt problem, the Paris Club responded to the Eastern European debt crisis almost immediately by funding a new European Bank to the tune of over \$13 billion. See Mistry P, *African Debt Revisited Procrastination or Progress?*, 13.

¹⁹ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 17.

²⁰ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 32.

²¹ Battaile B, Hernández F.L and Norambuena V, 'Debt Sustainability in Sub-Saharan Africa: Unraveling Country-Specific Risks' World Bank Group Macroeconomics and Fiscal Management Global Practice Group, Policy Research Working Paper 7523, December 2015, 3. ; Up to 30 low-income sub-Saharan African countries had their debts reduced. An estimated \$100 billion of debt was wiped out, easing countries' onerous debt burdens, often the result of loans taken on by corrupt regimes. These had meant more being spent on debt service payments than on health and education combined. See Sulaiman T, 'Analysis: Decade after debt relief, Africa's rush to borrow stirs concern' Reuters, 18 March 2014 —< <http://www.reuters.com/article/us-africa-debt-sustainability-analysis-idUSBREA2H08B20140318> > on 11 December 2016.

²² Mistry P, *African Debt Revisited: Procrastination or Progress?*, 13.

²³ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 34.

²⁴ Mistry P, *African Debt Revisited: Procrastination or Progress?*, 34.

the same cycle may sweep the continent once again.²⁵ History tends to repeat itself, often in cynical and ironic ways. The period after these debt relief programs led to an increase in financing including loan financing on the continent, which if it continues to go unchecked, could return African countries to the same cycle.²⁶ With this in mind, this dissertation seeks to expand the scope of the odious debt query to debts incurred even after the first African debt crisis.

Debt in Sub-Saharan Africa is on the rise. In 2014, disbursements of long-term debt increased by 34 per cent to stand at 54 billion US dollars. This figure is triple the comparable figures for other low- and middle-income countries. Disbursements from official creditors²⁷ rose by 30 per cent between 2010 and 2013. They rose a further 8 per cent in 2014 to 21.5 billion US dollars. Multilateral creditors (such as the World Bank) also increased disbursements in the region by 14 per cent.²⁸

What is more, African countries have begun to diversify their debt portfolios. Bond issuance in Sub-Saharan Africa has historically been confined to South Africa but this is no longer the case. In 2009 the whole of Sub-Saharan Africa raised less than 5 billion US dollars through bond issues, including both private and sovereign bonds, but by 2013 that had grown to 14 billion US dollars, and the 2014 total was around 20 billion US dollars. In 2014, sovereign bonds amounted to 29 per cent of disbursements from official creditors and 25 per cent of foreign direct investment inflows. Ethiopia issued a bond of 1 billion US dollars while Kenya issued one of 2 billion US dollars. Mozambique, Rwanda and Tanzania have also issued similar bonds.²⁹ As noted by one observer, “Eurobonds have become like stock exchanges, private jets and presidential palaces- every African leader wants to have one.”³⁰

²⁵Walker R, ‘The coming African debt crisis’ The Economist, 20 November 2014 – <http://www.economist.com/news/21631955-worrying-build-up-borrowing-coming-african-debt-crisis> > on 13 December 2016.

²⁶Battaile B, Hernández F.L and Norambuena V, ‘Debt Sustainability in Sub-Saharan Africa: Unraveling Country-Specific Risks’, 2.

²⁷Excluding the IMF

²⁸World Bank Group, *International Debt Statistics 2015*, 13.

²⁹World Bank Group, *International Debt Statistics 2015*, 13.

³⁰Sulaiman T, ‘Analysis: Decade after debt relief, Africa's rush to borrow stirs concern’ Reuters, 18 March 2014 – <http://www.reuters.com/article/us-africa-debt-sustainability-analysis-idUSBREA2H08B20140318> > on 11 December 2016.

The purpose of governments' international sovereign bonds is to finance infrastructure spending, to benchmark for other government and corporate bond markets and to aid in public debt management.³¹ However, sovereign bonds face economic difficulties in a changing and volatile global economy negatively influenced by factors such as the recent fall in commodity prices, especially oil, the slowdown in China and the sluggish recovery in Europe.³² Another issue is that when justifying these bonds with the use of Debt-Sustainability Analyses (DSAs), African governments as well as IFIs tend to use GDP predictions that paint a far rosier picture of the economy usually ignoring a country's historical performance.³³ When countries fall short of these expectations, which they are likely to, debt-servicing problems begin.³⁴

However, where odious debt is concerned, the origin of this new form of debt is perhaps the most pertinent challenge. Africa has previously almost exclusively borrowed from official lenders such as governments, the World Bank, the African Development Bank and the IMF. Today however, most of its borrowing is from private sources- private investors are the ones buying government debt.³⁵ Private creditors accounted for 60 per cent of African debt in 2014.³⁶ While the innovation in seeking alternative forms of funding is applauded, private lenders, unmoved by political and diplomatic considerations as public lenders may be, tend to be less forgiving when demanding repayment.³⁷ Further, the current discussions on odious debt assume or rely on negotiations between two sovereigns. When private investors are directly involved it may become more difficult, perhaps impossible, to invoke such a doctrine.

³¹ World Bank Group, *International Debt Statistics 2015*, 13

For example, Rwanda issued a \$400 million, 10-year, 6.875 Eurobond in April 2013, which will finance the construction of a convention center and the repayment of some state-owned RwandAir debt.³¹

³² Battaile B, Hernández F.L and Norambuena V, 'Debt Sustainability in Sub-Saharan Africa: Unraveling Country-Specific Risks', 15.

³³ African Forum and Network on Debt and Development, *The Challenges of Debt Sustainability in Africa: The Case of Ethiopia*, 2006, 17.

³⁴ Sulaiman T, 'Analysis: Decade after debt relief, Africa's rush to borrow stirs concern' Reuters, 18 March 2014 –<<http://www.reuters.com/article/us-africa-debt-sustainability-analysis-idUSBREA2H08B20140318>> on 11 December 2016.

³⁵ Walker R, 'The coming African debt crisis' The Economist, 20 November 2014 –<<http://www.economist.com/news/21631955-worrying-build-up-borrowing-coming-african-debt-crisis>> on 13 December 2016.

³⁶ World Bank Group, *International Debt Statistics 2015*, 13.

³⁷ Walker R, 'The coming African debt crisis' The Economist, 20 November 2014 –<<http://www.economist.com/news/21631955-worrying-build-up-borrowing-coming-african-debt-crisis>> on 13 December 2016.

3.5 Where Does the Money Go?

As already stated, debt is not inherently bad for a nation. Debt is necessary and seemingly unavoidable if a nation seeks to develop. African leaders justify these debts on the basis that large-scale infrastructural development on the continent is only possible with this kind of financing. Therefore, let us for a moment agree with this valid argument and concede that the debt incurred is a necessary and justifiable risk. There still remains a glaring problem- these funds continue to be lost to corruption, re-routed for personal use and are not directed to the intended projects. If these large-scale infrastructural projects do not come to fruition, the debts incurred to fund them are no longer justifiable in any way. Therefore, the issue is not necessarily that Africa is simply incurring debt; it is that Africa is incurring debt yet these funds are continually illegally diverted- the cycle of odious debt continues.

Over the last 50 years, Africa is estimated to have lost in excess of 1 trillion US dollars in illicit financial flows (IFFs).³⁸ This is roughly equivalent to *all* of the official development assistance received by Africa in the same period. Simply put, the two have cancelled out each other.³⁹ To put this in context, it is estimated that just a third of this loss would have been enough to fully cover the continent's external debt.⁴⁰ Currently, The United Nations Economic Commission For Africa (UNECA) estimates that the continent loses 30 to 60 billion US dollars to IFFs *every year*.⁴¹ This is a moderate estimate considering that the data does not exist on all African states and that IFFs are by nature secret and difficult to track. In the face of these statistics it is not far-fetched to say that Africa is haemorrhaging funds. As previously stated, capital flight is one indicator of odious debts.⁴²

³⁸ Report of the High Level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 13. IFFs are defined as money illegally earned, transferred or used.

³⁹ High Level Panel Report on Illicit Financial Flows, 13.

⁴⁰ High Level Panel Report on Illicit Financial Flows, 91.

⁴¹ High Level Panel Report on Illicit Financial Flows, 34.

⁴² Birdsall N, Williamson J and Deese B, *Delivering on Debt Relief: From IMF Gold to a New Aid Architecture*, 124.

As a result of this, African countries continue to lead indices of the most corrupt nations. In 2015, Transparency International found Sub-Saharan Africa to be one of the most corrupt regions in the world.⁴³ In Kenya for instance, the 2 billion US dollar sovereign bond issued by the Government continues to be dogged by persistent claims of corruption that the government has seemingly been unable to answer satisfactorily, with the Auditor General joining the chorus of doubters.⁴⁴ Yet in 2013, debt servicing was a dominant item for non-discretionary spending in Kenya's budget,⁴⁵ equalling 20 per cent of the aid the country had received in the same year.⁴⁶

Continued debt service is not unique to Kenya. In 2009, with an external debt of around 300 billion US dollars, African countries spent about 16 per cent of the continent's export earnings on servicing their external debt.⁴⁷ In contrast, in 2001 African governments committed to spend roughly the same amount of their national budgets on national health care.⁴⁸ In 2014, Africa's total debt service stood at 7.3 per cent of her of exports of goods, services and primary income.⁴⁹

Even Africa's youngest nation has not been spared from the corruption scourge. In September 2016, a report by the international organisation The Sentry revealed that corruption in South Sudan touches the very top levels of power including the president and vice president.⁵⁰ The US Department of State released a statement in support of the report noting that "the track record of corruption in South Sudan is extensive."⁵¹ While the Government of the United States stated that it did not itself give any assistance directly to the South Sudanese government, these statements build a formidable case that other creditors have been put on notice and are aware of the strong possibility that funds may be diverted. Yet, around the same period, South Sudan received a 2

⁴³ Transparency International, *Corruption Perceptions Index*, 2015.

⁴⁴ Wafula P, 'Audit: Sh215b Eurobond cash unaccounted for', 8 September 2016, *The Standard* <https://www.standardmedia.co.ke/article/2000215138/audit-sh215b-eurobond-cash-unaccounted-for> on 19 January 2017

⁴⁵ Institute of Economic Affairs, *Budget 2012/13, Laying the Foundation for Devolved System of Government: Marathon or a Sprint*, 2012, 10.

⁴⁶ <http://www.one.org/international/issues/debt-cancellation/> on 26 January 2016

⁴⁷ NEPAD, 'External Debt in Africa' *Policy brief No.3* October 2010

⁴⁸ The Abuja Declaration: Ten Years On, *WHO* <http://www.who.int/healthsystems/publications/Abuja10.pdf> on 17 March 2016

⁴⁹ World Bank, World Development Indicators: External Debt <http://wdi.worldbank.org/table/6.8> on 16 March 2016

⁵⁰ The Sentry, *War Crimes Shouldn't Pay: Stopping The Looting and Destruction in South Sudan*, September 2016, 5—< https://cdn.thesentry.org/wp-content/uploads/2016/09/Sentry_WCSP_Finalx.pdf> on 15 December 2016.

⁵¹ Press Statement by US Department of State on The Sentry's Report on Corruption in South Sudan, 14 September 2016 —< <http://www.state.gov/r/pa/prs/ps/2016/09/261843.htm>> on 15 December 2016.

billion US dollar loan from the Chinese Government.⁵² In light of these facts it is possible that odious debt could prove to be an issue for South Sudan going forward.

Some of the other corruption figures already alluded to include Mobutu's widespread corruption in the Democratic Republic of Congo, which left the country's debt burden at 14 billion US dollars by the time he left office.⁵³ More recent instances of corruption in DRC include an estimated 1.36 billion US dollars the country lost from 2010 to 2012 in illegal mining deals and concessions. In Nigeria, General Sani Abacha's is estimated to have diverted 4.3 billion US dollars, which is largely unrecovered today.⁵⁴ The Arab Spring also exposed the offshore assets of African leaders. In Tunisia, president Ben Ali's family had hidden an estimated 18 billion US dollars from Tunisian authorities⁵⁵ while Libya's Muammar Gaddafi had hidden assets whose conservative estimate value stands at 200 billion US dollars.⁵⁶

3.6 Creditor Awareness

Sack's third indicator of odious debts was creditor awareness. Carelessness and ignorance are not sufficient but instead the requirement is that creditors be *subjectively* aware of the absence of consent and absence of benefit at the time of the transaction.⁵⁷ While this determination is made on a case-by-case basis, some of the factors to consider include: representations to the creditor, the infamy of the regime in question, its duration, its domestic legality, its human rights record, whether its exit is imminent and whether it has well known practices of discrimination or

⁵² Okech F, 'South Sudan Seeks \$1.9 Billion Chinese Loan as Inflation Rockets' Bloomberg, 9 August 2016—
<<https://www.bloomberg.com/news/articles/2016-08-09/south-sudan-seeks-1-9-billion-chinese-loan-as-inflation-rockets>> on 11 December 2016.

⁵³ Hanauer A, 'The Odious Debt System' Master's Theses, University of San Francisco, 2012, 91.

⁵⁴ David Pallister and Peter Capella, 'British banks set to freeze dictator's millions' *The Guardian*, 18 July 2000, <http://www.theguardian.com/uk/2000/jul/08/davidpallister?INTCMP=ILCNETTXT3487> on 14 March 2016

⁵⁵ Eileen Byrne, 'Tunisia struggles to trace up to £11bn hidden abroad by Ben Ali regime', *The Guardian*, 13 January 2012 <http://www.theguardian.com/world/2012/jan/13/tunisia-11bn-hidden-funds-ben-ali> on 13 March 2016

⁵⁶ Tom Bawden and John Hooper, 'Gaddafis' Hidden Billions: Dubai Banks, Plush London Pads and Italian Water,' *The Guardian*, 22 February 2011; Paul Richter, 'As Libya Takes Stock, Moammar Kadafi's Hidden Riches Astound,' *Los Angeles Times*, 21 October 2011 <http://articles.latimes.com/2011/oct/21/world/la-fg-kadafi-money-20111022> on 12 March 2016

⁵⁷ Khalfan A, King J and Thomas B, 'Advancing the Odious Debt Doctrine' Centre For International Sustainable Development Law (CISDL), Working Paper No. COM/RES/ESJ, 2003, 16 and 89—
<http://cisdl.org/public/docs/pdf/Odious_Debt_Study.pdf> 5 January 2017.

political elitism.⁵⁸ Others still have suggested that creditors could bear responsibility where there are grossly disadvantageous terms and/or onerous and harmful conditions in the loans, as well as where there is aggressive and unscrupulous pushing by lenders to promote their vested interests at the expense of the borrowers and of the people who will pay the debts.⁵⁹

The inclusion of creditor awareness in determining odious debt is premised on one of the maxims of equity that provides “he who comes to equity must come with clean hands”. Therefore, creditors should not be able to recover odious debts due to their complicity.

The notion of creditor responsibility and duty has now come to be widely accepted. In 2012, the United Nations Conference on Trade And Development (UNCTAD) outlined Principles to Promote Responsible Sovereign Lending and Borrowing.⁶⁰ The aim of the principles was to reduce the frequency and severity of debt crises by developing a set of voluntary guidelines that promote and reinforce responsible sovereign lending and borrowing practices. Some of the creditor responsibilities include due diligence on the matter of agency by ensuring that the national agency of the sovereign borrower in question that is entering debt agreements is the one prescribed in the national law of that country.⁶¹ Other principles for lenders to consider include whether there is adequate financial and budgetary management and monitoring at a domestic level in the borrowing nation.⁶²

In 2013, Norway became the first creditor country to undertake a debt audit based on these principles.⁶³ A debt audit is a public, participatory and comprehensive assessment of a country’s debts. Sovereign debt audits encourage discipline around borrowing and lending practices.⁶⁴ These audits include assessment of public debt stock, lending and borrowing practices and debt-

⁵⁸ Khalfan A *et al*, ‘Advancing the Odious Debt Doctrine’, 46.

⁵⁹ Abrahams C, ‘Understanding the Concept of Illegitimate Debt’ in Mader M and Rothenbuhler A (eds), *How to Challenge Illegitimate Debt: Theories and Case Studies*, Aktion Finanzplatz Schweiz-Dritte Welt, 2009, 12.

⁶⁰ UNCTAD, UNCTAD/PRESS/IN/Doha/2012/003, ‘Principles on sovereign lending and borrowing: UNCTAD kick starts endorsement process’ 22 April 2012 – <http://unctad.org/en/pages/InformationNoteDetails.aspx?OriginalVersionID=20> on 19 January 2017.

⁶¹ UNCTAD, *Guidelines on Responsible Sovereign Lending and Borrowing*, 2014, para 114, 28.

⁶² UNCTAD, *Guidelines on Responsible Sovereign Lending and Borrowing*, 2014, para 157, 36.

⁶³ UNCTAD, ‘Norway to audit debt on basis of UNCTAD principles’ 22 August 2012 <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=231> on 14 January 2017.

⁶⁴ Deloitte, *Sovereign Debt Audit: A way to mitigate future debt crises*, 2015, 7.

sustainability issues. The Norwegian debt portfolio that was audited comprised of loans to emerging markets and was intended to ensure that Norway lived up to its responsibilities as a creditor. Such practices should be encouraged and undertaken by more creditor countries.

Creditor awareness of the odiousness of Africa's debts can be traced back to the debt crisis of the 1980s. In 1978, the IMF appointed Erwin Blumenthal, a senior financial advisor to advise the (then) Zaire Central Bank. After observing the practises of the bank, he filed a report that stated: "there is no chance, I repeat no chance, that Zaire's numerous creditors will ever recover their loans." Yet, shortly after this report, the IMF gave Zaire the largest ever loan given to an African country.⁶⁵ Economists such as Harvard's James Henry estimate that a large percentage of foreign debt in Africa disappeared into poorly planned, corruption-ridden development projects or was simply stolen outright and that creditors at the time were aware of this.⁶⁶

More recently, as has been mentioned, the US State Department acknowledged widespread corruption in South Sudan, which can be taken as an example of some level of creditor awareness. Apart from this, it is arguable that the sheer amount of financial data and reports coming from Africa on corruption cannot be ignored and must on some level serve as a warning to creditors.

Therefore creditor awareness has existed and continues to exist regarding the misuse of loans on the continent. Because of this there is some degree of creditor irresponsibility thus strengthening the argument of odiousness.

3.7 Conclusion

From this discussion it is clear that it is not yet time to celebrate in terms of sovereign debt relief in Africa and there is need for African countries to be vigilant and avoid slipping into the same practices and hence the same crises.

⁶⁵ Probe International Journal <https://journal.probeinternational.org/2009/07/06/imf-world-bank-lending-institutions-agents-promoting-poverty-or-development/> on 29 April 2016.

⁶⁶ Henry J, "The Mirage of Debt Relief" in Hiatt S (ed), *A Game As Old As Empire: The Secret World of Economic Hit Men and The Web of Global Corruption*, Berrett- Koehler Publishers, 2008, 219-262.

The chapter has illustrated that the African debt crisis of the 1980s was partly the making of Western donors and irresponsible lending. Further, given that the proceeds of these debts were by and large plundered, a fact of which the donors were patently aware of, these debts are odious.

Given that that misuse of funds continues to plague African nations, the chapter has argued that it is a very real possibility that Africa continues to incur odious debts that will have to be repaid in future and that it seems that this cycle has not been successfully broken. The situation becomes more complicated in light of the fact that an increasing amount of this debt is owed to private creditors.

The chapter has also illustrated that creditor awareness is an important factor in determining odiousness. Creditor responsibility in sovereign lending is an accepted concept and the UNCTAD principles on responsible sovereign borrowing and lending offer a criteria by which loans may be evaluated. From the discussion it is clear that there has been and continues to be creditor awareness about the illicit nature of debts incurred in Africa.

All these factors considered together reveal that odious debts have been and continue to be incurred on the continent which creates a strong argument for the formal recognition of the doctrine of odious debt. Debt-relief is just as pertinent today as it was three decades ago and must be considered seriously.

The next chapter will look at the modalities of how this doctrine would be formally recognised and applied.

Chapter 4

Operationalizing The Doctrine of Odious Debts

4.1 Introduction

The debt relief ‘solutions’ that have been offered to African countries (and developing countries in general) in the past have been little more than piecemeal offerings. The approach of developing countries and International Financial Institutions (IFIs) has been to do the bare minimum to prevent disaster, but never enough to fully and finally solve the debt crises- in a fair manner at that.¹ The doctrine of odious debt challenges this approach and seeks to shift the status quo. It is a broader and perhaps more ‘radical’ approach because loans that would be deemed odious would be eliminated rather than reduced.²

Chapter two of this dissertation illustrated the conceptual justification for the doctrine of odious debt and chapter three illustrated that African countries are indeed burdened with debts that could be considered odious. The necessity for the doctrine has been proven. Drawing from this, this chapter considers two questions: firstly, how the doctrine of odious debt can come to be accepted into international law as a legal concept and secondly, how the doctrine would be operationalized once accepted. Through this, the chapter seeks to answer the main research question of this dissertation: ‘Can the doctrine of odious debt be formally recognized and applied to African debts?’

Some of the benefits of the doctrine are that it relieves a population from having to pay back loans that did not benefit them, it places lenders on notice that certain debts will not be

¹ Christian Aid, *Enough Is Enough: The Debt Repudiation Option*, 2007.

² Rasmussen R, ‘Sovereign Debt Restructuring, Odious Debt, and The Politics Of Debt Relief’ 70 *Law and Contemporary Problems*, 2007, 254.

recoverable and therefore encourages more responsible and sound lending; and it can starve illegitimate regimes of funds thus possibly quickening their fall.³ However, if poorly executed, attempting to impose the doctrine could also have negative effects. For instance, countries that repudiate debt could see the ratings of their credit worthiness drop effectively locking them out of international lending markets.⁴ Further, creditors could become excessively reluctant to lend for fear that they would be unable to recover these funds, which would deny many developing countries an important source of funds and would paradoxically harm the populations that were victims of the odious debt in the first place.⁵ A key consideration in all this is the fact that creditors value predictability. It is therefore imperative that whatever system is proposed is as predictable as possible. Creditors are unlikely to lend money if there is a possibility that it will not be recoverable when the regime in power leaves (or is removed).⁶

For this reason, the manner in which this doctrine would be operationalized must be properly considered and the criteria as to what will constitute odious debts or odious regimes be clarified. Some of the issues to be addressed include: identifying which debts should be within the doctrine's scope, calculating how much relief should be granted⁷ and identifying the body or bodies that would govern all these processes.

This chapter begins by considering an important preliminary matter: the nature of sovereign debt and the unique characteristics it possesses that need to be considered when making any proposals on debt-relief. After this the chapter, considers the manner in which the doctrine of odious debt can become an international legal concept. Two possibilities are identified: international customary law and multilateral treaties. Once odious debt is accepted as a legal concept, the next question would be how to apply such a doctrine. Here, this chapter narrows its focus to two questions: which debts would qualify to be considered and who would make such a determination.

³ Bolton P and Skeel D, 'Odious Debts or Odious Regimes' *70 Law and Contemporary Problems*, 2007, 86.

⁴ Buchheit LC and Gulati G, 'Responsible Sovereign Lending and Borrowing' *UNCTAD Project Promoting Responsible Sovereign Lending And Borrowing*, 2009, 2 and 17.

⁵ Bolton P and Skeel D, 'Odious Debts or Odious Regimes', 84.

⁶ Stephan P, 'The Institutional Implications Of An Odious Debt Doctrine' *70 Law and Contemporary Problems*, 2007, 229.

⁷ Rasmussen R, 'Sovereign Debt Restructuring, Odious Debt, and The Politics Of Debt Relief', 252.

4.2 The Nature of Sovereign Debt

Unlike personal debts, sovereign debts are not expunged through death, dissolution, or bankruptcy.⁸ These debts carry over from regime to regime, government to government and generation to generation. This is in line with the concept of state (and government) succession by which the incoming government assumes all the obligations of the former government.⁹ This includes all financial obligations incurred by the previous regime. This has been long accepted under international law and is informed by the fact that a succession of states should not affect the rights and obligations of private creditors and debtors.¹⁰ The same principle applies to governments because when a government is removed, the state as an international entity remains unchanged, and the new government generally assumes all the previous international rights and obligations of its predecessor.¹¹

However, the international law obligation to actually pay back all the debts has never been treated as absolute¹² - states constantly negotiate and renegotiate repayment. Be it negotiation on the amounts to be paid or the scheduling of payments, diplomatic, political and economic considerations have driven states to approach debt repayment in various ways. There is therefore an opening for the doctrine of odious debt. The doctrine of odious debt seeks to elevate certain debts and make them an exception to the rules on state succession to debt.¹³ As per the doctrine, countries would be relieved of financial obligations that would otherwise be valid, leaving creditors unable to recover. The doctrine challenges the notion that sovereign debt should be automatically and unquestionably carried over to succeeding generations.

⁸ Buchheit L *et al*, 'The Dilemma of Odious Debts', 1207.

⁹ See Vienna Convention on Succession of States in respect of Treaties (1978) and Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983)

¹⁰ Article 24, Vienna Convention on Succession of States in respect of State Property, Archives and Debts 1983

¹¹ The United States of America v The Islamic Republic of Iran (Case No. B36), Award No. 574-B36-2, 3 December 1996), para. 54.

¹² Howse R, 'The Concept Of Odious Debt In Public International Law', 21.

¹³ Buchheit L *et al*, 'The Dilemma of Odious Debts', 1228.

4.3 Odious Debt As A Legal Concept in International Law

Odious debt does not currently exist in international law as a legal concept.¹⁴ In order to be applied, the doctrine must be moved from the realm of politics to that of law.¹⁵ This dissertation identifies two possible avenues by which the doctrine could be accepted into international law: international customary law and multilateral treaties.

4.3.1 International Custom

As per the Statute of the International Court of Justice (ICJ), international custom is created when two factors are present: state practice and *opinion juris*.¹⁶ State practice denotes consistent and uniform usage of a practice while *opinion juris* means that the state does the act because it is of the opinion that it is legally required to do so.¹⁷

There are a considerable number of instances over the course of history in which questions of legitimacy of debts as well as the possibility of defaulting on debts on the basis of their illegitimacy have been previously raised as a possible reason to expunge or repudiate debt. These instances serve as proof that state practice is not non-existent.

The Cuban loans negotiations at the Paris Conference of 1898 are generally regarded as the first direct invocation of the doctrine of odious debts.¹⁸ After the Spanish-American war, Spain ceded sovereignty of Cuba to the United States. The United States however refused to assume Cuban debt to Spain on the grounds that the debt was not incurred for the benefit of the Cuban people and that the creditors knew that the debts were incurred to suppress a freedom struggle.¹⁹ While in the end, neither Cuba nor the United States assumed these debts in the Treaty of Paris, the

¹⁴ De Martino M, 'The Case of Yacyretá' in Mader M and Rothenbuhler A (eds), *How to Challenge Illegitimate Debt: Theories and Case Studies*, Aktion Finanzplatz Schweiz-Dritte Welt, 2009, 63.

¹⁵ Rasmussen R, 'Sovereign Debt Restructuring, Odious Debt, and The Politics Of Debt Relief', 256.

¹⁶ Article 38(1)(b), Statute of the International Court of Justice, 1945.

¹⁷ Shaw M, *International Law*, 6 ed, Cambridge University Press, 2008, 75.

¹⁸ Khalfan A, King J and Thomas B, 'Advancing the Odious Debt Doctrine' Centre For International Sustainable Development Law (CISDL), Working Paper No. COM/RES/ESJ, 2003, 25—

<http://cisdl.org/public/docs/pdf/Odious_Debt_Study.pdf> 5 January 2017.

¹⁹ Howse, 'The Concept Of Odious Debt In Public International Law', 10.

American Commissioner invoked moral concerns as a reason to repudiate the debt- statements that were interpreted by some as an endorsement of the doctrine.²⁰

Other frequently cited examples of the doctrine include Mexican repudiation of Austrian debts in 1867. The Austrian emperor had incurred debts to suppress an uprising against the Mexican population and when the uprising was successful, the Mexican government repudiated these debts.²¹ In another instance, after the Russian Revolution in 1917, the Soviet government repudiated Tsarist debt arguing that those debts personally enriched the Tsars and not the nation.²² The 1919 repudiation of a portion of some post-war Polish debts at the Treaty of Versailles is also considered to be a direct application of the doctrine of odious debt.²³ The repudiated debts were those incurred by German and Prussian Governments for the German colonization of Poland.²⁴

In so far as *opinion juris* is concerned, the 1922 Tinoco arbitration²⁵ provides a promising example of the doctrine being invoked with the belief it was a legal rule.²⁶ Costa Rica had refused to honour loans made by the Royal Bank of Canada to the former dictator Federico Tinoco that he had put to personal use. By 1919, Tinoco had left the country and the Government fell. The succeeding Government of Costa Rica enacted a law, which invalidated all transactions between the State and the holders of the bills issued by the Royal Bank. The Chief Justice of the United States at the time, William Taft, was the sole arbitrator in the case. He found that given that it was established that the funds were used for personal enrichment, the debt in question did not create a valid public debt, nor was it in the public interest. For this reason, the legislation enacted by the Costa Rican government to repudiate the debts was valid in international law.

²⁰ Michalowski S, 'Understanding the Concept of Illegitimate Debt' in Mader M and Rothenbuhler A (eds), *How to Challenge Illegitimate Debt: Theories and Case Studies*, Aktion Finanzplatz Schweiz-Dritte Welt, 2009, 17

²¹ Khalfan A *et al*, 'Advancing the Odious Debt Doctrine', 24.

²² Howse R, 'The Concept Of Odious Debt In Public International Law', 11.

²³ Khalfan A *et al* 'Advancing the Odious Debt Doctrine', 27.

²⁴ Howse R, 'The Concept Of Odious Debt In Public International Law', 11.

²⁵ Facts from ²⁵ Khalfan A, King J and Thomas B, 'Advancing the Odious Debt Doctrine' 42 and Howse R, 'The Concept Of Odious Debt In Public International Law', 12.

²⁶ Howse R, 'The Concept Of Odious Debt In Public International Law' 12

More recently, the Iraq debt crisis of 2002 that followed the toppling of the Saddam Hussein regime reignited the debate on odious debt.²⁷ Saddam's regime left the country saddled with 140 billion US dollars in debt. At the time several commentators advocated for the application of the doctrine of odious debt to the Iraqi situation, effectively reviving the discussion.²⁸ The US government, at the time backing the new Iraqi regime, invoked odiousness as a reason to allow debt-relief.²⁹ While in the end, Iraq pursued debt-relief via the Paris Club, and was granted debt-relief based on other factors, the discussions surrounding the process revealed the possibility of invoking the doctrine.

In other instances, countries have been willing to unilaterally repudiate debt on the basis of odiousness. While these threats have helped some countries such as Nigeria³⁰, Argentina³¹ and Ecuador³² get more favourable debt-relief packages, in these instances creditor do not concede odiousness as the primary motivating factor for offering debt-restructuring and instead are reacting to the threat of repudiation. The practice nevertheless illustrates debtor countries openness to the concept.

Other promising indicators include some creditor countries allowing debt-relief on grounds of creditor responsibility. In 2006, Norway announced that it would unilaterally and unconditionally cancel debt because of creditor co-responsibility.³³ While the government insisted that the debt was not "illegitimate" per se³⁴, this was still the first time a creditor and an OECD-country had even admitted responsibility for irresponsible or bad lending and took action.³⁵ Such acts move the debate in a positive position.

²⁷ See generally, Damle J, 'The Odious Debt Doctrine After Iraq' 70 *Law and Contemporary Problems*, 2007, 139-156.

²⁸ Including Nobel prize-winning economist Joseph Stiglitz and other economists and commentators such as Patricia Adams, Seema Jayachandran, Michael Kremer and Jonathan Shafter. For a discussion on their various positions and proposals see: Damle J, 'The Odious Debt Doctrine After Iraq' 70 *Law and Contemporary Problems*, 2007, 150.

²⁹ Damle J, 'The Odious Debt Doctrine After Iraq' 70 *Law and Contemporary Problems*, 2007, 139-156.

³⁰ Damle J, 'The Odious Debt Doctrine After Iraq' 70 *Law and Contemporary Problems*, 2007, 152.

³¹ Christian Aid, *Enough Is Enough: The Debt Repudiation Option*, 2007, 24-25.

³² 'Ecuador's winning strategy' *The Economist*, 17 June 2009 —< <http://www.economist.com/node/13854456>> on 19 January 2017

³³ Abildsnes K, 'Why Norway Took Creditor Responsibility- The Case of The Ship Export Campaign', Norwegian Debt Campaign (SLUG), March 2007, 3.

³⁴ Howse R, 'The Concept Of Odious Debt In Public International Law', 16.

³⁵ Abildsnes K, 'Why Norway Took Creditor Responsibility- The Case of The Ship Export Campaign', 3.

From all this it is clear that the idea is not novel- states have attempted and continue to attempt to rationalise repayment of debt along the lines of legitimacy and odiousness. These examples illustrate that the doctrine is not one that is far-fetched and is not one that has never been tested. However, it is *still* not possible to say that odious debt forms part of international custom. The vast majority of debt-restructuring and relief agreements that have been struck make no mention of odiousness as a factor and there is still no acceptance of odious debt as law. For this reason, another avenue is better suited, in the meantime at least: treaty making.

4.3.2 Multilateral Treaties

While custom is a powerful source of law, it can take a long time to be formed. In contrast, treaties are a faster way to make a practice or concept legally binding in international law. For this reason, a multilateral treaty on the doctrine would be a viable solution.³⁶ Granted, negotiations on such a doctrine would be lengthy and heated, they would not technically be impossible. A multilateral treaty agreed upon by states could serve as a binding agreement to be recognised as law. This treaty would recognise odiousness of debt as a reason for debt-relief or restructure and would outline the mode in which this doctrine would be applied. Such a treaty would be legally binding on signatories. The United Nations General Assembly would be the most appropriate forum for such a deliberation.

This treaty would include the parameters of the doctrine and the way in which it would be operationalized. These are considered in the next section.

4.4 The Doctrine of Odious Debt in Practice

Having considered this, it is possible to then discuss the manner in which such a doctrine would operate. This dissertation identifies two main issues to be addressed in order to arrive at a

³⁶ Lewis B, 'Restructuring The Odious Debt Exception' 25 *Boston University International Law Journal*, 2007, 333.

workable ODD model: the scope of the doctrine in so far as which loans could be covered and the body or bodies to govern the application of the doctrine.

4.4.1 Odious Debts Versus Odious Regimes

The first point of contention is the scope of the doctrine in so far as when it would apply. On the one hand, there is the possibility of focusing on each particular debt on a case-by-case basis, as was originally imagined by Alexander Sacks.³⁷ This approach is propounded on the grounds that it is possible that some loans or some proceeds of loans of despotic regimes could be used for legitimate purposes, so-called ‘partial odiousness’³⁸. Further, a debt-by-debt analysis is less likely to result in a total freeze on lending which would affect even legitimate loans. However, this approach is tricky because it is difficult to trace. It would be difficult for lenders to trace with certainty the specific use of each loan- even if only because corrupt regimes do not tend to be transparent.

On the other hand, there is the idea of an odious regime. This would mean that once the government in question is declared to be odious, all debts incurred by it are assumed to be odious. The logic here is that dictatorial regimes tend to be dictatorial throughout their rule. A dictatorial government is one that by definition rules without the consent of the people.³⁹ Therefore, as per Khalfan, consent must be presumed absent and all debts incurred by such a regime should be considered odious, unless it can be proven otherwise.⁴⁰ In fact, for authors like Hanlon, the odiousness of the regime is the primary reason to nullify the debt.⁴¹

However, there is the question of what amounts to an odious regime. While the question is a difficult one to answer and could no-doubt attract protracted debates, an odious regime could be summed up as one that engages in either systematic suppression or systematic looting.⁴² Other factors that could support such a determination include: lack of democracy, widespread human

³⁷ Bolton P and Skeel D, ‘Odious Debts or Odious Regimes’, 84.

³⁸ Buchheit L *et al*, ‘The Dilemma of Odious Debts’, 1219.

³⁹ Khalfan A *et al*, ‘Advancing the Odious Debt Doctrine’, 4.

⁴⁰ Khalfan A *et al*, ‘Advancing the Odious Debt Doctrine’, 42.

⁴¹ Khalfan A *et al*, ‘Advancing the Odious Debt Doctrine’, 40.

⁴² Bolton P and Skeel D, ‘Odious Debts or Odious Regimes’, 84.

rights abuses, suppression of subgroups of the populations (for instance Jews in Germany or blacks in South Africa)⁴³ police states, and extended periods of forced military control.

According to Jayachandran, Kremer and Shafter⁴⁴, the odious regime approach is best applied *ex ante*. That is, the declaration of odiousness is made beforehand and then acts as a warning to future lenders. The advantage of this idea is that it draws the line between existing debt and future debt, reassuring creditors.⁴⁵ This approach seems sound. Would this then preclude particular debts incurred beforehand from qualifying as odious after the fact? Not entirely. The two concepts need not be mutually exclusive and can both be applied. The general rule in this case would be that debts of regimes that had been identified as odious beforehand would automatically qualify as odious. In this case, the burden of proof would lie on any creditor wishing to contest this. However, should a regime wish to contest a particular debt incurred by its predecessor that had *not* been qualified as an odious regime, it should be able to do so on a case-by-case basis and the burden of debt would lie with the government invoking the doctrine.

4.4.2 Deciding on Odiousness

There is also the question of *who* would make the determination of odiousness. Given their faulty track records when it comes to Third World debt, the IMF and World Bank are ill suited for this job. Bolton and Skeel propose that the United Nations Security Council (UNSC) should have the power to declare a regime odious.⁴⁶ The political motivations of the UNSC notwithstanding, it undoubtedly has significant legal and political power in so far as international security is concerned. If such odious regimes pose a threat to international peace and security, as they are likely to do, then this falls within the competence of the Security Council.⁴⁷ For this reason it is most suited for the task of determining odiousness of regimes.

⁴³ Bolton P and Skeel D, 'Odious Debts or Odious Regimes', 84.

⁴⁴ Jayachandran S, Kremer M and Shafter J, 'Applying Odious Debts Doctrine While Preserving Legitimate Lending', 24.

⁴⁵ Harford T, 'The not-so-sweet smell of odious debt' Financial Times, 10 March 2012—
<<https://www.ft.com/content/a001772c-67f2-11e1-978e-00144feabdc0>> on 19 January 2017.

⁴⁶ See generally: Bolton P and Skeel D, 'Odious Debts or Odious Regimes' 70 *Law and Contemporary Problems*, 2007, 83-108 —<<http://scholarship.law.duke.edu/lcp/vol70/iss4/4>> on 6 January 2017.

⁴⁷ Howse R, 'The Concept Of Odious Debt In Public International Law', 20.

As for question of the odiousness of debts, an international tribunal to make such a determination would be welcome. This is the approach favoured by the Nobel-winning economist Joseph Stiglitz.⁴⁸ Some have suggested that independent jurists or even major international organisations such as Transparency International. Such an institution would be tasked with considering on a case-by-case basis claims by a succeeding regime that particular debts incurred by its predecessor are odious. Some of the possible standards that could be used by such a tribunal include adherence to the UNCTAD Guidelines on Responsible Sovereign Lending and Borrowing. Through bodies like the Paris Club, lender countries have shown that they are not entirely opposed to the idea of international organisations making decisions on international debt-relief. In this case however, the decisions of such a body would be binding and most importantly, would consider odiousness as a factor for debt-relief and restructuring. In the style of the Paris Club, this international tribunal would be tasked with not only determining odiousness but also advising on the particular restructuring of the debt agreement. Such decisions should be binding in order to give this body the requisite authority. This body could arise out of an international treaty agreeing on its formation.

4.5 Conclusion

The doctrine of odious debt is not yet a legally binding concept in international law. However, there is an opening for it to become one and to be applied in respect of debt-relief.

The chapter has illustrated that though states have attempted to invoke the doctrine of odious debt in the past, it has not yet achieved the status of international custom. While the instances of the practice are promising and encouraging for the doctrine, it still remains that multilateral treaties are the better avenue to cement the status of the doctrine as an international legal concept. For this reason, the chapter recommends a UN treaty that provides for the operationalization of the doctrine as has been outlined in the chapter.

⁴⁸ Stiglitz J, 'Odious Rulers, Odious Debts' The Atlantic, November 2003 – <http://www.theatlantic.com/magazine/archive/2003/11/odious-rulers-odious-debts/302831/> on 20 January 2017

The chapter has also considered the question of whether to label specific debts as odious or entire regimes as odious. In this respect, the conclusion made is that the two approaches need not be mutually exclusive. The odious regime approach should be considered as the general rule with the burden of proof lying on creditors to disprove it while the case-by-case approach should be maintained for governments seeking to invoke the doctrine where their predecessors had not been labelled odious.

With respect to the bodies to be tasked with these duties, the chapter identified the UN Security Council as best placed to address questions of odiousness of regimes while an independent international tribunal would be best placed to address questions of odiousness of particular debts.

In all, the chapter found that the doctrine can and should be operationalized. The next chapter concludes the study and makes recommendations.

Chapter 5

Conclusion and Recommendations

5.1 Introduction

The problem identified by this dissertation was that the African continent is paying billions of dollars to service external debts whose origins and legitimacy is questionable and whose supposed benefits were never felt in the continent and instead remained in the hands of private individuals. Debt service diverts funds from sectors such as healthcare, education and general poverty alleviation. For this reason, Africa needs relief from these debts and so there is a need to more seriously consider the doctrine of odious debts as possible solution. In this respect, the dissertation hypothesised that some of Africa's debt could be considered to be odious and if the doctrine of odious debt were to be formally recognised by the international community and applied to these debts, it could offer much needed relief to these countries.

To arrive at an answer the study posed several questions including: Can the doctrine of odious debt be formally recognized and applied to African debts? What are the conceptual underpinnings of the doctrine? Are there odious debts in Africa? Is the doctrine of odious debt able to provide debt relief? What are the impediments to formally recognising the doctrine of odious debt and how may these be overcome? In what way can the doctrine be applied?

This chapter concludes the study, presents the results of this research and makes recommendations. It also highlights some areas of possible future study.

5.2 Findings

As a result of having considered the conceptual justification for the doctrine of odious debt, having studied the debt situation in Africa and having considered how the doctrine would be operationalized, the following findings have been made:

5.2.1 The doctrine of odious debt has conceptual underpinnings that justify its use in the African context

In chapter one and two the study found that there are conceptual underpinnings of the doctrine of odious debt. The study approached the doctrine of odious debt from three conceptual lenses: intergenerational equity, sovereignty of the people and transitional justice. The study found that these three concepts provide a sturdy foundation for the application of the doctrine on the African continent.

5.2.2 Odious debts exist in Africa

In chapter three the study found that Africa has incurred odious debts and continues to incur them. Looking at the volume of loans taken by various governments on the continent and comparing this to the amount of funds lost to corruption, the study found that there is a sufficient nexus between the two to conclude that these debts are odious. The study also found that creditor awareness of this odiousness exists.

5.2.3 The doctrine of odious debt can provide much needed economic relief in Africa

The study found that African countries continue to devote large portions of their budgets to debt-service. If the doctrine of odious debt were to be applied it would release these funds for other uses included developments. Therefore, the doctrine is able to provide significant and needed economic relief on the continent.

5.2.4 Odious debt can come to be accepted as a legal concept in international law by way of multilateral treaties

In chapter four the study found that odious debt is not a novel concept and in fact states have previously attempted to invoke some elements of the doctrine in repudiating or expunging debts. However, this scattered practice has not yet amounted to international custom. For this reason,

the study concluded that the more appropriate method by which the doctrine could come to be accepted in international law as a legal concept in via multilateral treaties.

5.2.4 The doctrine of odious debt can be formally recognised and applied in Africa

In chapter four the study identified the obstacles facing the formal recognition of the doctrine. These included deciding on which debts qualify and who would make these decisions. Having identified how these obstacles can be overcome the study concluded that it is possible to operationalize the doctrine. The study found that an *ex ante* approach should serve as a general rule by which regimes are labelled as odious and this serves as a warning to future creditors. In this model, the burden of proof lies with creditors to prove otherwise. In the alternative to the general rule, succeeding regimes would be allowed to contest loans on a case-by-case basis where their predecessors had not been labelled as odious regimes but nevertheless contracted some debts that could be considered odious. The study also found that the UN Security Council should be tasked with the duty of identifying odious regimes while an independent international tribunal would be tasked with deciding on the matter of particular odious debts.

5.3 Recommendations

Based on these findings, the study recommends the following:

5.3.1 African Union working group on sovereign debt relief

A unified approach by the African Union (AU) holds the best chance that debt-relief efforts on the continent will be successful. In this respect there is need for an AU working group to study, investigate and consolidate comprehensive information on the sovereign debt situation in Africa and the needs and requirements of different African economies. A report produced by such a working group presents the continent with the opportunity to have a coherent approach to the issue of sovereign debt. The process of preparing such a report would serve as an opportunity to build consensus on the continent and collect the varied views of the governments. It is from this internal dialogue and process that the official AU approach would emerge.

5.3.2 Multilateral treaty on duties of donor countries in sovereign debt crises

Treaty making is the most desirable avenue by which the doctrine of odious debt can be accepted as a legal concept in international law. Given its wide membership, the United Nations General Assembly is the most appropriate forum for this. As the trade arm of the UN, UNCTAD would be best placed to present such a document to the UNGA. Once again, a unified African approach presents the best chance for success. Lobbying by the African Union, and support from equally debt-ridden regions like South American nations within UNCTAD, could provide sufficient momentum for such a document to be drafted.

This treaty would set out commitments on the part of developing and donor nations to address sovereign debt crises as part of their international duty to ensure fair access to international trade. Building on the UNCTAD Guidelines on Responsible Sovereign Lending and Borrowing, the treaty would outline parameters of odiousness. Some of the identified issues the treaty should address include giving the UNSC power to declare a regime odious and outlining the manner in which a state may claim a particular debt as odious. In this respect, the treaty would have a monitoring mechanism that would serve as the international body to consider particular odious debts. The treaty would be binding in nature to ensure proper authority.

5.3.3 Sovereign debt auditing

On the part of borrowing countries, at a national level, there is a need for African countries to have national debt audit institutions embedded within national auditing institutions. This would ensure that African nations keep abreast of the national debt they incur. Publicity and scrutiny reduces the possibility of odious debt and such audits would increase accountability on the part of the government for loans it is incurring.

On the part of lender countries, these audits are important as they illustrate that sovereign lenders have a duty to lend responsibly. These audits would query whether the loans disbursed by these

countries were done so in a transparent manner and whether the conditions and circumstances under which the loans were disbursed were appropriate.

5.4 Further Research

Other areas of research that could be tackled by future researchers include the issue of determining the level and ration of debt relief that could be offered when a debt is identified as odious.

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