Rijks Universiteit Leiden

Thesis

The Doctrine of 'Odious Debts'

Does international law provide a remedy to instances where debts are contracted for purposes of committing recognised international wrongful acts? A contemporary case of the Apartheid Debts

By Charles Peter Abrahams

This thesis is undertaken in partial fulfilment of an LLM-degree in Public International Law at University Leiden, The Netherlands

August 2000.

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INTRODUCTION

The need for a critical assessment of the *corpus juris* of international law is strengthened by the "circumstances of the existential moment in which the preconditions for such a critique are present."[1] The urgency of this need is particularly evident in the recent developments in international economic, social, political and environmental relationships, whose gravity and dynamics are "rocking the traditional foundations of international law in its broadest sense."[2]

In particular, developments in international economic and financial law, especially after the Asian financial crisis, gave rise to a renewed debate around the 'moral hazards' of 'bailouts' for foreign investors or

[1] T H Franck, *Fairness in International Law and Institutions* 9 (1995)
[2] G Frankenberg & R Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts* 415, 12 International Journal of the Sociology of Law (1984)

governments who take reckless financial risks.[3] Another development in the case of international environmental law, is the separate opinion of Judge Weeramantry, in the *Gabcíkovo-Nagymaros Dam case*, in which he proclaimed that "the principle of sustainable development is more than just a mere concept but is a principle with normative value."[4]

It is the gravity and dynamics of these developments that force itself upon international law to ask the question – Is there fairness in international law? If so, does its fairness provide a credible response to the pressing problems of sovereign indebtedness widely experience by almost all the countries of, what is now acceptably referred to as, the 'South.' More specifically, does international law provide a remedy to those instances where States vis-à-vis other States or entities, in their capacity as debtors and creditors, enter into contractual relations for purposes contrary to contemporary international law principles? In particular, where such relations are not in conformity with the principles of international law embodied in the Charter of the United Nations?

International law indeed recognises principles which may find application, albeit in a limited way, in the instances of sovereign indebtedness. These are general principles of law such as '*ad impossibilitatem nemo tenetur'* (supervening impossibility of performance), *'clausula rebus stantibus'* (fundamental change of circumstances) and *'force majeure'* (an irresistible force). Whilst its application is

[3] Draft Guidelines for Public Debt Management: An IMF & World Bank Publication, 14 August 2000, at http://www.imf.org/external/np/mae/pdebt/2000/eng/index.htm
[4] Case Concerning the Gabcíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, 1997 ICJ Rep.

commendable,[5] it is not able to, and cannot for that matter, apply those other instances where contractual relations have been entered into for a purpose, contrary to international law. However, this is not to say that international law fails to find application in those instances when it arises.

In this regard, it is commonly said that international law contains "a minimum of social morals, without which it could not exist."[6] These morals find their expression in what is generally referred to as equitable norms, whose application is aimed at a pursuit of distributive justice.[7] One such equitable norm that has been able to provide a response to those instances where contractual arrangements are entered for purposes contrary to international law, is found in the doctrine of *'dette odieuse'* (odious debts). In its strict application in the context of State succession, it is referred to as the rule of non-transferability of 'odious debts.'

However, such equitable norms have sometimes been derided as 'contentless,' amounting to little more than a license for the exercise of judicial caprice. Professor Rosalyn Higgins, for instance, criticises equity as "a tendency to allow a court to achieve a result that is nowhere articulated other than by the self-deserving description of equitable."[8] Whilst there may be merit in this criticism, it often overlooks the fact that

[5] For an analysis of the application of these principles to sovereign indebtedness, see E de Vos, *Remedies or Stumbling Blocks? The Public International Law Aspects of the International Debt Crisis* 51 - 80
[6] See Frankenberg and Knieper, *supra note 2*, at 425
[7] See Franck, *supra note 1*, at 8
[8] Id., at 49-50

normativity indeed attaches to such norms. In the *case concerning the Continental Shelf*, the International Court of Justice (ICJ) held that:

> The justice of which equity is an emanation is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the more peculiar circumstances in an instant case, it also looks beyond it to principles of more general application. This is precisely why courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms.[9]

The operation and application of the doctrine of 'odious debts' form the basis of this thesis. What exactly is this doctrine about? In which instances does it operate, and more importantly, can it be invoked as a legal remedy in contemporary international law? These questions are dealt with in the course of the following three chapters.

Chapter one provides a basic description of State debts and those debts closely related to it. Its purpose is to show where 'odious debts' originate.

Chapter two deals in detail with the substantive aspects of 'odious debts.' It starts with various definitions and then locates the doctrine within the sphere of public international law. In so doing, the different theories of State succession are considered under the rubric of earlier and modern

theories. Since theory cannot operate without practice, consideration is given to the practice of States in relation to the treatment of 'odious debts.' Its treatment is broken into war- and subjugation debts. These debts are considered from the period of the mid-19th century until the period after WWII. The chapter concludes by ascertaining if, based on State practice, a rule of customary international law has emerged in respect of the non-transferability of 'odious debts.'

Chapter three looks at a more contemporary example of debts which may be considered 'odious.' Those are the debts of the former Apartheid South African regime, which debts are now commonly referred to as the Apartheid debts. In ascertaining if those debts can be considered 'odious,' consideration is given to the question of state- vis-à-vis governmental succession, the nature of, and legal rationale for considering those debts 'odious.' On the basis thereof, different options are considered whereunder those debts can be repudiated or challenged. The chapter concludes by posing a general challenge to the international community of States, organisations, tribunals and jurists to re-affirm the relevance of the doctrine in international law and applying it to the current problem of sovereign indebtedness.

[9] Case concerning the Continental Shelf (*Libyan Arab Jamahiriya v Malta*), Judgment, 1985 ICJ Rep. 39, at para. 45

CHAPTER ONE

CATEGORIES OF DEBT

1. INTRODUCTION

Invoking a defence based on the doctrine of 'odious debts' can conceivably be applied to both public and private law debts. However, since international law only deals with matters relating to States, only those debts, closely connected to States debts, will be considered.

2. CATEGORIES OF DEBT

2.1 Public State Debt

Article 33 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, defines a State debt as 'any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organisation or any other subject of international law.'[10] Such a debt can conveniently be called a Public State debt. It is contracted by a State; the creditor being another State or international organisation, and the financial obligation is based on a treaty, which is governed by international law.[11] Public State debts should be understood within the general context of acts attributable to States and the conditions under which such acts are engaged.[12] Acts attributed to a State at the international level are acts of persons or groups of persons to whom the legal status of an organ of a

[10] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/CONF. 117/14 (1983)
[11] See De Vos, *supra note 5*, at 36
[12] R Ago, *3rd Report on State Responsibility*, 1971 YILC, Vol., at 233

State is attributed in the internal order.[13] Even acts of public entities other than a State can be regarded as acts of a State although they are not considered as such in the internal order.[14] The International Law Commission (ILC) for that matter considers the following groups of persons to be organs of a State:

a) persons who have under the internal legal order of a State, the character of organs of "public" institutions, though separate from a State, and who act in that capacity in the case at issue;
b) persons who, under the internal legal order of a State, do not formally possess the character of organs of a State or of a public institution separate from a State, but in fact perform public functions or act on behalf of a State; and
c) persons who have the legal character of organs under the legal order of a State or of an international organisation, and who have been placed at the disposal of another State, provided that such persons are actually under the authority of the latter State and act in accordance with its instructions.[15]

2.2 Local Debts

Local debts of local authorities are different from Public State debts. Local debts are contracted not by the authority or department responsible to the central government, but by a public body that is usually not of the same political nature as the State, and that is in any

[13] Id., at 233
[14] Id., at 238
[15] R Ago, *4th Report on State Responsibility*, 1972 YILC, Vol., at 72

event inferior to the State.[16] They may be said to be debts contracted by: (a) a territorial authority inferior to the State; (b) used by that authority in its own name; (c) such territory has a degree of financial autonomy; (d) with the result that these debts are identifiable.[17] Since a local authority is a public-law territorial body other than the State, whatever debts it may contract by virtue of its financial autonomy, are not legally debts of the State and do not bind the State.[18]

2.3 Localised Debts

Localised debts are not to be confused with local debts. The distinction is based on the fact that, whilst local debts are contracted by a local authority and are not State debts, localised debts are State debts which are contracted by a State for specific use in a clearly defined portion of its territory.[19] Three successive stages may be discerned in the case of identifying these debts. Firstly, the State must have intended the corresponding expenditures to be effected for the territory concerned. Secondly, the State must actually have used the proceeds of the loan in the territory concerned. Thirdly, the expenditure must have been effected for the benefit and in the actual interest of the territory in question.[20] Thus, it can be said that a 'localised' debt is a State debt which happens to be, by way of exception, situated geographically.

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[16] M Bedjaoui, *9th Report on the Succession of States in Respect of Matters other than Treaties,* 1977 YILC, Vol. 2 (Part One), at 51
[17] Id., at 53
[18] See Bedjaoui, *supra note 16*, at 51
[19] M Bedjaoui, *13th Report on the Succession of States in Respect of Matters other than Treaties*, 1981 YILC, Vol. 2 (Part Two), at 75
[20] See Bedjaoui, *supra note 16*, at 52

2.4 Debts of Public Enterprises

Public enterprises are distinct from the State in that they have their own personality, a degree of financial autonomy and are subject to the *sui generis* juridical regime under public law.[21] Such entities usually provide a public service and have a public or public utility character.[22] In the context of State succession, debts of a public enterprise do not qualify as State debts, though they are of a public character.[23] However, they only qualify as State debts when they are guaranteed by the State.[24]

2.5 Commercial State Debts

Whilst a State incurs liability in respect of loans contracted with other States or international organisations, it may also incur liability in respect of loans contracted with a private (juristic) person.[25] Such debts are called Commercial State debts. The definition of a State debt in the context of the 1983 Convention adopts a restrictive approach, in that it does not extend to matters relating to financial obligations of a State to private creditors, as in the case of Commercial State debts.[26]

The connection between 'odious debts' and the categories referred to above, is that of origin. 'Odious debts,' when so regarded, are initially contracted as normal State-, localised-, State guaranteed- or State commercial debts. What makes them different is the purpose for which

[21] Id., at 54
[22] Id., at 54
[23] Id., at 54
[24] Id., at 55
[25] See De Vos, *supra note 5*, at 34
[26] P K Menon, *The Succession of States in Respect of Treaties, State Property, Archives and Debts 164 (1991)*

they are used, which is generally disapproved by a Successor State or is in conflict with contemporary international law. For these reasons they are dealt with as a separate category of debts.

CHAPTER TWO

THE DOCTRINE OF ODIOUS DEBTS

1. INTRODUCTION

The doctrine of 'odious debts' came to international prominence in the late 19th century at the Paris Peace Conference following the Spanish-American War of 1898, when the American Commissioners invoked arguments based upon moral reasoning.[27] Thirty years later Alexander Nahum Sack, former minister of Tsarist Russia and professor of law in Paris set forth the basic tenets of the doctrine in *Les Effets des Transformationis des Etats sur leurs Dettes Publiques et Autres Obligations Financieres,*[28] wherein he warned creditors of a hostile act they would commit in cases where they knowingly advanced 'odious debts' to sovereign borrowers. Then, as recent as 1977, the International Law Commission (ILC) working on its Draft Articles on Sucession of States in respect of matters other that treaties, extensively elaborated on the application of the doctrine and considered the inclusion of an article on the non-transferability of 'odious debts' in the final Convention.[29]

2. 'ODIOUS DEBTS'

2.1 Defining 'Odious Debts'

Scholars have recognised the difficulty in defining 'odious debts'. This is evident from the way in which the term has been used interchangeably with 'war debts,' 'subjugated or imposed debts' and 'regime debts.' Sack

[27] E Feilchenfeld, *Public Debts and State Succession* 337 (1972)
[28] English translation*: "The Effects of State Transformations on Their Public Debts and Other Financial Obligations*"

for instance, uses subjugation debts as an example of *'dettes odieuses'* but also refers to it as a regime's debt. He states:

> *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.*[30]

Sack provides an explanation for why he regards these debts to be 'odious.' He states that:

> *The reason these 'odious' debts cannot be considered to encumber the territory of the State, is that such debts do not fulfill one of the conditions that determine the* legality *of the debts of the State, that is:* the debts of the State must be incurred and the funds from it employed for the needs and in the interest of the State.
>
> *'odious' debts, incurred and used for ends which,* to the knowledge of the creditors, *are contrary to the interests of the nation, do not compromise the latter – in the case that the nation succeeds in getting rid of the government which incurs them – except to the extent that real advantages were obtained from these debts. The creditors have committed a hostile act with regard to the people; they can't therefor expect that a nation freed from a despotic power assume the 'odious' debts, which are personal debts of that power.*

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[29] See Bedjaoui, *supra note 16*, at 74

Even when a despotic power is replaced by another, no less despotic or any more responsible to the will of the people, the 'odious' debts of the eliminated power are not any less their personal debts and are not obligations for the new power…

One could also include in this category of debts the loans incurred by members of the government to serve interests manifestly personal – interest that are unrelated to the interest of the State."[31]

Bustamante however, makes a clear distinction between 'war' and 'subjugation debts.' 'War debts' he regards as

'debts contracted during a war of independence by the previous sovereign to cover the costs of that war … It would be said in private law that the costs of a lawsuit cannot be imposed on the winning party, and in public law it cannot be claimed that one of the parties should assume the obligations engendered or created to prevent, directly or indirectly, its birth and its existence.'[32]

Whereas 'Subjugation debts' are

'public debts created by the former State before the war of independence and charged to its general treasury of the region that subsequently became independent, with the direct or indirect intention of maintaining or ensuring its domination and preventing the birth of a new State.'[33]

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[30] P Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy*, 165 (1991)
[31] Id., at 165
[32] See Bedjaoui, *supra note 16*, at 67

In describing regime debts, Gaston Jèze for his part, states that "we should place on the same footing as war debts, debts contracted in peacetime, but specially for the purpose of subjugating the liberated territory … these are régime debts."[34] However, Jèze opens himself the criticism when he distinguishes régime debts from State debts, and thereby effectively placing régime debts outside of the realm of international law. Just as internationally wrongful acts committed by governments give rise to State responsibility, so does regime debts amount to State debts. A more appropriate distinction between 'odious' and regime debts, is that all 'odious debts' are regime debts, but not all regime debts are 'odious debts.'[35]

Feilchenfeld on the other hand, uses the term 'imposed debts' to describe what is referred to above as 'subjugation debts.' He states that the term is one which is apt to lead to misunderstanding unless its various meanings are clearly distinguished."[36] He distinguishes it from a debt contracted without the consent of the proper agents and actual rulers of the State but, instead, as one that has been created without the consent of those who have to raise the money for the payment of the debts.[37]

Having analysed the contributions of various international law jurists on the subject, Mohammed Bedjaoui,[38] Special Rapporteur of the ILC on State succession in matters other than treaties, puts forward the notion that the term 'odious debts' designates a genus, whereas 'war debts' and

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[33] Id., at 67
[34] Id., at 67
[35] Id., at 68
[36] See Feilchenfeld, *supra note 27*, at 702
[37] Id., at 703

'subjugated or imposed debts,' and conceivably other types debts, constitute the species within that genus. He singles out two important points to clarify the definition of 'odious debts:'

i) from the standpoint of the Successor State, an odious debt can be taken to mean a State debt contracted by the predecessor State to serve purposes contrary to the major interests of either the successor State or the territory that is transferred to it;

ii) from the standpoint of the international community, an odious debt could be taken to mean any debt contracted for the purposes that are not in conformity with contemporary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.[39]

2.2 Location of 'odious debts'

In order to ascertain any rule of international law regarding the treatment of 'odious debts' and proof of State practice to that effect, one has to search for such a rule and practice within the general context of State succession. However, the search for binding rules of international law regarding succession of public debts has permeated the minds of various jurists and scholars on this subject, from Grotius onwards to this day, but has not been resolved satisfactorily from the perspective of international law. Instead, a number of theories have been constructed in an attempt at finding a solution to the problem. Those theories are generally referred to as Earlier and Modern theories. The Earlier theories are based upon Universal Succession, Identity and Negativists doctrines

[38] Mohammed Bedjaoui is currently serving as judge of the International Court of Justice (ICJ)

whilst the Modern theories are based upon constructs such as International Fiscal Law, International Equity Law and the Acquired Rights Theory. An analysis of these theories is crucial in order to ascertain any rule regarding the treatment of 'odious debts.'

3. THEORIES OF STATE SUCCESSION

3.1 Earlier Theories

3.1.1 Universal Theory

The main proponents of the 'universal theory' are Grotius and Pufendorf who regard the State as more than just a totality of individuals but as a metaphysical entity.[40] Grotius distinguishes between form and substance of a State, with people being the substance and the organisation and sovereignty its form.[41] On this basis, he advances the argument that where a nation or all individuals belonging to it are reduced to slavery by a conquered power, such a nation merely looses its form as a person in international law but not its identity.[42] However, he falls short of expressing any view on whether a conqueror, in taking over rights, obligations are to be taken over as well.[43] Despite this fact, Grotius held contracts to be sacred.

Succession theories have come under immense criticism as it is based upon the Roman analogy of *heres* and thus regards the successor State

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[39] See Bedjaoui, *supra note 16*, at 68 and 70
[40] J L Foorman & M E Jehle, *Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers*, 1 University of Illinois Law Review 11 (1982)
[41] See Feilchenfeld, *supra note 27*, at 26
[42] Id., at 27
[43] Id., at 27

as a direct heir to its predecessor's personality and legal relationship.[44] Rights and duties of individuals and that of a State are not comparable, since the rights of the former are personal to the real being, whereas that of the latter is to a fictional one.[45] "The Roman law analogy is justifiable only as a metaphor, and the validity of the metaphor is not substantiated by an examination of the body of diplomatic and judicial practice. Internal as much as external politics have militated against the acceptance by States of an absolute inheritance of obligations."[46]

However, in order to find a binding rule based upon a commonly accepted practice and legal obligation, international law cannot look to the coercive or even the fully normative authority of municipal law, as is the case with succession theories.[47] The acceptance of a rule as a "binding rule" of international law must depend both upon its widespread and consistent use, and the feeling that such use is the result of a legal obligation. The universal succession theory fails in this respect in that it is no longer regarded as a general source of the *'ius commune'* and is no longer universally acceptable.[48]

3.1.2 Negativist Theories

The inconsistency between the universal succession theory and international practice contributed to the development of the negativist doctrine, which denies all premises on which universal succession was

[44] D P O'Connell, *The Law of State Succession* 7 (1956)
[45] Id., at 7
[46] Id., at 7
[47] M N Hoeflich, *Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*, 1 University of Illinois Law Review, at 44 (1982)
[48] Id., at 44

founded.[49] Negativist theories[50] are based on the idea of the supremacy of the sovereign will, and understandably so, developed at the time of imperialist expansion in the late 19th and early 20th centuries. According to these theories, the sovereignty of the predecessor State over the absorbed territory is abandoned and *a hiatus* is created between the expulsion of the one sovereignty and the extension of the other.[51] The successor State does not exercise jurisdiction over the territory by virtue of a transfer of power from its predecessor, but solely because it has acquired the possibility of expanding its own sovereignty in the manner dictated by its own will.[52] Its most ardent proponent, Arthur Berriedale Keith in his thesis *'The Theory of State Succession with Special Reference to English and Colonial Law,'* relied on the State practice of that time and argued that governments were under no legal obligation to assume the debts of its predecessors. In this regard, he held that it could not be shown in any case that the courts of any country have permitted an action to be brought against the Government to declare it to be responsible for the debts of a country which it has conquered and annexed.[53] According to him, both the United States and Great Britain denied the existence of any such rule under international law, "and that the assumption of public debts had occurred not from any sense of legal liability but because it was expedient for the successor nations to assume the debts."[54] Thus, in 1929, Professor Cavaglieri, also argued that "there is no general rule of law which obliges the annexing State to

[49] D.P. O'Connell, *State Succession in Municipal Law and International Law* 14 (1967)
[50] O'Connell identifies Imperative theories of law and theories of a sceptical character as specific theories within the genus of Negativist theories
[51] See O'Connell, *supra note 49*, at 15
[52] Id.
[53] See Feilchenfeld, *supra note 27*, at 404
[54] See Hoeflich, *supra note 47*, at 67

take upon itself the juridical consequences of acts of the extinguished State." He held that "there is no legal tie between the two, and therefore the extinguished State's rights and obligations no longer have a subject, its creditors have lost the debtor."[55]

However, just as in the case of the succession theories, negativist theories have been subjected to much criticism. Whilst universal succession theory commenced from *a priori* analogy between international law and private law and tries to force State practice within the confines of a single rubric, negativist theory in turn looks to State practice alone and refuses to admit any general principle.[56] O'Connell states that economic rather than legal consideration is considered with the result that no harmonious body of doctrine can be constructed.[57]

3.2 Modern Theories

Since the search for a binding rule in international law could undoubtedly not be found in the universal succession theory, let alone the negativist theories, scholars resorted to positive international law to solve the legal problem raised by State succession. This process started with the early French writers[58] and has since led to various new juristic constructs such as 'international financial law,' 'international equity law' the 'rule of maintenance,' and the 'acquired rights' theory.

[55] See O'Connell, *supra note 49*, at 15
[56] Id., at 28
[57] Id.

3.2.1 International Financial Law

According to Sack, international financial law forms part of the general public and financial law, granting foreign creditors rights against States. However, these rights are neither rights under a system of municipal law nor can it be explained by international law, which applies to relations between States only.[59] To such a law, he ascribes the capacity of binding the territory of a State and of impressing on it a burden of an absolute and permanent, and therefore transmissible character.[60] The importance of international financial law is that it is based on elements of equity and justice in that it takes into consideration the purpose and benefit that a transferred territory may have derived from a loan. Whilst acknowledging Sack for making the greatest contribution to the subject since World War I, Feilchenfeld criticises his argument that international law cannot deal with the treatment of public debts in State succession. Feilchenfeld is of the view that Sack's approach "overlooks the fact that international law may, and does, impose obligations with regard to the treatment of public debts which, while giving rights to foreign states and not to foreign creditors, protect the interest of creditors."[61]

3.2.2 International Equity Law

Feilchenfeld distinguishes between international law and international equity law. He states that international law applies to those rules which are sanctioned by custom or express recognition, whilst international equity law comprises all those rules which may be stated by international

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[58] Id., at 18
[59] See Feilchenfeld, *supra note 27*, at 592
[60] See O"Connell, *supra note 49*, at 374
[61] See Feilchenfeld, *supra note 27*, at 594

tribunals but are not sanctioned by custom or express recognition.[62] Thus, international law decisions based upon equity take into account the spirit of existing law or rules of existing law which appear to be in accordance with what international law tribunals regard as justice.[63] The 'burden and benefit theory' which forms part of Sack's international financial law, is almost completely based upon equitable principles.

3.2.3 Acquired Rights theory

It seems without doubt that the doctrine of acquired rights, although not adequately defined in the literature or judicial and diplomatic practice, has long been accepted in international law and has been sanctioned by decisions of international and municipal tribunals.[64] As a construct of O'Connell, he follows the same approach as the universal successionists by importing a model of analogy, which is that of 'unjust enrichment' or 'acquired rights.'[65] According to O'Connell, the basis of a successor State's obligation does not lie in abstract notions of identity or continuity but in the tangible enrichment of the successor State by virtue of its possession of the physical wealth of its predecessor. He argues:

> "When a state borrows money two things are created. There is, first, the juridical link between the parties, which exists until either the money is repaid or the state itself has disappeared. There is secondly, the factual situation which consists in the actual detention by the state of money in which the lender has an equitable interest. When the debtor state is superseded, the legal

[62] Id., at 587
[63] Id., at 588
[64] See O'Connell, *supra note 49*, at 239-240
[65] See Hoeflich, *supra note 47*, at 46

> duty to repay this money is not inherited ipso facto by its successor. What is "inherited" is the state of facts to which the now extinguished legal relationship has given rise. The equitable interest which the lender has in this actual situation is an acquired right which the successor state must respect. The latter becomes invested, not with legal obligations of its predecessor, but with a new obligation, the obligation not unjustifiably to enrich itself at the expense of private investors who have an equitable interest in the debt. It is not an obligation derived from the predecessor state, but one imposed *ab exteriore* by international law, and it arises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the titleholders' interest.[66]

Foorman and Jehle express their concern that creditors are left with equitable rather than contractual rights. They assert that banks have a general aversion to arbitration clauses in loan contracts that might likely result in the compromising of contractual provisions based on equitable interest.[67]

3.2.3 Rule of Maintenance

This rule, which is an adaptation of the general 'acquired rights theory,' is only applicable to acquired rights and guarantees only the maintenance of rights in their previous condition.[68] It provides that lawfully contracted debts of a State should be maintained by the State that succeeds it, but may not be invoked by foreign nationals directly but

[66] D.P. O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 BYIL 1, at 204 (1951)
[67] See Foorman & Jehle, *supra note 40*, at 13

only by their own States on their behalf.[69] The difference however, between the said rule and the 'acquired rights theory,' is that its application does not depend on a distinction between contractual and equitable rights, but on whether the rights in question concern the 'substance' or the 'quality' of the debt.[70]

4. EVIDENCE OF STATE PRACTICE

The persuasive and binding force of any particular theory is relatively unimportant if it finds no practical application which is commonly accepted by States and to which they feel legally obliged. The history of State practice reveals that many sovereign States have tailored their practice on one or the other theory either for accepting legal liability for public debt or refusing to do so. Whilst this indeed may have been the case with regards to the general treatment of public debts in the instance of State succession, insofar as 'odious debts' are concerned, the situation is different. A perusal of the 19th century legal literature shows that it was fully agreed that a successor State should be relieved of responsibility for any debt contracted by the predecessor State to sustain its war effort against the former.[71] It was inconceivable that a people who had freed themselves from the political sovereignty of a State by victorious resistance should be required, after their victory, to pay debts contracted by the State that had waged war upon them to keep them under its sovereignty.[72] A closer historical examination of State practice

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[68] See Feilchenfeld, *supra note 27*, at 625
[69] Id., at 626
[70] Id.
[71] See Bedjaoui, *supra note 16*, at 70
[72] Id.

in this regard, in particular that of Great Britain and the United States, reveals a pattern more in line with this approach.

4.1 War Debts

Influenced by the expediency of her imperial goals, Great Britain developed a theory and practice in opposition to the doctrine of continental jurists, which were based on binding and inflexible international law practices.[73] Thus in her early treatment of War Debts, Britain, following the American 'moral' theory, developed the notion that a successor State which assumed the debts of a predecessor did so not *ex lege*, but *ex gratia.*[74]

4.1.1 Annexation of the Boer Republics

After the conclusion of the Boer War and Britain's annexation of the Boer Republics, the question arose as to whether Britain was legally bound to assume the Republics' debts. Britain in general refused to assume liability for debts contracted during the war. In this regard, the British Government published a proclamation on 6 June 1900, wherein it refused to recognise the validity of certain war debts of the South African Republic.[75] As for the Republic's national debt, which included a deficit of 1,500,000 pounds, the matter was referred to the Crown Law Officers to advise whether or not the British Government was bound to take over the public debts of the extinct Republics.[76] The Officers were of the opinion that there was no legal obligation on the part of Britain to do

[73] See Hoeflich, *supra note 47*, at 56
[74] Id.
[75] See Feilchenfeld, *supra note 27*, at 381
[76] See O'Connell, *supra note 49*, at 378

more than leave the annexed States competent to discharge their own debts. They advised:

> Her Majesty's Government, as successor to the Government of the South African Republic and the Orange Free State, are bound to take over the public debts of these States as a charge thereon, but not, of course, as debts payable otherwise than from revenue derived from the conquered States respectively.
>
> (a) The conditions attaching to such debts will still continue, but it will be open to Her Majesty's Government to alter such conditions in any respect that may be more equitable, having regard to the altered conditions of affairs.
>
> (b) Her Majesty's Government are bound to pay any instalments of principal and interest which may be due in so far as they have revenue from the conquered territory available for that purpose.[77]

The fact that the British Government could make equitable modifications to those loan obligations indicates that the officers believed the obligation to be a moral one, and therefore, any assumption would be *ex gratia* and not *ex lege.* In this respect, the similarity between the British position and that of the United States in the Texan and Cuban Debt controversies is confirmed.[78]

However, as to the floatation of a loan in 1900 by the South African Republic to finance its military operations against Britain,[79] Britain

[77] Id.
[78] See Hoeflich, *supra note 47*, at 59
[79] Id.

denied all legal responsibility for such 'odious debts' and announced that it would not honour the bonds upon presentation.[80] In November that same year, the Crown Counsel came to the same conclusion when it presented its opinion to the Colonial Office:

> We think that obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle in international law which would oblige Her Majesty's Government to recognize such obligations.[81]

4.1.2 Lyttelton Commission

Concurrent to these developments, the British government, in August 1900, appointed the Hon. A Lyttelton as chairperson of a commission to examine the maintenance of concessions granted by the South African Republic to a number of foreign companies.[82] One of the many companies investigated was a Dutch incorporated company, the Netherlands South African Railway Company. Its Board of Directors consisted of Dutchmen and the shareholders were mainly Dutch nationals and subjects of other continental States.[83] The commission found that the local managers of the company, with the approval of the Board of Directors, had supported the South African Republic in its warfare beyond the obligations which would have fallen upon them according to the South African law.[84] It recommended that the concession should not be recognised and no compensation should be

[80] See Feilchenfeld, *supra note 27*, at 394
[81] See Bedjaoui, *supra note 16*, at 70
[82] See Feilchenfeld, *supra note 27*, at 381
[83] Id.
[84] Id.

paid to the shareholders.[85] According to Feilchenfeld, the report of the commission argued that "probably no State would acknowledge private rights which caused or contributed to cause the war which resulted in annexation."[86] The commission concluded that "the support which the company had rendered to the South African Republic during the war was regarded as an unlawful act, which ought to be treated analogously to unneutral service in maritime warfare."[87] It went further and argued that the shareholders were legally responsible for damages which third parties had suffered by acts of the company. Hence the commission advocated the view that neutral creditors of belligerents, or neutral holders of property rights in belligerent countries forfeited their rights if they supported a belligerent whose country was later annexed.[88]

4.1.3 West Rand Central Gold Mining Company Limited v the King

The principle that succession did not extend to public debts was not only a position taken by the British government and its foreign office, but also one adopted by its law courts. In the case of *West Rand Central Mining Company Limited v the King,*[89] the South African Republic seized gold belonging to West Rand Central Mining Company Limited, a British company, in a manner allegedly contrary to the law of the Republic.[90] Consequently, when Great Britain annexed the Republic in 1900, a petition of right was brought against the Crown to recover the gold or compensation for its loss. In its judgment however, the Court was of the

[85] Id.
[86] Id., at 394
[87] Id.
[88] Id.
[89] *West Rand Central Gold Mining Company, Limited v. The King*, 2 King's Bench Division (3-4 May, 1 June 1905)
[90] Id., at 398

view that the petition did not show any obligation of a contractual nature on the part of the Transvaal Government, and thus did not disclose a sufficient ground for relief.[91] However, it felt bound to answer the question as to whether all contractual obligations of a State annexed by Great Britain upon conquest are imposed as a matter of course.[92] Lord Robert Cecil, on behalf of the plaintiff argued that "all contractual obligations incurred by a conquering State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history."[93] He based his arguments on three propositions. Firstly, that by international law, the Sovereign of a conquering State is liable for the obligations of the conquered. Secondly, international law forms part of the law of England, and thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.[94] The court was not persuaded by the applicant's propositions and adopted the view that a "conquering Sovereign, when making peace, can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them."[95] Feilchenfeld states that the Court literally echoed the official British position found in statements of the Government counsels before the court, which was substantially approved in the dicta of the decision.[96]

[91] Id., at 399
[92] Id., at 400
[93] Id.
[94] Id., at 401
[95] Id., at 402
[96] See Feilchenfeld, *supra note 27*, at 385

This, principally, was the position of Britain towards the end of the 19th and beginning of the 20th century. However, such practice did not stop with Britain but was carried on by a larger community of States in their attempts to solve the question of war debts, which arose out of World War I & II.

4.1.4 Treaty of Versailles

O'Connell states that the drafting style of the Treaty of Versailles applied the 'odious debt' test employed by the American Commissioners in the Cuban debt controversy.[97] Article 254 of the Treaty exempted Poland from the apportionment of those debts which "in the opinion of the Reparation Commission are attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland."[98] Only German public debts contracted prior to 1 August 1914, the date of the outbreak of the war, were assumed by successor States in the manner specified in Article 254.[99]

4.1.5 Treaty of Peace with Italy

Bedjaoui states that "the treaties ending the Second World War followed the same line as the 1919 treaties with respect to the rejection of 'war debts' by the successor States."[100] He cites the Treaty of Peace with Italy of 10 February 1947 and states that the Franco-Italian Conciliation Commission under that treaty ruled that:

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[97] See O'Connell, *supra note 44*, at 189
[98] Id.
[99] See Bedjaoui, *supra note 16*, at 70
[100] Id., at 71

> Debts contracted by the ceding State *for war purposes*, or for the purpose of expanding a territory which was first annexed and subsequently liberated, cannot bind the successor or restored State. It is inconceivable that Ethiopia should have to assume the burden of expenses incurred by Italy in order to ensure its domination over Ethiopian territory.[101]

4.2 Subjugation debts

Unlike war debts, subjugation debts, as a category of 'odious' debts, are described by Bedjaoui as "debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory."[102] A historical overview of the treatment of subjugation debts essentially follows the same approach as those adopted in the treatment of war debts.

4.2.1 Cuban Debt Controversy

In the Paris peace treaty of 10 December 1898, Spain relinquished her sovereignty over Cuba to the United States after being defeated in the Spanish-American war that same year.[103] The problem of the Spanish debts, with its focus mainly around the so-called 'Cuban debts,' became the subject of a detailed and heated discussion at the peace conference. These debts consisted mainly of various loans which had been floated after 1880 and were then consolidated and converted through two Spanish laws of 25 July 1884 and 13 July 1885.[104] A Royal Decree of 10

[101] Id.
[102] Id., at 72
[103] See Hoeflich, *supra note 47*, at 51-52
[104] See Feilchenfeld, *supra note 27*, at 332

May 1886 under which a 6% loan of 620 000,000 pesetas was floated, provided for the interest and redemption of the Mortgage Bills to be satisfied out of the yearly Budget of the Island of Cuba.[105] They were specially guaranteed by "the receipts of the Customs, the Seal, and the stamp office, the Island of Cuba, the direct and indirect taxes existing in the Island, or which may be established there in the future, and the general guarantee of the Spanish nation."[106]

A new issue of bonds with the same guarantee was issued in 1890 and was authorised by the Spanish government to refund the loan of 1886 and covering new debts contracted between 1886 and 1890.[107] Those bonds were sold on the international market and were held by nationals of a number of major powers, including France and Belgium.[108] Although those debts were made obligations secured upon the revenues of Cuba and payable out of them, they were owed by Spain and were contracted under Spanish and not Cuban laws.[109]

At the peace conference, the United States sought to include the following statement into the peace treaty: "Article I. Spain will relinquish all claim of sovereignty over and title to Cuba."[110] The Spanish Commissioners were not prepared to accept an inclusion of such a bare statement into the peace treaty and demanded a fuller statement which would include an acknowledgment by the United States of a transfer by Spain to the United States, of:

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[105] Id.
[106] Id., at 333
[107] Id.
[108] See Hoeflich, *supra note 47*, at 52
[109] See Feilchenfeld, *supra note 27*, at 333

> all charges and obligations of every kind in existence at the time of the ratification of this treaty of peace, which the Crown of Spain and her authorities in the island of Cuba may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof.[111]

This proposal was rejected by the American Commissioners and a controversy arose which, as referred to by Feilchenfeld: "… neither two hundred years' development of usage, nor the various abstractions and theories of writers had created recognised rules of international law on the treatment of debts in case of cession, was shown even more clearly in the peace negotiations which followed the Spanish-American War of 1898."[112]

The arguments of the Spanish Commissioners favouring the allocation of debts were essentially based on precedent, and arguments based on revenue pledges and public debts forming part of the ceded sovereignty.[113] They argued that:

> [I]t is perfectly self-evident that if, during the period intervening between the assumption of a sovereign by an obligation and the fulfilment of the same, he shall cease to be bound thereby through relinquishment or any other lawful conveyance, the outstanding obligation passes as an integral part of the

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[110] I J Moore, *Digest of International Law* 351 (1906)
[111] Id., at 352
[112] See Feilchenfeld, *supra note 27*, at 329-330

> sovereignty itself to him who succeeds him. It would be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all his rights over a territory and the inhabitants thereof, and despite this to continue to be bound by the obligations he had contracted exclusively for their regime and government.
>
> These maxims seem to be observed by all [cultured] nations that are unwilling to trample upon the eternal principles of justice, including those in which such cessions were made by force of arms and as a reward for victories through treaties relating to territorial cessions. Rare is the treaty in which, together with the territory ceded to the new sovereign, there is not conveyed a proportional part of the general obligations of the ceding state, which in the majority of cases have been in the form of a public debt.[114]

The American Commissioners in contrast, did not follow a strict legal doctrinal approach as the Spanish Commissioners, but also adopted an approach based upon justice, equity and moral duty.[115] By adopting such an approach the American Commissioners could construct an acceptable rationale for repudiating 'odious debts' contracted for immoral purposes.[116] They advanced two arguments in support of thereof:

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[113] Id., at 334-336
[114] See Moore, *supra note 110*, at 353
[115] See Hoeflich, *supra note 47*, at 54
[116] Id.

1. the loans have not been contracted for the benefit of Cuba, but, on the contrary, the proceeds had been spent in a way contrary to the interest of Cuba; and
2. the financial burdens connected with these loans had been imposed upon Cuba against her will and without her consent.[117]

Feilchenfeld states that: "The protracted dispute between the American and Spanish delegations as to whether or not the Cuban debts had been imposed by Spain concerned interpretation of facts rather than the facts themselves."[118] Representatives of the Cuban treasury, whilst not a branch of the Spanish treasury but accountable to the Ministro de Ultramar of the Spanish Secretary for the Colonies, sat on the 'Council of Indies' and the 'Council of Castile.'[119] According to the American Commissioners those debts were imposed for reasons of the objections of the Cuban representatives in 1886 to the budget and the creation of a Cuban debt, and furthermore, for reason of non-consultation with Cuba as a country.[120] Both Spanish and American Commissioners agreed that prior to 1860 part of the Cuban revenue had been sent to Madrid and used for national expenses.[121] Spain did not deny that an increase in the Cuban debt between 1861 and 1880 was due to its attempts to reincorporate San Domingo into the Spanish dominions, to pay for Spanish expeditions to Mexico, and to suppress the uprisings which occurred in Cuba between 1868 and 1878.[122]

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[117] See Feilchenfeld, *supra note 27*, at 337
[118] Id.
[119] Id., at338
[120] Id.
[121] Id., at 339

In view hereof, the American Commissioners argued that "the Cuban debts were in no sense obligations properly chargeable to Cuba, because they were debts created by the Government of Spain, for its own purpose and through its own agents, in whose creation Cuba had no voice."[123] They further stated that:

> If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence, would be even more unjust."[124]

With regard to the revenue pledge, the Commissioners pointed out that the creditors knew that the revenues were pledged for "the continuous effort to put down a people struggling for freedom from the Spanish rule," and that "they took the obvious chances of their investment on so precarious a security."[125]

Spain, in the face of decided opposition and a hard line approach by the American Commissioners was willing to reach a compromise subject to

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[122] Id.
[123] Id., at 340
[124] Id., at 341
[125] Id.

certain compensations being granted.[126] This did not mean that it was assuming the correctness of the United States' arguments, but was prepared to deviate from its strict international law approach. However, the United States and Cuba did not assume any of the obligations after the Treaty of Paris, with the result that the holders of the 'Cuban debt' did not collect fully on their claims.

The different positions adopted by the Spanish and American Commissioners represent a very specific instance of the general theoretical distinction between Continental theory and practice on the one hand, and the practice of the United States and Great Britain on the other hand. In this regard, Feilchenfeld notes:

> Both American and English decisions failed to base their unvaried insistence on the maintenance of acquired rights on theories of succession. The Continental theories were rigid theories of positive law which allowed no exceptions. The English and American theories, on the other hand, because of the inclination to regard international law as a system of positive morality, advocated doctrines of justice, rather than inflexible rules of positive law. Such doctrines naturally were subject to modifications in special cases where justice seemed to demand a deviation from the general principle. This difference in theory was a potential source of controversy, because Continental lawyers, accustomed to absolute theories of succession, were not likely to approve of such modification.[127]

[126] Id., at 343

4.3 Criticism on the treatment of 'odious debts'

However, the manner in which war and subjugation debts were dealt with has been challenged by a number of writers. Pufendorf, for instance, maintained that all acquired rights of creditors, even 'odious' ones, are to be respected by a successor State.[128] De Louter, on the question of the debts of the South African Republics, states that "there is no question but that Great Britain was … duty bound, in 1901, to discharge the debts and other pecuniary obligations of the South African Republics it was conquering…"[129] He further maintained that "that is true of all debts, regardless of the purpose for which they were incurred, including those resulting from efforts to defend the homeland and prevent it from being destroyed.' Feilchenfeld for his part states that:

> Most discussions, however, concern cases which are considerably weaker. They do not argue that a debt should not be maintained because the use of its proceeds had the incidental effect of injuring another State, as would be the case, for instance, if the use of the proceeds has the effect of diminishing the export of another country; nor that all debts should be exempted from maintenance which have been contracted with the purpose of using the proceeds in a way which is positively harmful to other countries. The customary arguments are essentially restricted to war debts, and even so frequently apply only to war debts contracted during a war which immediately precedes the annexation. Further, the customary argument is restricted to the

[127] Id., at 312
[128] See Bedjaoui, *supra note 16*, at 71
[129] Id.

> fact that the exemption concerns debts which have been contracted in the last war fought against the annexing State.[130]

With regard to the Cuban debt controversy, Hoeflich makes the point that "leaving the theoretical justification aside, one sees here a clear instance of power politics. Implicit in the submission of both sides is the notion that ultimately the question of assumption of debt by a successor State rests, in part, on its political, economic, and military power, vis-à-vis the creditors involved and the whole community of nations."[131] He asserts that the obligation to assume public debt became an obligation to do 'right,' but what was 'right' was to be determined by the successor State.[132] He is of the view that what one sees here is "that felicitous meeting of theory and practice resulting in what can only be described as a maximisation of national self-interest."[133]

It has to be acknowledged that the doctrine, at times, has been used as a mechanism of serving the opportunistic self-interest of States. This is clearly demonstrated in the case of 'fascist' Germany's annexation of Austria in 1938, when it invoked the defence based on 'odious debts.'[134] Germany refused to recognise any legal liability for Austria, which was heavily indebted to the League of Nations for large loans floated under its auspices.[135] The United States, a guarantor State of those loans, expected Germany to discharge the relief of indebtedness of the Government of Austria. However, when no satisfactory reply was

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[130] See Feilchenfeld, *supra note 27*, at 718
[131] See Hoeflich, *supra note 47*, at 55-56
[132] Id., at 55
[133] Id.
[134] See O'Connell, *supra note 49*, at 380
[135] Id.

received, the United States, on 9 June 1938 delivered a note to Germany stating:

> It is believed that the weight of authority clearly supports the general doctrine of international law founded upon obvious principles of justice that in case of absorption of a state, the substituted sovereign assumes the debts and obligations of the absorbed state, and takes the burdens with the benefits. A few exceptions to this general proposition have sometimes been asserted, but these exceptions appear to find no application to the circumstances of the instant case.[136]

The United States asserted that the loans were contracted in a time of peace, and that it was used for construction work and humanitarian purposes.[137] The German Government was not persuaded by the United States' argument and replied that "neither by international law nor in the interest of economic policy, nor morally, is there any obligation on the part of the *Reich* to acknowledge the legal responsibility for Austria's Federal debts."[138] Germany claimed that the debts were designed to preserve Austrian independence whilst it asserted that its union with Austria was in that country's best interest.[139]

However, the German example constitutes a rare instance of abuse of the doctrine and should not be regarded as the general practice of States in

[136] Id., at 381
[137] See Hoeflich, *supra note 47*, at 63
[138] See O'Connell, *supra note 49*, at 381
[139] See Foorman & Jehle, *supra note 40*, at 22

this regard. States have shown consistent practice with regard to the non-transferability of 'odious debts' even after WWII.

4.4 Recent State Practice

In 1949, the question of the Indonesian debt was dealt with at the Round Table Conference held in The Hague. Indonesia declared its readiness to assume certain debts of the Netherlands' public debt, which arose prior to the Netherlands' capitulation to the Japanese in Indonesia in 1942.[140] However, it refused to assume debts resulting from the Netherlands' military operations against the Indonesian national liberation movement and those financing guerrilla operations between 21 July 1947 and 17 January 1948 and again between 20 December 1948 and 1 August 1949.[141] Though Indonesia initially agreed to pay 4.5 billion guilders, which was the result of the Round Table Conference agreement, it denounced the agreement in 1956 as 'odious.'[142]

5. A RULE OF CUSTOMARY INTERNATIONAL LAW?

What can be concluded from the State practice in the treatment of 'odious' debts, is that States clearly do not regard those debts as transferable to a successor State. This is evident in the consistency of such practice, though at times marred by opportunistic practice.

Thus, the ILC Special Rapporteur in 1977 proposed the inclusion of a general principle on the non-transferability of 'odious debts' in the final

[140] See Bedjaoui, *supra note 16*, at 73
[141] Id.
[142] Id., at 73-74

Convention on the Succession of States in Respect of Matters other than Treaties.[143] However regrettably, the ILC abandoned the idea as it was of the view that "the rules formulated for each type of succession of States might well settle the issues raised by the question, and might dispose the need to draft a general provisions on it."[144] Whilst it could be said that the ILC missed a 'golden opportunity' in direct codification, the doctrine now finds application in the 'clean slate rule' which will be dealt with hereunder.

Hoeflich's point that most of the practice was the result of politics, economics and military power falls short of taking into account *opinio juris,* to ascertain the extent to which States felt legally compelled to deal with 'odious debts' in that manner. Apart from the *West Rand Central Gold Mining case*, the arbitration in the matter between *Great Britain and Costa Rica*[145] establishes authority for the existence of *opinio juris* on the part of States. The arbitration concerned claims by Great Britain against Costa Rica arising out of, *inter alia*, acts of the former *de facto* government of President Tinoco in respect of banking transactions in which the Royal Bank of Canada was concerned.[146] Banco Internacional de Costa Rica issued several 'bills' which were to be realised by the Treasury. Cheques drawn by the Finance Minister on Banco Internacional de Costa Rica was paid-in to the credit of the Government with the Royal Bank of Canada.[147] The government drew cheques against these bills, which cheques were honoured by the Bank. Great

[143] Id., at 74
[144] *Commentary on the ILC Draft Articles on Succession of States in respect of Matters other than Treaties*, 1977 YILC, Vol. 2 II (Part Two), at 67
[145] *Great Britain v Costa Rica*, 2 Annual Digest 34 (1923)
[146] Id.

Britain contended on behalf of the Royal Bank of Canada that the Government of Costa Rica was bound either to honour the 'bills or reimburse to the Bank the amount of the cheques.'[148] Costa Rica, on the other hand, contended that it was not obliged to do so, because the Tinoco government was neither a *de facto* nor a *de jure* government under international law and, therefore, could not bind subsequent Costa Rican governments.[149] Chief Justice Taft dismissed Costa Rica's claim and held that the Tinoco government was indeed a *de facto* government, notwithstanding the fact that it came to power by revolutionary means and that it had not been recognised by a number of States. However, he dismissed Britain's claim on the grounds of irregularity and furthermore found that the Royal Bank had not demonstrated that it had acted in good faith or that it had furnished the money for a legitimate government use. The Chief Justice held:

> The transactions in question, which in themselves did not constitute transactions of an ordinary nature and which were "full of irregularities," were made at a time when the popularity of the Tinoco Government had disappeared, and when the political and military movement aiming at the overthrow of that Government was gaining strength. The payments made by the bank were either in favour of Frederico Tinoco himself for "expenses of representation of the Chief of the State in his approaching trip abroad," or to his brother as salary and expenses in respect of a diplomatic post to which the latter was appointed by Tinoco. "The case of the Royal Bank depends not on the mere form of the

[147] Id., at 35
[148] See Foorman and Jehle, *supra note 40*, at 18
[149] Id.

> transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose." The position was essentially the same in respect to the payments made to Tinoco's brother. The Royal Bank of Canada cannot be deemed to have proved that the payments were made for legitimate governmental use. Its claim must fail. [150]

This judgment adopts a consistent approach, confirming the rule on non-transferability of "odious debts." Decisions such as these, together with treaties, national legislation, diplomatic correspondence, policy statements by government officers, opinion of national law advisers, comments by States on draft reports of the ILC, and resolutions of the political organs of the United Nations constitute clear evidence of State practice. In this respect, some jurists argue that where such evidence exists, *opinio juris* will be presumed in respect of a particular rule.

The belief that a State activity is legally obligatory *(opinio juris)*, is a factor which turns practice into a custom and renders it part of the rules of international law.[151] Article 38(1) of the Statute of the International Court of Justice refers to international custom, as evidence of a general practice accepted as law. Brownlie asserts that the ICJ is willing to

[150] See Great Britian v Costa, *supra note 145*, at 176

assume the existence of an opinio juris on the basis of evidence of a general practice.[152] However, the Court adopted a rather rigorous approach in the *North Sea Continental Shelf Cases*.[153] There it found that "a provision requiring the continental shelf to be divided in accordance with the principle of equidistance contained in the 1958 Geneva Convention on the Continental Shelf had not become a customary rule."[154] The Court held that despite some practice in favour of the application of the equidistance principle, there was "no evidence that [states] so acted because they felt legally compelled to draw [continental-shelf boundaries] in this way by reason of a rule of customary law obliging them to do so."[155] It stated:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated

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[151] M Shaw*, International Law* 67 (1999)
[152] I Brownlie, *Principles of International Law* 7 (1980)
[153] North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*), 1969 ICJ Rep. 3
[154] J Dugard, *International Law "A South African Perspective"* 28 (1994)
[155] Id.

only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[156]

Should the approach, based on the presumption of *opinio juris* be followed, the argument is made that the rule of non-transferability of 'odious debts' has become part of customary international law. Such a proposition is based upon evidence of State practice in the following respect:

- Evidence of treaties as in the case of, the Peace treaty of Paris of 1898, Treaty of Vereeniging of 1905, Treaty of Versailles of 1905 and the Treaty of Peace with Italy of 1947 as evidence of treaties;
- Decisions of national and international tribunals as in the case of the *West Rand Gold Mining Company* and *Great Britain v. Costa Rica;*
- Opinion of national law advisors as in the case of the Crown counsel's opinion of 1900 in the case of the annexation of the Boer Republics.

However, it has to be admitted that proof of *opinio juris* is difficult to produce. Thus, the choice of approach depends very much on the nature of the issues involved and the manner in which the Court would exercise its discretion.[157] Since the question of 'odious debts' has never been before the International Court of Justice, it is not certain whether the rule has attained the status of customary international law. However, on the strength of State practice, it can be concluded that the rule is firmly entrenched in international law.

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[156] See North Sea Continental Shelf Cases, *supra note 153*, at 44

This brings us to the contemporary question of whether the debts, incurred by the former South African Apartheid regime, could be regarded as 'odious' and therefore be non-transferable?

[157] See Brownlie, *supra note 152*, at 7

CHAPTER THREE

THE APARTHEID DEBT

1. INTRODUCTION

In 1993, the Multi-Party Negotiating Process (MPNP) reached an agreement on an Interim Constitution[158] for South Africa. Section 231(1) thereof provided:

> All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.

A similar provision is found in the final constitution which was adopted by the Constitutional Assembly on 8 May 1996. Article 231(5) thereof states that "the Republic is bound by international agreements which were binding on the Republic when this Constitution took effect." One such obligation under international agreements is the foreign sector public debt of the former Apartheid regime. In 1993, the total foreign sector public debt amounted to R 49 411 billion.[159] The government of the day seems willing to assume those obligations in terms of the above constitutional provisions. However, in terms of international law, is there a legal obligation to assume obligations, which can rightfully be regarded as 'odious' and therefore non-transferable? In addressing this question in

[158] Act 200 of 1993
[159] South African Reserve Bank Quarterly Bulletin, vol. 2 (1998)

relation to the foreign sector public debts of the former Apartheid regime, consideration has to be given to the following issues:

1. Has South Africa gone through a governmental or State succession.
2. What is the nature of the foreign sector public debt?
3. Has that debt been contracted for purposes contrary to international law.

2. GOVERNMENTAL OR STATE SUCCESSION?

The rule of non-transferability of 'odious debts' is, strictly speaking, invoked at a time when the legal personality of a State undergoes a change[160] as a result of annexation, decolonization, dissolution of one State into several States, or the merger of several States into one State.[161] A mere change in the political regime of a State does not change the identity or interruption of continuity for a debtor State.[162] Hence, International law does not concern itself with a mere succession in government, but instead, concerns itself with the instance of State succession. However, the distinction between government and State succession has not always been very clear and has resulted in some controversy, as in the case of Soviet Russia.

2.1 Changes in Soviet Russia in 1917

In 1918, the Soviet government issued a decree annulling all foreign loans contracted under the Czarist and Kerensky governments, "without reserve

[160] See Bedjaoui, *supra note 16*, at 74
[161] See Dugard, *supra note 154*, at 275
[162] See Bedjaoui, *supra note 16*, at 68

or exception of any kind whatsoever."[163] At the creditors' conference in Genoa, the Soviet delegation adopted the view that revolutionary governments are not bound to honour debts of an overthrown government.[164] They held:

> Governments and systems that spring from revolution are not bound to respect the obligations of fallen governments. The French Convention of which France declares herself to be the legitimate successor proclaimed … that the "sovereignty of peoples is not bound by treaties of tyrants."[165]

Foorman and Jehle are of the view that it is uncertain whether the position adopted by the Soviet delegation characterised the October Revolution as a change of governments, thereby repudiating the general rule concerning debts, or as a succession of States, thereby asserting a negativist doctrine reminiscent of British practice.[166] O'Connell believes that the Soviet position maintained neither of these. He cites an authority published in 1962,[167] which argues that "the Soviet is a successor State" since "the socialist revolution so fundamentally destroyed the basis of the capitalist State as to terminate its identity."[168] Professor Marek however, suggests that the Soviet delegation neither claimed that the October Revolution constituted a succession of States nor repudiated the general rule that successor governments are bound by the obligations incurred by their predecessors. He asserts that they

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[163] See Foorman and Jehle, *supra note 40*, at 19-20
[164] Id., at 20
[165] Id.
[166] Id.
[167] Kirsten, *Enige Probleme der Staatenanchfolge* (1962)
[168] See O'Connell, *supra note 49*, at 20

invoked a defence based upon *clausula rebus sic stantibus* (changed circumstances).[169]

An analogy based upon fundamental changes is clearly evident between former Soviet Russia and post-1994 South Africa. In both instances fundamental changes occurred which fundamentally altered the former state of affairs in these two countries. Thus, if fundamental changes constitute a ground for invoking the doctrine of 'odious debts,' it may well be submitted that post-1994 South Africa would be entitled to raise the defence in this regard. However, whilst in many respects this analogy might be true, the situation in South Africa also differed fundamentally from that of Soviet Russia.

2.2 Scholarly views on the changes in South Africa

Just as in the case of Soviet Russia, scholars are divided over the question whether the negotiated settlement and subsequent elections in 1994 ushered in a newly independent State in South Africa or whether the process merely resulted in a change of government. Dugard, on the one hand, adopts the view that the changes were merely governmental and that the legal personality of South Africa did not change as a result thereof.[170] Motala, on the other hand, questions whether South Africa achieved total independence under apartheid rule because of the lack of self-determination.[171]

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[169] See Foorman J Hehle, *supra note 40*, at 20
[170] See Dugard, *supra note 154*, at 353
[171] Z Motala, *Under international law, does the new order in South Africa assume the obligations and responsibilities of the apartheid order? An argument for realism over formalism* 295, 30 CILSA (1997)

For Dugard, South Africa became a full subject of international law when the British parliament passed the Statute of Westminster in 1931.[172] This Statute, which repealed the Colonial Laws Validity Act, provided that in future, no Act of the British Parliament would extend to a Dominion without the latter's consent.[173] On the basis hereof, Dugard asserts that it is clear beyond all doubt that South Africa became a sovereign independent State, a full subject of international law, in 1931.[174] Motala, in turn, regards the notion of sovereignty to be largely concerned with the inward workings of a State and that it constitutes merely one facet of independence.[175] He links sovereignty and independence to the exercise of self-determination and holds that in view of the absence thereof, South Africa did not achieve statehood.[176] Whilst Dugard's approach is more popularly accepted, there is however support in international law for the view that recognised that the form of domination under Apartheid was akin to colonial rule and was unlike anything experienced by any other country.[177]

2.3 Colonial assimilation of South Africa

In 1984, the *Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid*,[178] issued a Declaration, declaring that "the application of the principles of self-determination to the situation in South Africa has had the important

[172] See Dugard, *supra note 154*, at 17
[173] Id.
[174] Id.
[175] See Motala, *supra note 171*, at 295
[176] Id., at 303
[177] *Declaration of the Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle Against Apartheid*, UN Doc. A/39/423 (1984), at 4
[178] *Report of the Seminar on the Legal Status of the Apartheid Regime in South Africa and Other Legal Aspects of the Struggle Against Apartheid*, UN Doc. A/AC.115/L.616 (1984)

consequences that the political arrangements under apartheid have been assimilated to a colonial situation."[179] It adopted the view that the General Assembly, Security Council, specialised agencies and subsidiary organs of the United Nations have established a repertory of practice in respect of the situation in Southern Africa, unparalleled in modern international relations.[180] Moreover, it held that international law has forged three important instruments which have won general acceptance through the resolutions of the General Assembly, State practice, international law jurists and the jurisprudence of the International Court of Justice.[181] These are, one, the rules relating to the right to self-determination, two, the principle of the illegality of racial discrimination and three, the rules relating to the legitimacy of the liberation struggle in South Africa.[182] In this regard, the Declaration submits that "the application of the principle of self-determination to the situation in South Africa has had the important consequences that the political arrangements under apartheid have been assimilated to a colonial situation."[183]

The terms of the Declaration have been noted and reaffirmed in Resolution 39/72 of 1984 of the General Assembly. The General Assembly not only reaffirmed the right to self-determination in respect of all South Africans, but also requested all States to refrain from any action that would provide to or imply legitimacy for the Pretoria regime.[184] Emphasising the illegitimacy of the Apartheid regime was part of the

[179] See Declaration on the Legal Status of Apartheid, *supra note 177*, at 4
[180] Id., at 3
[181] Id., at 4
[182] Id.
[183] Id.

repertory practice of the General Assembly.[185] In this regard, it has to be said that International law already established precedent declaring such kind of illegitimacy and lack of self-determination as unlawful. In 1965, for instance, after the Smith regime in Rhodesia unilaterally declared its independence, the Security Council adopted resolutions characterising it as unlawful in terms of the Charter of the United Nations and called upon all States not to recognise that illegal regime.[186]

2.4 Right to Self-determination

The exercise of the right to self-determination for all the people of South Africa has been recognised by the international community in various Security Council[187] and General Assembly resolutions.[188] It was not envisaged that the application of this principle to South Africa would be construed as authorising or encouraging any action which would dismember or impair the territorial integrity of South Africa. Such an approach would have been contrary to the 1970 Declaration on Friendly Relations[189] and the principle of *uti possidetis*.[190] Hence, the granting of

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[184] UN Doc. A/RES/39/72A (1984)
[185] See for instance UN Docs. A/RES/39/72 (1984); 40/64 (1985)
[186] See Brownlie, *supra note 152*, at 98
[187] See for instance UN Docs. S/RES/392 (1976); 417 (1977); 554 (1984); 560 (1984)
[188] See for instance UN Docs. A/RES/2396 (1969); 2671 (1970); 3411 (1975); 31/61 (1976); 36/172A (1981); 40/64 (1985)
[189] Such an approach would have been inconsistent with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. With regard to the principle of self-determination, it states:
Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples … and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
[190] This principle is derived from Latin America whereby the administrative divisions of the Spanish empire in South America were deemed to constitute the boundaries for the newly independent successor States. This principle is more accurately reflected in resolution AHG/Res. 16(1) (1964) of the Organisation of African Unity wherein it declared that the colonial frontiers existing as at the date of independence constitute a tangible reality and that all member States pledge themselves to respect such borders.

independence to the TBVC States[191] by the South African Parliament was condemned by the General Assembly in Resolution 31/6A, for destroying the territorial integrity of the country, and perpetuating white domination through dispossessing the African people of South Africa.[192] The call for non-recognition of the TBVC States was subsequently endorsed by the Security Council in resolutions 402 of 1976 and 407 of 1977. However, in the colonial context, the granting of independence to the TBVC States further evidenced the fact that the Apartheid regime acted as a colonial power by portraying such independence as a form of decolonization.[193]

2.5 Recognition of the Armed Struggle

The international community did not only recognise the right of the South African people to exercise their right to self-determination, but also recognise its struggle as a struggle for liberation.[194] In this regard, the United Nations and other international organisations recognised both the African National Congress (ANC) and Pan Africanist Congress of Azania (PAC) as legitimate liberation movements of South Africa. Moreover, General Assembly Resolutions 38/39A of 1983 and 39/72A of 1984 called upon States to provide the necessary "moral, political and material assistance" to the ANC and PAC, which many States interpreted as authorisation for military support.[195] Thus, the conflict in South Africa was no longer regarded as purely an internal conflict, but ascribed by international law, as an international armed conflict to which the laws of

[191] Transkei, Bophuthatswana, Venda and Ciskei
[192] See Dugard, *supra note 154*, at 78
[193] Id., at 79
[194] See for instance UN Docs. A/RES/38/39A (1983) and A/RES/39/72A (1984)
[195] See Dugard, *supra note 154*, at 327

war were to apply.[196] Article 1(4) of Protocol 1 of the Geneva Conventions classifies armed conflicts "in which peoples are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right to self-determination," as international conflicts for the purpose of applying the laws of warfare.[197] In this regard, the United Nations called upon all the parties to the conflict in South Africa to apply the rules of international humanitarian law contained in the 1949 Geneva Conventions, and requested that all combatants be treated as prisoners of war.[198]

In view of the aforegoing analysis, it is submitted that the situation in South Africa was unlike that of any other sovereign independent State. No other sovereign State had the combined deficiencies of colonialism, illegitimacy, lack of internal self-determination and the recognition of the armed struggle as a means of bringing about an end to a system of institutionalised racial discrimination. Hence, the end of the colonial assimilation, the granting of the right to self-determination for all South Africans and the coming-into-power of the erstwhile Nation Liberation Movements (NLM), could not have amounted to just a mere change of government. By implication, it must have amounted to more than that. To use the rationale of the authority cited by O'Connell in respect of the changes in Soviet Russia: The changes in South Africa so fundamentally destroyed the Apartheid State that it terminated its identity. On this basis, it is maintained that the 'colonial thesis' provides a credible ground for asserting the view that the changes in South Africa were so

[196] Id.
[197] Id., at 299
[198] UN Docs. A/RES/2383 (1968); A/RES/3103/1973

fundamental that its occurrence ushered in a newly independent South Africa.

It is however, anticipated that critics of such an approach may argue that the 'colonial thesis' relies predominantly on resolutions of the General Assembly. These resolutions are, strictly speaking, not legally binding and therefore do not constitute law. Should such an approach be adopted, it would fail to take account of the development of the so-called 'source debate' within international law. A popular view is emerging which holds that "General Assembly resolutions are an authoritative or authentic interpretation or concretization of the provisions of the Charter."[199] Though such a view may seem to be extreme, T Elias, judge of the ICJ, defended his thesis by stating that "those states that vote for a particular resolution by the prerequisite majority are bound on the grounds of consent and estoppel. Those that abstain are also bound on the ground of acquiescence and tacit consent, since an abstention is not a negative vote; whilst those that vote against the resolution should be regarded as bound by the democratic principle that the majority view should prevail when the vote has been truly free and fair and the requisite majority has been secured. To hold otherwise would be contrary to the democratic principle that, if every state has had its say, the requisite majority must have its way."[200]

The conclusion that South Africa can be regarded as a newly independent State provides the basis for an enquiry into the nature of the financial obligations incurred by the former Apartheid State vis-à-vis other States,

[199] J J van Hoof, *Rethinking the Sources of International Law* 181 (1983)

international organisations and foreign private entities. Since those obligations constitute debt contracted by the former Apartheid State, they will henceforth be referred to as the Apartheid debt.

3. NATURE OF THE APARTHEID DEBT

In February 1999, research conducted by Mascha Madorin, Gottfried Wellmer and Martina Egli culminated in the publishing of a Report, titled *"Apartheid-Caused Debt: The Role of German and Swiss Finance."*[201] The Report focuses on the total foreign debt of South Africa during the period of 1980 – 1993.[202] The period is important in that it coincided with increased international economic sanctions against South Africa, aimed at coercing the State to terminate its policies of Apartheid and to comply with its obligations under international law. What is significant, especially from an 'odious debt' perspective, is the Report's exposé of the role of German and Swiss financial institutions, providing much-needed financial support to South Africa during that period.[203] It is such support that contributed to South Africa's total public sector foreign debt of US $14.6 billion in 1993.[204] Of this amount, the total public authorities foreign debts amounted to US $5.4 billion of which US $2.8 billion were the foreign debts of the central government, and US $9.1 billion, the total public corporation foreign debt.[205] An overview of the Report's exposé

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[200] Id., at 184
[201] Madorin et al, *Apartheidschulden Der Anteil Deutschlands und der Schweiz* (1999). English translation by Gottfried Wellmer and Elaine Griffiths published by Jubilee 2000 South Africa.
[202] Id., at 5
[203] Id.
[204] Id., at 45
[205] Id.

starts in 1976, with official loans from the International Monetary Fund (IMF) to South Africa.

3.1 Loans from the International Monetary Fund (IMF)

In 1975, the increased modernisation and expansion of the Apartheid regime's armaments procurements and supply lines, the setting up of strategic oil supply reserves and its invasion into Angola, weighed increasingly on the State's already-in-deficit budget.[206] Whilst the increased budget deficit for the fiscal year 1975/76 partly reflected the government's attempt at avoiding a recession and the costs of the Angolan invasion, the economy went into actual recession that following year, as is reflected in the increased budget deficit of 1977/78.[207] In order to alleviate the effects of the military-strategic sector spending on the internal capital market and the balance of payments situation, South Africa needed foreign capital to stabilise the economy.[208] In this respect, South Africa, in 1976, requested a loan from the International Monetary Fund (IMF) in the amount of US $464 million.[209] This amount almost equalled the increase in South Africa's military expenditure that same year.[210] The IMF granted the loan, despite the occurrence of events that lead to the 'bloodbath' of 16 June 1976, which the Security Council described as "the callous shootings of Africans" and "[a] situation [...] brought about by the continuous imposition [...] of apartheid and racial discrimination."[211] Requests for future loans did not deter the IMF in its approval thereof, despite the fact that the Apartheid regime continued to

[206] Id., at 9
[207] Id.
[208] Id.
[209] Korner et al, *The IMF and the Debt Crisis: A Guide to the Third World's Dilemma* 61 (1987)
[210] Id.

violate its obligations under international law. Thus, for instance, in November 1982, the IMF granted the Apartheid regime a 'stand-by' credit facility of US $1.1 billion.[212] That facility was granted despite the fact that the United Nations General Assembly voted by 121 votes to 3, with 3 abstentions, against IMF aid to South Africa.[213] Korner notes that some IMF directors at an executive meeting pointed out that "it is highly doubtful whether South Africa needed that loan economically. With a projected trade balance surplus of US $1.6 billion for 1983 and a debt service ratio of 7.9%, South Africa was creditworthy enough to meet its requirements without any difficulty whatsoever on the international capital markets."[214] It was held that, "the Apartheid regime was primarily interested in the aura of international capital approval which goes with IMF loans, and would thus demonstrate to critics and sceptics at home and abroad how ineffective UN boycott calls are."[215]

However, increased international pressure resulted in the enactment of the US Gramm Amendment in 1983, which effectively terminated all IMF loans to the South Africa.[216] In terms of that amendment, the US executive director at the IMF was required to vote against further loans to South Africa, unless the US treasury secretary personally assured the US Senate and the House Bank Committee that such loans would help reduce the socio-economic distortions in South Africa caused by Apartheid.[217] That amendment was followed by the passing of the

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[211] UN Doc. S/RES/392 (1976)
[212] See Korner et al, *supra note 209*, at 61
[213] Id.
[214] Id., at 72 fn 17
[215] Id.
[216] See Madorin et al, *supra note 201*, at 17
[217] Id.

Comprehensive Anti-Apartheid Act in 1986, which increasingly made it difficult for US investments in South Africa.[218] Taking these measures into consideration, it can be said that the IMF became the last international intergovernmental organisation[219] rendering support the Apartheid regime. However, because of the Gramm Amendment, the regime had to turn to the international capital markets for continuous financial support.

3.2 Loans from the International Financial Markets

Already in 1976, South Africa raised a loan of US $110 million from a consortium of international banks to balance its balance of payments deficit.[220] Citibank, Morgan Guarantee, First Chicago and Deutsche Bank each provided US $25 million, whilst the remaining US $10 million was provided by Credit Suisse White Weld.[221] Future access to such loans was made easy because of an increase in the price of gold and a short-lived period of exchange control liberalisation.[222] This resulted in an increase in South Africa's short-term debts to European Communities banks from 39% in 1980 to 57% in 1985.[223] However, the increased demand for economic sanctions on the one hand, and the liberalisation of the financial sector on the other hand, resulted in the eventual devaluation of the Rand and the subsequent flight of capital-in-mass from South Africa.[224] Such a massive flight of capital however, did not mean

[218] Id.
[219] South Africa discharged all its loan obligations to the International Bank for Reconstruction and Development (World Bank) in 1976, and has since been re-classified as a donor rather than a recipient country.
[220] See Madorin et al, *supra note 201*, at 9
[221] Id.
[222] Id., at 15
[223] Id.
[224] Id., at 16

that South Africa was not able to attract fresh capital to meet its debt service obligations and to finance its ongoing armaments programme.[225] In this respect the exposé of German and Swiss financial institutions is of particular importance, since those institutions provided financial support to South Africa at a time when the international community increasingly resorted to economic sanctions as a means of legitimately coercing the regime to comply with its legal obligations.

3.2.1 German Capital in South Africa

According to the Report, German business in 1993 was the most important creditor of the public authorities of South Africa, holding 17,5% of all claims, ahead of the USA with 16.7% and Switzerland and the United Kingdom with 13.8% and 13.6% respectively.[226] German exports to South Africa increased from DM 3.4 billion in 1975 to DM 6.1 billion in 1989 with Hermes guarantees for exports to South Africa having increased from DM 2.3 billion in 1976 to more than DM 7 billion in 1994.[227] 76% of all German exported capital had been imported by only two South African public corporations, namely ESCOM and SASOL.[228] The companies supplying those capital goods were Brown, Boveri & Cie. (Mannheim), the Siemens Group, the Mannesmann Group, the GHH-MAN Group, the German Babcock Group, Linde AG, L & C. Steinmüller, being affiliates of the Hoechst Group, Airbus and Klöckner & Co Group.[229] Banks which insured export credits with the Hermes Insurance AG, were

[225] Id., at 17
[226] Id., at 55
[227] Id., at 57
[228] Id.
[229] Id.

Ausfuhr Kreditgesellschaft, Dresdner Bank, Bayerische Vereinsbank and Kreditanstalt für Wiederaufbau, KfW.[230]

As for German capital investments in South Africa, a massive net capital export of DM 2.6 billion took place between 1975 and 1979, mostly in the form of financial credits and investment into securities.[231] Coinciding with the critical period of increased calls for disinvestments, German private capital invested a total of DM 427 million and DM 4.3 billion between 1980 to 1984 and 1985 to 1993 respectively.[232]

Some examples of loans raised by South Africa with the active assistance of German banks include the 1980 loan in which South Africa issued a public bond of DM120 million on the Eurobond market. This loan was managed by Dresdner Bank, Commerzbank and Kredietbank International of Germany, together with other banks from Britain, Switzerland and the United States.[233] The fact that it received very favourable terms, with a seven year maturity and oversubscribed by 25%, was an indication of foreign banks' willingness to renew business relations with South Africa after coming out of recession.[234]

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[230] Id.
[231] Id., at 58
[232] Id.
[233] *Report of the Special Committee Against Apartheid in South Africa,* UN Doc. A/36/22 (1981), at 100
[234] Smith T, *The Role of Foreign Banks in South Africa: Economic Support for Apartheid*, UN Doc. A/CONF.107/7 (1981), at 2

3.2.2 Swiss Capital in South Africa

Swiss businesses invested mainly in credits for the South African public authorities.[235] However, Switzerland was an important financial centre for South Africa in respect of the trade of gold and diamonds, the financing of the State and public corporations and short-term business with South African banks.[236] Swiss banks occupied second place in their participation in syndicated bank loans to South Africa and public corporations.[237] Between 1982 and 1984 Union Bank of Switzerland (UBS/SBG), Swiss Bank Corporation (SBC) and Credit Suisse (CS) were among the most active lead managers with German banks in respect of syndicated loans to the Apartheid regime.[238] Between 1980 and 1985, liabilities of the South African public authorities towards Swiss banks increased by about SFr1.5billion.[239] In 1984, South Africa signed a SFr70 million loan with the Union Bank of Switzerland, followed by a $115 million bond issue which was floated on the Eurobond market in January and March that year.[240] A clear example of a loan contracted in violation of international law was the R 5.3 million loan which Soditic of Switzerland, in 1984, helped the bantustan of Transkei to raise.[241]

Thus, the willingness of German and Swiss banks to continue 'business-as-usual' with South Africa received special attention at the *International Seminar on Loans to South Africa,* organised by the United Nations Special

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[235] See Madorin, et al, *supra note 201*, at 71
[236] Id.
[237] Id., at 72
[238] Id.
[239] Id.
[240] *Report of the Special Committee on Anti-Apartheid Against South Africa*, UN Doc. A/39/22 (1984), at 48
[241] Id.

Committee Against Apartheid in South Africa in 1981.[242] In a declaration issued, it made a special appeal to those two countries stating that, "while many other international banks are currently refusing to lend to the apartheid regime, Swiss and West German banks continue to play a major leadership role in co-ordinating a wide variety of South African financial transactions. The governments concerned have taken no action even to discourage such transactions ..."[243]

Not only did foreign banks assist the Apartheid regime with much needed capital, but also participated and provided support for the regime's militarization against South Africa's black majority and neighbouring States. This is illustrated by the appointment of several members[244] of Barclays and Standard Banks to the Defence Advisory Board.[245] The purpose of the Board was to advise the armed forces on the 'best business methods and other matters including the manufacturing of arms.[246] Former Prime Minister P.W. Botha, on 1 May 1980, told the House of Assembly that the Defence Force has succeeded in obtaining the goodwill and co-operation of business leaders and said:

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[242] See Report of the Special Committee Against Apartheid, *supra note 233*, at 18
[243] Id.
[244] Members of the Board were:
Mr. J G van der Horst, Chairman of the South African Mutual Life Assurance Society; Dr. F J du Plessis, Chairman of Trust Bank and Managing Director of Sanlam; Dr. J S Hurter, Chairman of Volkskas; Dr. Frans Cronje, Chairman of Nedbank and Syfrets-UAL Holdings; Dr. W J de Villiers, Chairman of General Mining; Mr. J Wilkens, President of the South African Agricultural Union; Mr. Gavin Relly, Deputy Chairmain of Anglo American; Mr. R J Goss, Managing Director of South African Breweries; Mr. I McKenzie, Chairman of Standard Bank; Mr. Basil Hersov, Chairman and Managing Director of Anglo-Transvaal Consolidated Investment Co.; Mr. Christopher Saunders, Chairman of the Tongaat Group; Mr. Mike Rosholt, Chairman of Barlow Rand; and Mr. Richie Lurie, President of the Johannesburg Stock Exchange.
[245] See Report on the Role of Foreign Banks in South Africa, *supra note 234*, at 4
[246] Id.

> I think that with this list of names, we have obtained some of the top business leaders in South Africa to serve on the Defence Advisory Board in order to advise me from the inside, not only about the armaments industry, but also about the best methods to be applied within the Defence Force ... I want to unite the business leaders of South Africa, representative as they are, behind the South African Defence Force. I think I have succeeded in doing so.[247]

It is against this background that the question of the 'odious' nature of the Apartheid debts has to be dealt with. Is there a legal justification for arguing that the debts contracted by the former Apartheid regime with transnational corporations and foreign banks are 'odious,' in that they have been contracted for purposes that were not in conformity with contemporary international law and, in particular, the principles of international law embodied in the Charter of the United Nations? Moreover, have they been contracted for purposes contrary to the major interest of the population, that is to say, for purposes of subjugating the major population of South Africa? Any analysis aimed at addressing this question entails a consideration of the nature of Apartheid itself, which will necessarily overlap with some of the arguments already dealt with above.

[247] *Report of the Special Committee Against Apartheid in South Africa*, UN. Doc. A/35/22 (1980), at 104

4 APARTHEID DEBT IN VIOLATION OF INTERNATIONAL LAW

4.1 Policies of Apartheid

Since 1948, Apartheid has been the official State policy in South Africa and remained in place until 1992, whereafter it was officially abandoned. The policy of Apartheid is best described in General Assembly resolution 2922 of 1972, which regarded it as "a total negation of the purposes and principles of the Charter of the United Nations." In particular, apartheid has negated the purpose and principle of promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion. As to the fulfilment of its obligations as a member of the United Nations, South Africa violated those obligations under the Charter and international law in three important respects.

4.2 Apartheid in Breach of the UN Charter and International Law

Firstly, as has already been stated, the right to self-determination has found application within the context of South Africa. This right is recognised as a legal right in almost all the important human rights instruments. In particular, Article 55 of the United Nations Charter,[248] Articles 1 of the two International Human Rights Covenants,[249] the 1970 Declaration on Principles of International Law,[250] and Article 20 of the

[248] Article 55 states:
"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote …"
[249] Articles 1 thereof state:
All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
[250] More specifically called the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970). In its preamble the General Assembly expressed its conviction that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary

African Charter on Human and People's Rights.[251] Some international law scholars regard this right as a right of *jus cogens*. Dugard is of the view that "once the right of self-determination is recognised as a *jus* it would seem to follow by necessary implication that it is *jus cogens* in the light of the pivotal position it occupies in the contemporary international public order."[252] The policies of Apartheid prevented the majority of South Africans to exercise that right to determine their own political future. In this respect, South Africa violated that fundamental right.

Secondly, the Apartheid policies violated most of the rights contained in the 1948 Universal Declaration of Human Rights, the two International Human Rights Covenants[253] and the International Covenant on the Elimination of All Forms of Racial Discrimination. The legal effect of the provisions contained in most of these instruments are controversial, with States being reluctant to accede to it, or in the case of accession, attaching various forms of reservations thereto. However, in the light of State practice, some of the provisions in those instruments have become part of customary international law.[254] As for the rights enshrined in the

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international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality.

[251] Article 20 reads:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

[252] See Dugard, *supra note 154*, at 76

[253] International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

[254] See Shaw, *supra note 151*, at 204

Charter, the ICJ,[255] General Assembly[256] and the Security Council,[257] had held that those provisions impose legal obligations upon its Members. Consequently, because South Africa's domestic legislation were in breach of many of those rights enshrined in the Charter and other instruments,[258] South Africa had violated its obligations under Articles 55 and 56 of the Charter, which required it to observe and respect those rights, and pledge joint and separate action to achieve its purpose.[259]

Thirdly, South Africa had also violated its obligations under Article 2(4) of Charter.[260] In 1975, the South African Defence Force (SADF) invaded Angola under the justification that the effect of its invasion was because of Russian and Cuban presence there.[261] Though South Africa withdrew that following year, it had continued to illegally occupy South Angola for many years in order to provide active support to the UNITA rebels.[262]

4.3 Apartheid in breach of obligations *erga omnes* and norms of *jus cogens*

In the light of the aforegoing, it is submitted that South Africa failed to observe obligations *erga omnes* which it owed towards the international

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[255] Barcelona Traction, Light and Power Company Case (*Belgium v Spain*) Second Phase, 1970 ICJ Rep. 32

[256] See e.g. General Assembly Resolutions 72 (VIII) of 1953, 1598 (XV) of 1961 and 1663 (XVI) of 1961

[257] See e.g. Security Council Resolutions 134 (1960) and 181 (1963)

[258] See J Dugard, *Human Rights and the South African Legal Order* 1978

[259] See Dugard, *supra note 154*, at 200

[260] Article 2(4) states:
All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

[261] See Dugard, *supra note 154*, at 326

[262] Id.
See also further examples of South Africa's violation of Article 2(4) in K Ferguson-Brown's unpublished thesis on "South Africa's Cross-Border Raids against alleged ANC Bases in the Neighbouring States: An International Legal Analysis.

community of States. Consequently, the international community's response to South Africa's failure in this regard is contained in a plethora of Security Council and the General Assembly resolutions, describing apartheid as a crime against humanity and the regime to be illegitimate.[263] As for obligations *erga omnes*, they are obligations which the ICJ in *the Barcelona Traction Case* referred to as "rights involved which all States can be held to have a legal interest in their protection."[264] The Court held:

> … an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[265]

The Court cited examples of the rights to be protected by such obligations. It held that "such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law *(Reservations to the*

[263] See for e.g. the 1973 Convention on the Suppression and Punishment of the Crime of against Apartheid. The Convention follows the model of the Genocide Convention by calling upon all Parties thereto to criminalise the crime of Apartheid'[263] and to adopt legislative measures to that effect. Although only 89 States had ratified it by 1991, the Convention remains an important deterrent to any future State adopting policies based on racial discrimination.
[264] See Barcelona Traction Company Case, *supra note 255*, at 32
[265] Id.

Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. 1951, p.23); others are conferred by international instruments of a universal or quasi-universal character"[266]

Influenced by the Court's decision, the International Law Commission (ILC) deemed it desirable to include a provision on criminal liability in its Draft Articles on State Responsibility.[267] Article 19(3)(c) thereof reads:

> Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
>
> (a)… (b)…
>
> (c) a serious breach on a wide scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;

On the basis hereof, Article 53 of the Draft Articles imposes obligations on all other States in their dealings with a criminal State. It states that:

> An international crime committed by a State entails an obligation for every other State:
>
> (a) not to recognise as lawful the situation created by the crime;
>
> (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
>
> (c) to co-operate with other States in carrying out the obligations under sub-paragraphs (a) and (b); and

[266] Id.
[267] D J Harris, *Cases and Materials on International Law* 488 (1998)

(d) to co-operate with other States in the application of measures designed to eliminate the consequences of the crime.

The importance of the inclusion of Article 19 in the Draft Articles is based upon the view that contemporary international law has reached the point of outright condemning violation of certain fundamental norms. The ILC in its commentary states:

> It seems undeniable that today's unanimous and prompt condemnation of any direct attack on international peace and security is paralleled by universal disapproval on the part of the States towards certain activities. Contemporary international law has reached the point of condemning outright the practice of certain States in forcibly keeping other peoples under colonial domination or forcibly imposing international regimes based on discrimination and the most absolute racial segregation, in imperilling human life and dignity in other ways, or in so acting as gravely to endanger the preservation and conservation of the human environment. The international community as a whole, and not merely one or other of its members, now considers that such acts violate principles formally embodied in the Charter and, even outside the scope of the Charter, principles which are now so deeply rooted in the conscience of [man]kind that they have become particularly essential rules of general international law. There are enough manifestations of the views of States to warrant the conclusion that in the general opinion, some of these acts genuinely constitute "international crimes," that is to say,

> international wrongs which are more serious than others and which as such, should entail more severe legal consequences...[268]

However, Article 19 has also been the source of much controversy within the ILC, with a minority of its members expressing doubt as to whether the Draft Articles should provide for criminal liability on the part of States.[269] In view of such uncertainty, it is doubtful whether the concept will be retained in the final text.[270] However, its exclusion thereof would not effect States' universal disapproval of fundamentally unacceptable practices such as the establishment or maintenance by force of colonial domination, slavery, apartheid and acts of aggression.[271] It is now firmly accepted that such conduct remains contrary to the rules of *jus cogens* and obligations *erga omnes*.[272]

In the light hereof, it is submitted that those States, that had entered into commercial treaties for purposes of fostering economic, trade and financial relations with South Africa, have themselves violated obligations *erga omnes* and norms of a *jus cogens* character. In the context of Article

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[268] *ILC Draft Articles on State Responsibility*, 1976 YBILC, Vol. 2 II (Part Two), at 109

[269] Rosenstock, the United States member of the ILC summarises the position of the minority as follows:
One group of members of the Commission argued that the inclusion of the notion of crimes by states in Article 19 of part I of the Commission's draft was a mistake that should not be compounded by attempting to elaborate the consequences of such a "crime" as distinguished from the consequences of a delict. Those who took this position argued, inter alia, that there was no basis in state practice for the notion of "crimes" by states and that the notion seemed to suggest the idea of collective punishment or other like penal sanctions, both of which were unacceptable... Some of those who questioned the need or utility of including the notion of crimes by states suggested that it might be better to consider a continuum within a single regime of responsibility extending from minor breaches to series ones and that the distinction should be quantitative, not qualitative. (Extract from D J Harris, *supra note 267*, at 489-490)

[270] See Harris, *supra note 267*, at 490

[271] Such practices amount to international wrongful acts, which will give rise to international delicts on the part of States. The ILC defines an international wrongful act to result from a breach by a State of an international obligation so essential for the protection of fundamental interest of the international community that its breach is recognised as a crime by that community as a whole.

[272] See Harris, *supra note 267*, at 837

53 of the Draft Articles, those States rendered aid and assistance to a State that was guilty of committing an international crime.

4.4 Commercial treaties conflict with obligations *erga omnes* and norms of *jus cogens*

This view is supported by Ferguson-Brown who adopts the approach that South Africa not only violated its legal obligations under international law, but that foreign trade and investment encouraged South Africa to continue violating its international obligations.[273] In support of thereof, he refers to the statement of the American Committee on Africa to the United Nations Special Committee on the Policies of Apartheid, wherein it was held that:

> …foreign, financial and commercial support for the South African economy through investment and trade enables the totalitarian regime of South Africa to maintain a firmer grip over its own destiny and therefore impedes fundamental change in the status quo. Foreign economic support not only aids a white South African strategy to become an insulated self-sufficient economy, but also provides significant psychological buttresses for the *apartheid* system…[274]

This fact was admitted by the former South African Prime Minister, John Voster, when, in August 1972 he made the following statement: "Each

[273] K W Ferguson-Brown, *The Legality of Economic Sanctions against South Africa in Contemporary International Law* 81, 14 SAYIL 1988-89
[274] Id., at 81

trade agreement, each bank credit, each new investment is another brick in the wall of our continued existence."[275]

The General Assembly confirms this view in a number of resolutions titled *'[the] adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to colonial and racist regimes in southern Africa.'*[276] For instance, in Resolution 31/33 of 1976, the General Assembly expressed its conviction that such forms of collaboration were the major factor in the perpetuation of the policies of Apartheid. In this regard, it called upon all States to cease all new and foreign investment in and financial loans to South Africa as it was of the view that that would constitute and important step in international action for the elimination of apartheid. The Security Council, for its part, came short of imposing mandatory economic sanctions against South Africa, due to Britain and the United States having exercised their veto rights in respect of two draft resolution in 1986, which would have made sanctions mandatory.[277] However, in adopting Resolution 569 of 1985, the Security Council went as far as urging member States to, *inter alia,* suspend all new investments and guaranteed export loans to South Africa.

Given that economic, trade and financial co-operation provided South Africa with the resources to perpetuate its policies of apartheid and violate its international law obligations, a clear conflict was evident between States' obligation under the Charter and their obligations under

[275] See Madorin et al, *supra note 201*, at
[276] See G.A. Resolutions 2054 of 1965; 31/33 of 1976; 33/29 of 1978; 35/32 of 1980; 36/51 of 1981, 38/17 of 1983; and 39/15 of 1984
[277] See Ferguson-Brown, *supra note 267*, at 59

commercial treaties.[278] Thus, according to Ferguson-Brown, any State that has voluntarily imposed economic sanctions against South Africa did not act contrary to international law, since such a State would be released from its legal obligation under a commercial treaty in terms of Article 103 of the Charter. That Article reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Similarly, the necessity for a treaty to yield to *jus cogens* is confirmed in Article 53 of the 1969 Vienna Convention on the Law of Treaties,[279] which provides that "a treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of international law." Peremptory norms, or norms of *jus cogens* are those norms in respect of which States have to exercise their obligations *erga omnes*.[280] They are based upon an acceptance and recognition by the international community of States as a whole, of fundamental and superior norms from which no derogation is permitted, and which can only be modified by a subsequent norm of general international law having the same character.[281]

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[278] Id., at 81

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

[280] See Harris, *supra note 267*, at 837

[281] See Shaw, *supra note 151*, at 97

Since Apartheid constituted a violation of the norms of *jus cogens*, it necessarily follows that, at the time of its conclusion, those commercial treaties must have been void for reasons of conflicting with peremptory norms in terms of Article 53. Thus, looking at it from an 'odious debt' perspective, those treaties violated principles of contemporary international law, in particular, the principles of international law embodied in the Charter of the United Nations. For reasons hereof, those treaties cannot, but be regarded as an 'odious' source, enabling transnational corporations and foreign banks to enter into 'odious debt' obligations.

4.5 The role of foreign creditors

The role of transnational corporations, foreign banks and other commercial institutions has to be considered in the light of commercial treaties being a source of 'odious debt' obligations. It is standard State practice for commercial relations between States and private parties to be provided for within the framework of bilateral commercial treaties.[282] Such arrangements are intended to encourage investment in a way that protects the interests of both the capital-exporting and capital-importing States.[283] Strictly speaking, within the ambit of the 1969 Convention, such arrangements can be interpreted as constituting acts performed in reliance of a treaty, even though they are concluded independently and are governed by different legal regimes. Thus, it could be argued that in terms of Article 69[284] of the Convention, such arrangements constitute

[282] Id., at 580
[283] Id., at 580-581
[284] Article 96 reads:
1) A treaty the validity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

consequences of treaties which are invalid and for that reason should also be regarded as void.

However, even if it's contended that such agreements do not constitute acts in performance of an invalid treaty, it cannot be said that they cannot be regarded in the same light as those of commercial treaties. They served the same purpose – the perpetuation of the system of apartheid.

It was common knowledge among foreign banks and transnational corporations that by making investments and extending loans to Apartheid South Africa, they perpetuated the policies of apartheid. In this regard, the General Assembly on numerous occasions directly addressed itself to foreign banks, transnational corporations and other organisations not to, *inter alia*, invest in South Africa, as such forms of assistance made them "accomplices in the inhuman practices of racial discrimination, colonialism and apartheid perpetrated by this regime." [285] In resolution 35/32 (1980), for instance, the General Assembly described such forms of collaboration to constitute "a hostile act against the oppressed peoples of southern Africa and a contemptuous defiance of the United Nations and of the international community." Thus, the United Nations Special Committee Against Apartheid in South Africa, in November 1979, co-sponsored an *International Seminar on the Role of Transnational*

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2) If acts have nevertheless been performed in reliance on such a treaty:
a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
3) ....
4) ....

Corporations in South Africa.[286] The Seminar likewise expressed the view that "transnational corporations bear a major share of responsibility for the maintenance of the system of apartheid, for strengthening the repressive and military power of the racist regime and for the undermining of international action to promote freedom and human dignity in South Africa."[287] In consequence thereof, the General Assembly, in resolution 34/93 of 12 December 1979, authorised the Special Committee to organise, in co-operation with the Organisation of African Unity (OAU), a further International Conference on Sanctions against South Africa.[288] The conclusions of the Conference are contained in the Paris Declarations on Sanctions against South Africa, whose terms have been adopted in General Assembly resolution 36/172 of 1981. The Declaration similarly expressed the view that it is a well-established fact that foreign capital, loans and other financial facilities sustained the apartheid economy, and provided it with the necessary resources to expand its military and nuclear capability to the detriment of peace and security in Southern Africa.[289]

Further knowledge on the part of foreign banks and corporations that their actions perpetuated the system of apartheid system, is found in the Report and Recommendations of the Panel of Eminent Persons Group appointed by the UN Secretary-General. The panel was authorised to conduct hearings on and examine the activities and operations of

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[285] See *supra note 276*
[286] See Report of the Special Committee Against Apartheid, *supra note 247*, at 14
[287] Id.
[288] See Report of the Special Committee Against Apartheid, *supra note 233*, at 95
[289] UN Doc. A/CONF.107/8 (1981)

transnational corporations in South Africa and Namibia. [290] Transnational corporations and foreign banks were represented by the International Chamber of Commerce, as well as the South African Chamber of Commerce and the South African Federated Chambers of Industries.[291] Evidence before the panel reconfirmed the fact that "by providing capital and technology, transnational corporations benefited and strengthened the minority regime and provided it with the resources to enforce apartheid."[292] The Report also went further and highlighted the role of transnational corporations under the National Key Points Act, which required all companies (including foreign) in South Africa to maintain a security force far larger than required for their own protection.[293] In terms of that law, the Minister of Defence could declare any building or installation a 'national key point' thereby requiring the owner to take special security precautions.[294] Since banks have been a target for urban guerrilla attacks, foreign banks were included in the secretive operations of South Africa's militarisation.[295] Accordingly, the Report recommended, *inter alia*, that no new investments and loans should be granted to South Africa.[296]

In this regard, it is submitted that ample evidence exist which confirms the view that foreign creditors were aware of the fact that their contractual agreements aided, abetted and encouraged the policies of apartheid. They continued to perpetuate their activities despite the

[290] *Transnational Corporations in South Africa and Namibia*, The Review – International Commission of Jurists, No. 36-39 (1986-87), at 34
[291] Id., at 35
[292] Id.
[293] Id.
[294] See Report on the Role of Foreign Banks in South Africa, *supra note 234*, at 4
[295] Id.

warnings from the international community of States that they were committing hostile acts against the majority of South Africa. Thus, from an 'odious debt' perspective, it has to follow that those agreements were entered into for purposes contrary to the major interest of the population of South Africa. They were entered into for purposes of subjugating South Africa's majority. For these reasons, it follows that South Africa's Apartheid debts cannot, but be regarded as 'odious debts.'

5. OPTIONS OPEN TO SOUTH AFRICA

5.1 1978 & 1983 Vienna Conventions

The effect of Article 231(5) in the Constitution of the Republic of South Africa does not prevent it from invoking the doctrine of 'odious debts.' The 1978 Vienna Convention on Succession of States in Respect of Treaties approves of the 'clean slate rule' in respect of newly independent States. Article 16 thereof reads:

> A newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates.

A similar provision is found in Article 38[297] of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives

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[296] Id., at 37

[297] Article 38 states:

(1) When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwise in view of the link between the State debt of the predecessor State connected with

and Debts. That article provides that no State debt shall pass to a Successor State unless otherwise agreed. In this regard, there exists an important link between 'odious debts' and these two articles. The International Law Commission (ILC), in dealing with the question of 'odious debts,' adopted the approach that it would first "examine each particular type of succession of States, because the rules to be formulated might well settle the issue and dispose of the need to draft general provisions on the matter."[298] If one considers the rules relating to the succession of newly independent States, of which the "clean slate rule" is part, it was clearly intended that the question of 'odious debts' be dealt within that context. Thus, inherent in the 'clean slate rule' is the rationale that debts of a predecessor State might be 'odious' and for that reason States should be entitled to invoke the said rule within the context of Articles 16 and 38 of the two Conventions[299] respectively. Hence, the criticism of O'Connel and the International Law Association (ILA), that the Conventions fail to adopt a 'pragmatic continuity approach,' fails to take account of the 'odious debt' rationale.[300]

Applying the provisions of the Conventions to the case of South Africa, it is clear that obligations under those commercial treaties which gave rise to 'odious' obligations, need not be assumed within the context of the 'clean slate rule.' At the time of their conclusion, they clearly conflicted

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its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

(2) The agreement referred to in paragraph 1 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.

[298] Commentary on the ILC Draft Articles on Succession of States in respect of Matters other than Treaties, 1977 YILC, Vol. 2 II (Part Two), at 67

[299] Both Conventions have *not come into force yet.*

[300] See Dugard*, supra note 154,* at 275-276

with international law. Whilst this is the case in respect of those commercial treaties, it has to be said that none of South Africa's Apartheid debts constitute debts within the context of the two Conventions.[301] As mentioned earlier, they have been entered into with entities other than States, and for that reason they fall outside of the strict ambit of international law. This does not mean that the doctrine of 'odious debts' does not find application within such a context. South Africa, as a sovereign State, is entitled to invoke its sovereign rights to repudiate its obligations towards foreign creditors which it regards as 'odious.' However, in doing so, it is envisaged that foreign banks and corporations would either resort to litigation or arbitration in order to protect their investments. It is generally the case that the jurisdiction of the foreign creditor's law apply in respect of such agreement with the result that international law finds no application. However, agreements between States and foreign creditors have increasingly been internationalised, with the result that rules of international law find direct application.

5.2 Internationalisation of State contracts vis-à-vis foreign creditors

[301] In respect of the 1983 Convention, Article 38 was criticised by a member of the ILC because of not allowing for debts between a State and nationals of other States. He held that international law had always dealt with the relationship between a State and nationals of other States. Although nationals could not claim their rights directly at the international level and had to exhaust the resources provided by domestic law, it was recognised that the "receiving State" had an obligation to treat such persons in conformity with international law and that the State of which those persons were nationals had authority to act on their behalf with a view of ensuring that they were so treated. At the current stage in the development of international law, when both theory and practice were moving towards recognition of the rights of individuals, it did not seem right to exclude the possibility that a successor State might be a debtor of subjects other than the subjects of international law. (Extract from M Bedjaoui, *13th Report on Succession of States in Respect of Matters Other than Treaties*, para 127)

In the *Serbian Loans case*, it was found that in the absence of a law governing loan agreements between a State and a foreign private party, it is presumed that the national law of the State party will apply.[302] This approach is now largely discredited especially in the wake of the *Texaco Arbitral Award case*.[303] Clause 28 of the Deeds of Concession entered into between the Libyan Authorities and Texaco and Another, held:

> This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.[304]

Professor Dupuy held that:

> It follows that the reference made by the contracts under dispute to the principles of Libyan law does not nullify the effect of internationalization of the contracts which has already resulted from their nature as economic development agreements and recourse to international arbitration for the settlement of disputes. The application of the principles of Libyan law does not have the effect of ruling out the application of the principles of international law...[305]

[302] PCIJ (1929), Series A. No. 20, at 41
[303] *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v Libya*, 53 ILM 389 (1977)
[304] Id., at 14
[305] Id., at 18

Thus, the more recent view holds that countries' national laws are further enlarged by so-called quasi-international contracts, with the result that a loan agreement between a State and a foreign creditor might be governed by the law of the creditor's country, the law of debtor's country, supplemented by rules of international law.[306] Consequently, such contracts allow for a 'seepage' of rules of international law to find its way into its ambit, making it possible for the doctrine of 'odious debts' to be applied in that context. Furthermore, often the rules adopted by the major international arbitration treaties and institutions, such as ICSID, [307] and the ICC[308] provide for disputes, albeit in a limited way, to be decided *'amiable compositeur'* or *'ex aequo et bono.'*[309] Thus, in the case of South Africa, it would be entitled to invoke the doctrine, eventhough most of those agreements with transnational corporations and foreign banks are governed by different legal regimes.

6. CONCLUSION

The conclusion that the Apartheid Debts are 'odious' provides a window of opportunity for the re-affirmation of the doctrine in international law. The basis of such re-affirmation necessarily implies an acknowledgment of the history of State practice in relation to the treatment of such debts. That is to say, international law practice acknowledges the rule of non-transferability of 'odious debts.'

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[306] Reinish A, *State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring* 77-78 (1995)

[307] The International Convention on the Settlement of Investment Disputes (ICSID) was drafted under the auspices of the United Nations and World Bank in 1965 and provides for limited range of investment disputes between States and foreign investors.

[308] The International Chamber of Commerce's International Court of Arbitration was established in 1923, and remains the world's leading international commercial arbitration institution.

The non-transferability of 'odious debts' has generally been perceived from the perspective of the successor State. The debt must have been incurred for purposes contrary to the major interest of a successor State. In this regard, Sack 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." The approach based upon the perspective of the international community, that debts are 'odious' if contracted for purposes not in conformity with international law or the UN Charter, provides an even greater opportunity for invoking the doctrine in contemporary international law. This is because the nature of International law has changed dramatically since WWII, due to the enormity of the atrocities committed by the Nazi regime. The promotion and protection of human rights have since been proclaimed as a fundamental goal towards international peace and security. In this regard, notions such as norms of *jus cogens* and obligations *erga omnes* have since been firmly entrench within the framework of international law. As the Court held in the *Barcelona case* that all States have a legal interest in the protection of outlawing of acts of aggression, slavery, genocide and apartheid.

However, whilst international law developed progressively in this regard, it also set itself on collision course with the forces of the new supranational economic order, characterised by transnational corporations and institutions that prefer to operate beyond the regulatory

[309] G B Born, *International Arbitration and Forum Selection Agreements* 79 (1999)

reach of their national States.[310] Hence, transnational corporations and foreign banks were able to provide loans unabatedly to the Apartheid regime, thus perpetuating a system that clearly constituted an international wrong under international law. Moreover, it did so with impunity from their national States, that were themselves under a legal obligation not to aid and abet an international wrong such as apartheid, but failed to do so.

Thus, the problem of sovereign indebtedness provides the circumstances of the existential moment in which the preconditions for the application of the doctrine of 'odious debt' are present. Never before have the conditions exist than today, where both the international community of States and organised civil society are looking for joint and separate solutions to the problem of sovereign indebtedness. Indicative hereof is the HIPC Initiative of the World Bank and IMF and the Cologne Debt Initiative, aimed at providing debt relief to countries that are unable to establish sustainable levels of debt servicing, despite previous attempts through bi- and multilateral debt relief efforts.[311] Whilst those initiatives might be commendable in one way or the other, it does not and has not as its objective, debts contracted in violation of international law or for purposes that are contrary to the major interest of the population of a State. To note but one example of debts not taken into account by those Initiatives are the US$ 14 billion accumulated by Congo under the rule of

[310] H M Wachtel, *The Money Mandarins: The Making of a Supranational Economic Order* 14 (1990)

[311] The Heavily Indebted Poor Countries (HIPC) was endorsed by the Interim and Development Committees of the IMF and the World Bank in September 1996, as a program jointly by the two institutions. The Initiative is designed to provide exceptional assistance to eligible countries following 'sound economic policies' to help them reduce their external debt burden to sustainable

Mobutu Sese Seko. Those debts were used for purposes of converting national wealth into personal assets, often with the complicity and complacency of foreign creditors.[312] Yet, it is expected of the population of Congo to pay those debts mostly at the expense of much needed development.

Thus, precisely for reasons hereof, the international community of States, international tribunals and international law jurists are seized with an opportunity to invoke the doctrine in contemporary international law. In this regard, South Africa has already taken the lead in cancelling the debts of Namibia and Mozambique. With regards to the debts of Namibia, South Africa held that they were "incurred without the consent of the Namibian people who played no part in budget expenditure priorities and decisions, the South African Government regards this situation as inequitable and unacceptable."[313] However, it remains to be seen if this opportunity will be seized.

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levels. (Extract from IMF Factsheet, Debt Initiative for the Heavily Indebted Poor Countries (HIPCs), at http://www.imf.org/external/np/hipc/hipc.htm (September 1999)

[312] L Ndikumana & J K Boyce, *Congo's Odious Debt: External Borrowing and Capital Flight in Zaire*, Vol. 29 Development and Change, at 195 and 205 (1998)

[313] *South Africa takes over Namibia's RSA Government-guaranteed debt*, at http://www.woza.co.za/budget97/namibia.htm ((March 1997)

BIBLIOGRAPHY

BOOKS

Adams P, *Odious Debts: Loose Lending, Corruption, And the Third World's Environmental Legacy,* Earthscan, London & Toronto (1991)

Born G B, *International Arbitration and Forum Selection Agreements,* Kluwer Law International, The Hague (1999)

Brownlie I, *Principles of International Law,* Clarendon Press, Oxford (1980)

De Vos E, *Remedies or Stumbling Blocks? The Public International Law Aspects of the International Debt Crisis,* Doctoral Thesis at the Katholieke Universiteit Nijmegen, The Netherlands (1993)

Dugard J, *Human Rights and the South African Legal Order,* Princeton University Press (1978)

Dugard J, *International Law "A South African Perspective,"* Juta & Co, Ltd., Cape Town (1994)

Feilchenfeld E, *Public Debts and State Succession,* Macmillan Company, New York (1931), Kraus Reprint Co., New York (1972)

Frank T H, *Fairness in International Law*, Oxford University Press Inc., New York (1995)

Harris D J, *Cases and Materials on International Law*, Sweet & Maxwell, London (1998)

Korner P, Maass G, Siebold T & Rainer T, *The IMF and the Debt Crisis: A Guide to the Third World's Dilemma,* Zed Books Ltd., London (1987)

Madorin M, Wellmar G & Egli M, *Apartheidschulden Der Anteil Deutschlands und der Schweiz,* Bread for the World, Stuttgart (1999)

Menon P K, *The Succession of States in Respect of Treaties, State Property, Archives and Debts* (1991)

Moore I J, *A Digest of International Law* (1906)

O'Connell D P, *State Succession in Municipal Law and International Law,* University Press, Cambridge, UK (1967)

O'Connell D P, *The Law of State Succession*, University Press, Cambridge, UK (1956)

Reinisch A, *State Responsibility for Debts "International law aspects of External Debt and Debt Restructuring,"* Boehlau, Wien (1995)

Shaw M N, *International Law,* University Press, Cambridge, UK (1999)

Van Hoof J J, *Rethinking the Sources of International Law,* Deventer, Kluwer (1983)

Wachtel H M, *The Money Mandarins: The Making of a Supranational Economic Order*, Pluto Press London (1990)

ARTICLES & JOURNALS

Ferguson-Brown K W, The Legality of Economic Sanctions against South Africa in contemporary International Law, *South African Yearbook of International Law* (SAYIL), Vol. 14 (1988-89)

Foorman J L & Jehle M E, Effects of State and Governmental Succession on Commercial Bank Loans to Foreign Sovereign Borrowers, *University of Illinois Law Review*, Vol. 1 (1982)

Frankenberg G & Knieper R, Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts, *International Journal of the Sociology of Law,* Vol. 12 (1984)

Hoeflich M N, Through a Glass Darkly: Reflections upon the History of the International Law of Public Debts in Connection with State Succession, *University of Illinois Law Review*, Vol. 1 (1982)

Motala Z, Under international law, does the new order in South Africa assume the obligations and responsibilities of the apartheid order? An argument for realism over formalism, *Comparative & International Law Journal of Southern Africa* (CILSA), Vol. 30 (1997)

Ndikumana L & Boyce J K, *Congo's Odious Debt: External Borrowing and Capital Flight in Zaire*, Development and Change, Vol. 29 (1998)

O'Connell, Secured and Unsecured Debts in the Law of State Succession, *British Yearbook of International Law* (BYIL), Vol. 1 (1951)

Transnational Corporations in South Africa and Namibia, *The Review – International Commission of Jurists*, No. 36-39 (1986-87), at 34

CASES

Barcelona Traction, Light and Power Company Case *(Belgium v Spain)*, Second Phase, 1970 ICJ Rep.

Case concerning the Continental Shelf *(Libyan Arab Jamahiriya v Malta)*, Judgment, 1985 ICJ Rep.

Case concerning the Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) 1997 ICJ Rep.

Cases concerning the North Sea Continental Shelf *(Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands),* 1969 ICJ Rep.

Great Britain v Costa Rica, 2 Annual Digest 34 (1923)

Serbian Loans Case, PCIJ, Series A, No.14

Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v Libya, 53 ILM (1977)

West Rand Central Gold Mining Company, Limited v. The King, 2 King's Bench Division (1905)

REPORTS OF THE INTERNATIONAL LAW COMMISSION

Ago R, 3rd Report on State Responsibility, Vol. 2, YILC (1971)

Ago R, 4th Report on State Responsibility, Vol. 2, YILC (1972)

Bedjaoui M, 9th Report on the Succession of States in Respect of Matters other than Treaties, Vol. 2, YILC (1977)

Bedjaoui M, 13th Report on the Succession of States in Respect of Matters other than Treaties, Vol. 2, YILC (1981)

REPORTS & DOCUMENTS OF THE UNITED NATIONS

Report of the Special Committee Against Apartheid in South Africa, UN Doc. A/35/22 (1980)

Report of the Special Committee Against Apartheid in South Africa, UN Doc. A/36/22 (1981)

Report of the Special Committee Against Apartheid in South Africa, UN Doc. A/39/22 (1984)

Declaration of the *Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Stuggle Against Apartheid*, UN Doc. A/39/423 (1984)

Report of the *Seminar on the Legal Status of the Apartheid Regime in South Africa and Other Legal Aspects of the Struggle Against Apartheid*, UN Doc. A/AC.115/L616 (1984)

Declaration on the *International Seminar on the Role of Transnational Corporations in South Africa,* UN Doc. A/34/655 (1979)

The Role of Foreign Banks in South Africa: Economic Support for Apartheid, UN Doc. A/CONF.107/7 (1981)

International Conference on Sanctions against South Africa, UN Doc. A/36/319-S/14531 (1981)

Paris Declarations on Sanctions against South Africa, UN Doc. A/36/319-S/14531 (1981)