

# RENEGOTIATING THE ODIIOUS DEBT DOCTRINE

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## I

### INTRODUCTION

Following the United States' invasion and subsequent occupation of Iraq,<sup>1</sup> the U.S. government argued that the successor government in Iraq was not responsible for Iraq's Saddam-era debt under the purported doctrine of odious-regime debt. This purported doctrine apparently excused—by operation of law—all successor regimes from repaying debts that were incurred by oppressive predecessor regimes.<sup>2</sup> Some human-rights groups liked this idea and promoted the purported legal doctrine through websites and publications.<sup>3</sup> Soon, the global media joined in.<sup>4</sup> It had become fashionable to suggest that debtors be released from oppressive prior debts.

Fads pass. When they do, calmer heads may acknowledge the truism that when an entity is a creditor, it rather likes to be repaid. But when it is a debtor, it finds little pleasure in repaying loans and might even claim that its debts are repugnant or odious.<sup>5</sup> Law, and the legal scholars that shape it, should appraise

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1. See S.C. Res. 1483, pmb1., U.N. Doc. S/RES/1483 (May 22, 2003) (recognizing the United States and the United Kingdom as “occupying powers”); S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004) (describing the Coalition Provisional Authority as an “occupation”).

2. See Soren Ambrose, *Social Movements and the Politics of Debt Cancellation*, 6 CHI. J. INT'L L. 267, 278–79 (2005) (“[T]he US government argued for cancellation of the external debt of Iraq in terms very similar to those of the odious debt doctrine.”) (citing U.S. Secretary of the Treasury John Snow); Iraqi Freedom From Debt Act, H.R. 2482, 108th Cong. § 3 (2003) (calling for the cancellation of Iraqi debt) (as of Nov. 15, 2006, this bill has not passed into law). *But see* DANIEL PATRICK O'CONNELL, *THE LAW OF STATE SUCCESSION* 187 (1956) (“Unanimous agreement as to what constitutes an odious debt has been inhibited by a diversity of economic and political theories.”).

3. See, e.g., Jubilee Iraq, <http://www.jubileeiraq.org/aboutus.htm> (last visited Nov. 14, 2006) (“The debts which Saddam owes cannot be legitimately passed on to the Iraqi people without assessment by . . . the doctrine of odious debts . . .”).

4. See Steve Negus & John Reed, *Iraq Seeks Further Deal on Debt Relief*, FIN. TIMES, Dec. 2, 2004, at 12 (discussing Iraqi debt as “odious”); Conrad De Aenlle, *As Iraqi Dust Settles, Debt is Getting a Lift*, N.Y. TIMES, May 4, 2003, § 3, at 7 (mentioning designation of Iraqi debt as “odious”).

5. Cf. O'CONNELL, *supra* note 2, at 187 (“The concept of odious debts tends to be expanded as States seek a pretext for avoiding obligations which otherwise would be imposed upon them . . .”).

such claims of odiousness and determine the appropriate international response.

This article presents a three-part response. The first part of the response, detailed in Part II below, addresses the purported rule that oppressive debts of a predecessor government do not bind its successor. Even assuming that positivism is the correct focal lens, state practice does not support a purported doctrine of odious-regime debts.

Part III demonstrates that the purported doctrine of odious-regime debts inadequately supports the human-rights policies that its proponents identify as its normative basis. The purported doctrine is both overinclusive and underinclusive. It is overinclusive because the purported rule would eviscerate creditors' rights, even in situations where doing so could destabilize global markets, harm millions of people dependent on these markets for their livelihoods, and cause creditors to deny much-needed fresh loans to successor governments. It is underinclusive because the purported rule does not address non-debt commercial obligations that might debilitate the successor government if their repayment terms exceeded the capacity of the successor government's economy to meet them.

Part IV proposes that the problem of succession of debts should be reframed more broadly as a problem of succession to all commercial obligations. A solution to this broader problem is to abandon arid formalism in favor of understanding and adjusting the global decisionmaking process. The international response to claims that a debt is an odious-regime debt is more subtle than a brute doctrinal approach. Creditors, debtors, and other influential international actors exchange claims and counterclaims backed by varying degrees of power and authority. Eventually, outcomes are reached that tend to balance global stability with the human rights of the citizens of the successor entity. Commercial arrangements are generally preserved, but commercial obligations are adjusted on terms that would allow the successor entity's economy to recover from the trauma of succession.

## II

### A DOCTRINAL APPRAISAL OF THE PURPORTED DOCTRINE OF ODIUS-REGIME DEBTS

The issue of how to address claims that postsuccession debts are odious is important because successions occur with some regularity. States are essentially self-governing territories of individuals.<sup>6</sup> Just as humans fail, so too do their efforts to govern. When the ruling elite of a territory fails to properly govern with sufficient frequency or intensity, the governed may, by force or peaceably, replace the ruling elite with new leaders and authority structures.

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6. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097.

There have been numerous successions in the twentieth century alone. Some of these have involved changes in the international legal personality of a state or changes in territory, such as the independence of East Timor or the secession of Montenegro from Serbia and Montenegro. Others have involved fundamental changes of government, such as the communist revolutions in China and the Soviet Union and the military coup d'état in Burma. On occasion, foreign powers may undermine the ruling elite of a state. The most overt example of such meddling occurs through invasions, or, as it is more coyly termed today, "regime change." This was the case with the recent successions in Afghanistan and Iraq.

It would not be beyond the realm of possibility to anticipate foreign-engineered successions in the future—in North Korea, Iran, or other states that may have allegedly gravitated towards an imaginary "axis of evil."<sup>7</sup> Independence movements in provinces such as Aceh in Indonesia, Chechnya in Russia, and Transnistria in Moldova may succeed in these territories. Should more fundamentalist notions of Islam find more followers in secular states with significant Muslim populations, more successions may occur.

In successions, large debts could be subject to claims of odiousness. When the Soviet Union dissolved in 1991, it owed \$67 billion in external debts.<sup>8</sup> When Saddam Hussein was forcibly removed from power in Iraq, his regime had incurred \$140 billion in external debt.<sup>9</sup> Cuba, which will not be forever governed by Fidel Castro, reportedly owed about \$40 billion in 2002.<sup>10</sup> Given the frequency of successions and the magnitude of debt that could be at stake, the college of international jurists should propose appropriate international responses to the purported odious debt doctrine.

The idea of odious debts is broad. When the U.S. government and human-rights groups invoked the purported doctrine of odious debts, they were in fact referring only to a narrow species of odious debts that in international legal theory is known as regime debts. In order to determine the meaning of the purported doctrine of regime debts, it is necessary to clarify the meanings of doctrine or legal rules, state and government successions, and odious debts generally as opposed to regime debts specifically.

#### A. Legal Doctrines and Rules

Positivists conceive of international law as a system of legal rules with which international actors are required to comply and which tribunals or courts with

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7. See President George W. Bush, State of the Union Address (Jan. 29, 2002), in 38 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS, at 135 (coining the term "axis of evil").

8. See *id.* at 345.

9. See Presentation of the Iraqi Government at the Meeting with Iraq's Commercial Claimants, Dubai, May 4, 2005 at 4 (on file with author); Joanna Chung & Stephen Fidler, *Restructuring Under Fire: Why Iraq Debt is No Longer a Write Off*, FIN. TIMES, July 17, 2006, at 15.

10. BUREAU OF W. HEMISPHERE AFF., U.S. DEP'T OF ST., CUBA'S FOREIGN DEBT (2003), <http://www.state.gov/p/wha/rls/fs/22743.htm> (last visited Nov. 14, 2006).

jurisdiction over disputes could apply.<sup>11</sup> According to Article 38 of the Statute of the International Court of Justice, which positivists regard as codifying the customary law on sources of law,<sup>12</sup> these rules are determined by reference to formal sources of international law. These sources are principally treaties, customary law as determined by widespread state practice and *opinio juris* (a belief in the existence of the rule), and general principles.<sup>13</sup> When a rule exists and is applicable to an international dispute, it prescribes an outcome by operation of law.

Modern positivism recognizes that in some situations, parties to a dispute may negotiate a settlement in which they mutually consent to derogate from the applicable rules, such as an agreement to release each other from treaty obligations.<sup>14</sup> But even such negotiations take place in the shadow of legal rules, because a failure to reach settlement could result in the outcome prescribed by the default legal rule.

The decisionmaking process in the absence of legal rules is different from when such rules exist. Absent substantive legal rules, outcomes are often reached through negotiations involving claims and counterclaims. The influence of such claims on outcomes does not depend on the inherent “compliance pull” of rules,<sup>15</sup> but on power,<sup>16</sup> authority,<sup>17</sup> and interests that underlie those claims.

Thus, under positivism, a purported legal doctrine of odious-regime debts refers to the cancellation of oppressive debts *ipso jure* (by law) on the occurrence of succession. It does not refer to a nonlegal claim that may be made during postsuccession negotiations.

## B. State and Government Succession

Positivists distinguish between state and government succession. State succession involves a change in the territory or international legal personality of a state.<sup>18</sup> In contrast, government succession involves a change in government, or even a fundamental change in the structure of state authority, but it does not change the state’s international legal personality, that is, its identity under

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11. Anne-Marie Slaughter & Steven R. Ratner, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291, 293 (1999) (describing positivism).

12. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 622 (6th ed. 2003); MALCOLM N. SHAW, *INTERNATIONAL LAW* 66 (5th ed. 2004).

13. See Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1031.

14. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 54, Mar. 21, 1986, 25 I.L.M. 543 [hereinafter Vienna Convention on the Law of Treaties].

15. See Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 90 (2006); Kai Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 406 (2000) (both discussing “compliance pull”).

16. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 155–57 (2005) (discussing definitions of “power”).

17. See Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 388 (1991) (discussing definitions of “authority”).

18. BROWNLIE, *supra* note 12, at 621.

international law.<sup>19</sup> Under this dichotomy, the dissolutions of Yugoslavia and the unification of Germany are examples of state and not government succession. By comparison, the regime changes in Afghanistan and Iraq in the twenty-first century are examples of government and not state succession.

Pursuant to a positivistic international law rule, a successor government is always responsible for the debts of its predecessor government.<sup>20</sup> Positivists derive this rule from the classical view that international law recognized only states as having international legal personality, and only states were subject to international law. Thus, although debts are incurred by acts of government officials, such as in signing loan agreements or contracts, these officials incurred debts on behalf of the state.<sup>21</sup> Accordingly, a change in government does not affect the identity of the debtor, which is the state. Under positivism, therefore, the issues of succession to debts, and whether these debts are odious, never arise in government succession.<sup>22</sup>

By comparison, when state succession occurs, a question may arise as to whether the successor state is responsible for the debts of its predecessor state.<sup>23</sup> The predecessor state that contracted the debt may no longer exist—as in the case of dissolution—and the successor state did not itself contract the debt. Thus, positivists have searched for rules to determine when debt might pass from a predecessor to a successor state.

There are no clear customary rules or multilateral treaties in force governing whether and when a successor state is responsible for the debts of its predecessor state.<sup>24</sup> Jurists are divided on what the applicable rules might be. On one hand, some scholars favor a clean-slate approach in which the new state is never bound by the obligations of the predecessor state. Under this approach, there is no need, or indeed room, for a doctrine of odious debts, because these obligations do not pass to the successor state regardless of whether they are odious.

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19. See INTERNATIONAL LAW ASSOCIATION, *ECONOMIC ASPECTS OF STATE SUCCESSION* 14, ¶ 18 (2006).

20. See DANIEL PATRICK O'CONNELL, 1 *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 6 (1967) (explaining that in government succession, "continuity of . . . rights and obligations was presumed in virtue of continuity in the personality of the possessor"); ALEXANDER N. SACK, *LA SUCCESSION AUX DETTES PUBLIQUES D'ETAT* 255 (1929).

21. See Vienna Convention on the Law of Treaties, *supra* note 14, at art. 7.

22. Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 *CHI. J. INT'L L.* 391, 404 (2005) ("The law of government (as distinct from state) succession is settled—revolution notwithstanding, 'the nation remains with rights and obligations unimpaired.'" (citing *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927); *Tinoco Arb. (Gr. Brit. v. Costa Rica)*, 1 R.I.A.A. 369 (Arb. 1923) ("[T]hrough the government changes, the nation remains, with rights and obligations unimpaired."); *U.S. v. Islamic Republic of Iran*, 32 *IRAN-U.S. CL. TRIB. REP.* 162, 176 (1996) ("[W]hen a Government is removed through a revolution, the State, as an international person, remains unchanged and the new government generally assumes all the previous international rights and obligations of the State.")).

23. Cf. Oscar Schachter, *State Succession: The Once and Future Law*, 33 *VA. J. INT'L L.* 253, 255 (1993) (noting "doctrinal history" in which the issue of odious debts only arose with the "extinction of the personality" of a state).

24. TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* 4 (2006).

On the other hand, other scholars favor a universal-succession approach, in which the successor state is generally bound by the obligations of its predecessor state.<sup>25</sup> Some jurists have proposed that under the universal approach, a debt might, as an exception to the general rule of continuity, not bind the successor state if it was odious.<sup>26</sup> In other words, to the extent that there could be a doctrine of odious debt, it is an ancillary doctrine that can exist only if one accepts a principle of general continuity to obligations.<sup>27</sup>

### C. Odious Debts and Its Sub-Species

Many commentators suggest that the idea of odious debts was conceived in 1898, when the United States occupied Cuba and refused to pay debts incurred by Spain on behalf of Cuba.<sup>28</sup> In fact, the idea that debts could be odious traces as far back as international law itself. Aristotle noted, “[When] a democracy tak[es] the place of an oligarchy or despotism . . . some persons refuse . . . to meet the contracts in hand on the ground that it was not the State, but the despot who entered upon them . . . .”<sup>29</sup>

It may appear at first blush that Aristotle regarded the notion of odious debt as applicable to government and not state succession. Such an interpretation of Aristotle’s writings would be wrong. It ignores the metaphysical concept of statehood prevailing at that time, which did not distinguish between the state and its government.<sup>30</sup> Once jurists developed a metaphysical or doctrinal distinction between the state and government in later centuries, they explained that the idea of odious debt could apply only to state succession.<sup>31</sup>

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25. *Id.* at 13–26 (tracing and appraising the evolution of clean-slate and universal-succession theories).

26. See O’CONNELL, *supra* note 2, at 187 (noting that if a debt were not odious, it “would otherwise be imposed upon [the debtor states]”); BROWNLIE, *supra* note 12, at 627 (“[S]ome modern exponents of the principle of vested or acquired rights are moved to formulate certain large qualifications concerning ‘odious concessions’ . . .”).

27. See *Summary Records of the 1420th Meeting*, [1977] 1 Y.B. Int’l L. Comm’n 25, U.N. Doc. A/CN.4/SER.A/1977; *Summary Records of the 1426th Meeting*, [1977] 1 Y.B. Int’l L. Comm’n 57, U.N. Doc. A/CN.4/SER.A/1977 [hereinafter U.N. Int’l Law Comm’n Yearbook 1426th Meeting] (recording comments that odious debts “constituted an exception to the normal rule concerning succession to State debts”).

28. See, e.g., Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2005 UTAH L. REV. 401, 409 (2005); Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT’L L. REV. 1239, 1246 (2004); Christoph G. Paulus, “Odious Debts” vs. *Debt Trap: A Realistic Help?*, 31 BROOK. J. INT’L L. 83, 84 (2005).

29. ARISTOTLE, *ARISTOTLE’S POLITICS* 162 (W. E. Bolland trans., Longmans, Green, & Co. 1877).

30. See 2 O’CONNELL, *supra* note 20, at 5 (“Until the middle of the nineteenth century both [state and government succession] were assimilated, and the problems they raised were uniformly solved.”) (citing, *inter alia*, Grotius and Pufendorf).

31. See O’CONNELL, *supra* note 2, at 187–92 (considering the odious debt doctrine only in the context of state succession).

In the millennia after Aristotle, scholars expanded the idea of odious debts into two categories. The first category is “regime debts”<sup>32</sup> or “hostile debts,”<sup>33</sup> the type of odious debt that Aristotle had in mind. In 1927, Alexander Sack argued that such regime debts should be excused if they met two criteria. First, the debt must have been hostile to the interests of the debtor state—that is, it was debt not used “for the needs and interests of the State.”<sup>34</sup> Second, creditors must have been aware that their loans would be used to oppress the population of that state.<sup>35</sup> In 2003, Canadian jurist Ashfaq Khalfan and his collaborators added a third condition—that odious debts have to be incurred without the consent of the governed.<sup>36</sup> In fact, other jurists had already proposed that condition, including John Bassett Moore in 1906<sup>37</sup> and Daniel Patrick O’Connell in 1956.<sup>38</sup> Khalfan’s innovation was to divide regime debts into those debts that “are actively aggressive against the interests of a population (e.g., conquest, colonisation, war, suppressing secessionist attempts)” and “Third World Debts” that “were harmful burdens assumed by a state but for which the population received no benefit.”<sup>39</sup>

The second category of odious debts was “war debts.” In 1625, Grotius posited that although preexisting debts generally passed to a successor state, a conquering state was not bound by the obligations of the conquered state, except by choice.<sup>40</sup> This expansive absolution of a conqueror’s obligations to discharge the preexisting debts of its conquered state eventually evolved into a narrower idea of war debts. By the mid-twentieth century, the doctrine of war debts had narrowed to excuse a successor state from paying only those debts that were “used to finance the preparation or prosecution of war against the successor State, and possibly against other States.”<sup>41</sup>

Although the U.S. government, scholars, and nongovernmental organizations (NGOs) described Saddam debt as “odious debts,” in fact they were referring to regime debts and not war debts. They argued that Saddam

32. U.N. Int’l Law Comm’n Yearbook 1426th Meeting, *supra* note 27 (recording statement about “regime debts”).

33. O’CONNELL, *supra* note 2, at 188–89 (describing hostile debts).

34. *Id.* at 187; cf. U.N. Int’l Law Comm’n Yearbook 1426th Meeting, *supra* note 27 (recording a statement that odious debts are those that “had been employed for purposes contrary to the right to survival or independence of a State”).

35. SACK, *supra* note 20, at 255. See Anderson, *supra* note 28, at 408 (explaining Sack’s theory).

36. Paulus, *supra* note 28, at 85. In fact, other jurists had already proposed this condition. See 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 359 (1906).

37. *Id.*

38. O’CONNELL, *supra* note 2, at 188.

39. Ashfaq Khalfan et al., *Advancing the Odious Debt Doctrine 2* (Centre for International Sustainable Development Law, Working Paper No. COM/RES/ESJ/, 2003), [http://www.odiousdebts.org/odiousdebts/publications/Advancing\\_the\\_Odious\\_Debt\\_Doctrine.pdf](http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf).

40. Hugo Grotius, iii JURE BELLI AC PACIS, ch. viii., § 1 (1625), translated in HUGO GROTIUS, OF THE RIGHTS OF WAR AND PEACE 139 (J. Morrice trans., 1725).

41. O’CONNELL, *supra* note 2, at 189–91 (discussing war debts). See also U.N. Int’l Law Comm’n Yearbook 1426th Meeting, *supra* note 27 (considering war debts as a type of odious debt); Khalfan et al., *supra* note 39, at 18–19.

debt did not bind the successor government because it was incurred by Saddam for oppressive purposes without the consent of the Iraqis.<sup>42</sup> They never once raised the argument that the U.S. government should not have to pay for Saddam debt because it was the victorious conqueror of Iraq. Thus, to be precise, the contemporary discourse precipitated by the forcible removal of Saddam concerns regime debts, not war debts. This article responds principally to this discussion of regime debts.

War debts are also appropriately excluded from this article because the policy considerations underpinning regime debts are different from those of war debts, as are the principal beneficiaries of those policies. Purported justifications for canceling regime debts include the injustices inflicted upon the oppressed people of the territory in transition.<sup>43</sup> Purported justifications for canceling war debts include the injustice of a victor in war being made responsible for loans used to oppose it.<sup>44</sup> The distinct policy analyses concerning war debts and regime debts are properly the subject of different articles.

#### D. State Practice

Although the idea of forgiving regime debts has existed for millennia, it has not crystallized into a rule of customary international law because of a lack of state practice in support of such a rule.<sup>45</sup> The twentieth century has been filled with successions, especially after World War II and at the end of the Cold War.<sup>46</sup> And yet many jurists commenting on regime debts have not been able to find support for a purported regime-debt doctrine in recent international practice.<sup>47</sup>

42. Jürgen Kaiser & Antje Queck, *Odious Debts—Odious Creditors? International Claims on Iraq*, OCCASIONAL PAPERS, Mar. 2004, at 24, [http://www.erlassjahr.de/content/languages/englisch/dokumente/200403\\_iraq\\_paper.pdf](http://www.erlassjahr.de/content/languages/englisch/dokumente/200403_iraq_paper.pdf); Gelpern, *supra* note 22, at 394–96; Anderson, *supra* note 28.

43. Nsongurua J. Udombana, *The Summer Has Ended and We Are Not Saved! Towards a Transformative Agenda for Africa's Development*, 7 SAN DIEGO INT'L L.J. 5, 27 (2005) (“[I]t is unfair to call on ordinary taxpayers in countries ruled by corrupt governments to repay loans made to leaders who did not represent these payers.”); Mark Thompson, Comment, *Finders Weepers Losers Keepers: United States of America v. Steinmetz, the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama*, 28 CONN. L. REV. 479, 501 n.101 (1995) (“[N]o people is obliged [sic] to pay debts that are like the chains it has been forced to bear for centuries . . .”) (quoting Georgy Chicherin).

44. Hans J. Cahn, *The Responsibility of the Successor State for War Debts*, 44 AM. J. INT'L L. 477, 480 (1950) (“Every state at war . . . is justified in considering its own case as just, and in consequence the enemy's action combatting him as an international wrong. . . . Therefore, debts contracted in order to prepare, to maintain or to increase the war effort of the annexed or diminished state in its war against the successor state may be disapproved . . .”).

45. See Mancina, *supra* note 28, at 1252 (“The odious debt doctrine is not a part of international law. It does not exist under any treaties, nor does it exist in state practice . . .”).

46. CHENG, *supra* note 24, at 6–8 & n.4 (discussing waves of successions in the twentieth century).

47. Cf. Gelpern, *supra* note 22, at 406 (“Odious Debt's apparent disuse . . . after a century of Hitler, Stalin, Mobutu, Abacha, Somoza, Marcos and Idi Amin—not to mention the socialist revolutions, capitalist restorations, and the intervening wars of liberation from colonial rule—are more than mildly puzzling.”). See also Gregory W. Bowman, *Seeing the Forest and the Trees: Reconceptualizing State and Government Succession*, 51 N.Y.L. SCH. L. REV. (forthcoming 2007) (reviewing TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* (2006)) (“[P]ost-Cold War succession events have underscored even more clearly that international law doctrine on state and government succession does not reflect state practice.”).

Instead, they have been reduced to relying on the following late nineteenth and early twentieth century successions: the Mexican repudiation of Austrian debts in 1867,<sup>48</sup> the Chilean repudiation of Peruvian debt in 1883,<sup>49</sup> the U.S. repudiation of Cuban debt in 1898,<sup>50</sup> Great Britain's rejection of Boer debts in 1900,<sup>51</sup> the rejection in 1923 of debts incurred by Frederico Tinoco on behalf of Costa Rica,<sup>52</sup> the Soviet repudiation of Tsarist debts in 1918,<sup>53</sup> repudiation of Polish debts at the Treaty of Versailles in 1919,<sup>54</sup> and the German repudiation of Austrian debts in 1938.<sup>55</sup>

Many of these examples address the cancellation of war debts and not regime debts. Chile repudiated Peruvian debt through Article 8 of the Peace Treaty of Ancon in 1883. Under this Treaty, Peru ceded to Chile the Province of Tarapaca. The repudiation of debt was an exercise of the conqueror's power. It was not achieved out of a desire to relieve the people of Tarapaca of oppressive debts, but to relieve the new ruler of the debts of the previous ruler.<sup>56</sup> As regards Boer debts, the English Court of Appeal explained in *West Rand Central Gold Mining Co. v. Rex* that Great Britain rejected Boer debts when it conquered the Boer republics not under a doctrine of regime debts, but under a principle that a conquering state did not become responsible for the conquered state's debts—that is, a doctrine of war debts.<sup>57</sup> Likewise, attempts by Germany to repudiate Austrian debts following Germany's 1938 annexation of Austria related to war debts, not regime debts, because no claim was made that the Austrian government had incurred debt to oppress the Austrian people.<sup>58</sup> In any event, Germany did eventually pay Austria's debts to Great Britain.<sup>59</sup>

48. Khalfan et al., *supra* note 39, at 24.

49. *Id.* at 24–25; James L. Foorman & Michael E. Jehle, *Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers*, 1982 U. ILL. L. REV. 9, 30 (1982).

50. PATRICIA ADAMS, ODIIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY, 162–64 (1991); O'CONNELL, *supra* note 2, at 188–89; Anderson, *supra* note 28, at 409; Foorman & Jehle, *supra* note 48, at 22–23; Günter Frankenberg & Rolf Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts*, 12 INT'L J. OF SOC. OF LAW 415, 429 (1984); Joseph Hanlon, *Defining Illegitimate Debt and Linking Its Cancellation to Economic Justice* 3 (2002) (on file with author); Khalfan et al., *supra* note 39, at 25–26.

51. Khalfan et al., *supra* note 39, at 26.

52. Cf. Patricia Adams, *Iraq's Odious Debts*, POLICY ANALYSIS, Sept. 28, 2004, at 4, <http://www.cato.org/pubs/pas/pa526.pdf>; Anderson, *supra* note 28, at 410; Foorman & Jehle, *supra* note 48, at 18; Gelpern, *supra* note 22, at 411; Khalfan et al., *supra* note 39, at 41; Paulus, *supra* note 28, at 84–85.

53. Anderson, *supra* note 28, at 409; Foorman & Jehle, *supra* note 49, at 19–21; Khalfan et al., *supra* note 39, at 27; Schachter, *supra* note 23, at 254; Adams, *supra* note 52, at 3.

54. Anderson, *supra* note 28, at 409–10; Cahn, *supra* note 44, at 483; Khalfan et al., *supra* note 39, at 27; Adams, *supra* note 52, at 4.

55. Foorman & Jehle, *supra* note 49, at 21–22; Khalfan et al., *supra* note 39, at 28.

56. See 2 O'CONNELL, *supra* note 20, at 411.

57. *W. Rand Cent. Gold Mining Co. v. Rex*, (1905) 2 K.B. 391, 402.

58. Khalfan et al., *supra* note 39, at 28 (explaining that Germany claimed to repudiate Austrian debt because it had been contracted against Germany's interests).

59. 337 PARL. DEB., H.C. (5th ser.) (1938) 2362 (statement of the Chancellor of the Exchequer).

Other examples cited by scholars do not support the purported doctrine of regime debt because they involve government succession. When Chief Justice William Taft sat as arbitrator in *Great Britain v. Costa Rica*,<sup>60</sup> a case concerning whether the Costa Rican government was responsible for the debts incurred by its predecessor Tinoco regime, he could not rely on the doctrine of odious debt because Costa Rica did not undergo state succession. Instead, Taft confirmed the international rule in existence at that time—that government succession does not terminate preexisting state debts because the identity of the state is unchanged. Likewise, the cancellation of Bolshevik debts following the Soviet revolution does not provide evidence of an odious debt doctrine. Although Soviet scholars argued that revolution could be considered state succession,<sup>61</sup> the prevailing view is that revolution brings about merely a change in government and the international legal personality of the state remains intact.<sup>62</sup>

The United States' repudiation of Cuban debt after the Spanish-American War of 1898,<sup>63</sup> which is often touted as the example *par excellence* of the cancellation of regime debts,<sup>64</sup> may not in fact concern regime debts at all. Many proponents of a purported doctrine of regime debts rely on alleged comments by the U.S. commissioners rejecting responsibility for all Cuban debt because they were allegedly "contracted of Spain for national purposes, which in some cases were alien and in others actually adverse to the interest of Cuba."<sup>65</sup> This statement is drawn from Moore's early twentieth-century records on the Cuban debt issue.<sup>66</sup> But Moore's records also reveal that not all Cuban debt was incurred to oppress the Cubans. Some debts were incurred during a period of "perfect peace, and at the pinnacle of [Cuba's] prosperity."<sup>67</sup> Other debts were incurred to make up for deficiencies in appropriations bills that resulted from reduced taxation of Cuba by Spain.<sup>68</sup> The cancellation of the entire Cuban debt cannot support a purported regime-debt doctrine because not all the debt was oppressive.<sup>69</sup>

60. Tinoco Arbitration (Gr. Brit. v. Costa Rica), 18 AM. J. INT'L L. 147, 154 (1923).

61. See Natalia Vasilevna Zakharova, *States as Subjects of International Law and Social Revolution*, SOVIET Y.B. INT'L L. 164, 165–66 (1960); 1 O'CONNELL, *supra* note 20, at 19–21.

62. YILMA MAKONNEN, *THE NYERERE DOCTRINE OF STATE SUCCESSION AND THE NEW STATES OF EAST AFRICA* 22–26 (1984).

63. See generally ADAMS, *supra* note 50, at 164 (describing the dispute over Cuban debt).

64. Kaiser & Queck, *supra* note 42, at 7 ("Among the most frequently mentioned cases is that of Cuba . . .").

65. Frankenberg & Knieper, *supra* note 50, at 429. See also M.H. Hoeflich, *Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39, 53 (1982).

66. MOORE, *supra* note 36, at 358.

67. *Id.* at 377.

68. *Id.* ("It is well known that these deficiencies were due to the great reduction of taxes made in Cuba by the mother country.")

69. 2 O'CONNELL, *supra* note 20, at 460 ("The extent to which the Cuban debt was a consolidation of loans for these purposes is uncertain, but it is clear that the United States went beyond the premises of its own argument in treating the entire Cuban debt as unbeneficial to the island.")

Even if the Cuban debt dispute could be interpreted as involving some variant of odious debts, it may only provide evidence for a doctrine of war debts and not regime debts. The U.S. commissioners conceded that they were concerned that this debt had been used “to oppose the United States” and to “wage war against the United States.”<sup>70</sup> If a doctrinal reason must be found to explain why the Cuban debts were unpaid, it was because Spanish-incurred loans were used to finance a war against the United States, the successor state to the Cuban territory. This reasoning accords more with a doctrine of war debts than with one of regime debts.

An analysis of U.S. interests at stake also supports the interpretation of the Cuban debt dispute as an issue of war debts. Although the U.S. commissioners rejected Cuban debts with the rhetoric of freeing Cuba from oppression, the facts show that the United States’ real intentions were to promote its foreign policy and to weaken Spain.<sup>71</sup> The U.S. invasion of Cuba was part of its larger anti-Spain strategy that was precipitated after Spain sunk the Battleship Maine on April 25, 1898. This larger strategy involved battles over the Philippines, Puerto Rico, Guam, and other islands.<sup>72</sup>

Although the United States initially passed the Teller Resolution in 1898 disclaiming “any disposition or intention to exercise sovereignty, jurisdiction or control” over Cuba,<sup>73</sup> the United States did extend its sovereignty over Cuba.<sup>74</sup> Article II of the 1898 Protocol of Armistice between the United States and Spain provided that Spain would “cede to the United States . . . islands now under Spanish sovereignty in the West Indies,” which included Cuba.<sup>75</sup> This agreement did not provide that Spain would grant Cuba independence. After three years of occupation, Cuba agreed to incorporate the Platt Amendment into Cuba’s constitution in 1901.<sup>76</sup> The Platt Amendment provided, inter alia,

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70. MOORE, *supra* note 36, at 377.

71. John D. Ingram, *Puerto Rican Independence: Whose Choice? The People of Puerto Rico or the United States Government?*, 2001 L. REV. M.S.U.-D.C.L. 85, 86 (2001) (“[T]hrough most of the nineteenth century there was a popular belief that it was the ‘manifest destiny’ of the United States to occupy as much of the land as possible in North America between the Atlantic and Pacific Oceans.”); C. Todd Piczak, Comment, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. PITT. L. REV. 287, 290 (1999) (“[T]he United States was ready to assert itself on the stage of world affairs.”).

72. Teller Amendment, S.J. Res. 24, 55th Cong., 30 Stat. 738 (1899); Ingram, *supra* note 71, at 86.

73. The Teller Resolution (Cuba), *supra* note 72.

74. Cf. Platt Amendment of 1901, art. 4, reprinted in 6 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, 1117 (Charles I. Bevans ed. 1971) (describing U.S. presence in Cuba as a “military occupancy”).

75. Protocol of Armistice between the United States and Spain, 1898 art. II, reprinted in part in MOORE, *supra* note 36, at 351.

76. See Platt Amendment of 1901, *supra* note 74, arts. 1-3. See also James Brown Scott, Editorial Comment, 8 AM. J. INT’L L. 565, 591 (1914), (“[The Platt Amendment] was accepted and incorporated in the constitution . . .”); Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT’L & COMP. L. REV. 321, 325 (2000) (“Because of the [U.S.] occupation, the Constitution contained the Platt Amendment, which allowed the United States to intervene in Cuba’s domestic affairs . . .”).

that Cuba, which is situated at the United States' throat, would not provide any other state with a naval base, that the United States retained the right to intervene militarily in Cuba, and that Cuba would not contract any debt that it would not be able to service.<sup>77</sup> The United States' real goal in repudiating Cuban debt was simply to expand U.S. foreign interests. This included ensuring that the Cuban government would be free from influence by other imperial powers. It might have also included eliminating all risk, no matter how remote, that the United States would be responsible for Cuban debt.<sup>78</sup> In light of these U.S. interests, beneath its rhetoric, the U.S. repudiation of Cuban debt was really an example of the Grotian idea that a victor in war will often attempt to disclaim the burdens that previously encumbered the conquered territory.

Even assuming to be true the U.S. rhetoric that it was benignly seeking to free Cuba from oppression, the Cuban debt dispute still does not support a general doctrine of odious-regime debt applicable to all forms of succession. The doctrine of regime debts that writers have propounded would permit repudiation of debts incurred to oppress any territory and not just colonies. This doctrine would also permit repudiation when any form of succession occurs, not just decolonization. In contrast, the Cuban debt controversy at most supports a hypothesis that colonies might repudiate colonial debts upon independence.<sup>79</sup> This hypothesis would be consistent with practice in a limited number of other decolonizations,<sup>80</sup> such as the Mexican repudiation of Austrian debts in 1867<sup>81</sup> and the repudiation at the Treaty of Versailles in 1919 of Poland's debts incurred by its German colonizers.<sup>82</sup>

Relying on the Cuban debt controversy and historical instances of decolonization to support a general theory of regime debts would be overreaching. The Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts of 1978 (the 1978 Convention) indicates that decolonizations are *sui generis*,<sup>83</sup> and the rules of succession to debts in decolonizations do not apply to other forms of succession.<sup>84</sup> Over three decades, the International Law Commissioners reviewed state practice on succession of states.<sup>85</sup> They concluded that state practice did not support the discontinuity of

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77. See Platt Amendment of 1901, *supra* note 74, at arts. 1-3.

78. See ADAMS, *supra* note 50, at 164 (“[T]he United States never acknowledged any liability for the Cuban debt . . .”).

79. See MOORE, *supra* note 36, at 355 (noting that Cuban debt concerned “colonial obligations”).

80. See MAKONNEN, *supra* note 62, at 53-73 (discussing repudiation of colonial obligations).

81. See JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE 75 (1886); Khalfan et al., *supra* note 39, at 24.

82. O'CONNELL, *supra* note 2, at 189 (citing opinion of the 1919 Reparation Commission that Polish debts were “attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland”).

83. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, at arts. 15, 28, 38, U.N. Doc. A/CONF/117/14 (Apr. 8, 1983) [hereinafter 1983 Convention].

84. *Id.* at arts. 37, 39, 40, & 41.

85. See generally CHENG, *supra* note 24, at 125-29 (discussing debates leading to the 1983 Convention).

oppressive debts. They thus omitted from the 1983 Convention a draft article creating a general exception to continuity for odious debts.<sup>86</sup> The 1983 Convention ultimately reflected a view that if any exception were made, it would be limited strictly to decolonized states<sup>87</sup> in order to obtain sufficient support from U.N. member states for the Convention. Even this limited discontinuity for decolonized states proved to be deeply divisive among states, and the 1983 Convention never entered into force.<sup>88</sup>

### III

#### A NORMATIVE APPRAISAL OF THE PURPORTED DOCTRINE OF REGIME DEBTS

In addition to lacking support from international practice, the purported doctrine of regime debt does not support the global policies that its proponents invoke.

##### A. Protecting the Human Rights of Debtors

A key purpose of the purported regime-debt doctrine, according to its proponents, is to promote the human rights of the citizenry that undergo succession.<sup>89</sup> It does not adequately do so. It purports to invalidate only financial obligations that have been incurred without benefit to the citizenry, and only on the occurrence of state succession. Even assuming to be true the assumption inherent in the purported odious debt doctrine, that past oppression provides an overriding policy reason to invalidate debts, the odious debt doctrine is drawn too narrowly because it would not operate—by its own terms—in oppressive situations involving government succession, such as the regime change in Iraq. It also would not operate—again by its own terms—to invalidate nondebt obligations that may have been incurred oppressively, such as the unjust concessions that Indonesia granted to Australia over the Timor Gap.

Further, if the purpose of the purported odious debt doctrine is to protect the human rights of the oppressed, then it should adjust not only the obligations that were incurred under oppressive circumstances, but also those obligations that, moving forward, will debilitate the state and prevent its economic

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86. Compare *Summary Records of the 1425th Meeting*, [1977] 1 Y.B. INT'L L. COMM'N 49, at 54, U.N. Doc A/CN.4/SER.A/1977 (discussing Draft Article D, *Non-Transferability of Odious Debts*), with 1983 Convention, *supra* note 83.

87. Compare 1983 Convention, *supra* note 83, at art. 38 with *id.* at arts. 37, 39, 40, 41.

88. U.N. Treaty Collection, Entry on the 1983 Convention, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/ChapterIII/treaty37.asp> (last visited Nov. 14, 2006) (stating that the 1983 Convention had only seven signatories out of the fifteen required under Article 50 of the Convention).

89. See Udombana, *supra* note 43, at 28–32 (characterizing the effect of odious debt on individual economic rights as a human-rights issue); Anderson, *supra* note 28, at 437 (“[A] minority of the population maintained power through ‘massive violations of human rights.’ Thus, . . . Hussein’s debts are odious . . .”).

development. But the purported doctrine does not account for the economic consequences of continuity, only for presuccession injustices.

Nor does the purported doctrine account for situations in which the cancellation of obligations upon succession would harm the human rights of the citizenry. Repudiation risks depriving the successor government of foreign capital that is often needed after a traumatic succession. Further, investors may increase the cost of lending or refuse to extend fresh credit until old debts are paid. The successions of the Socialist Federal Republic of Yugoslavia (SFRY),<sup>90</sup> Czechoslovakia,<sup>91</sup> the Soviet Union,<sup>92</sup> and Iraq<sup>93</sup> have all shown that some form of repayment is often necessary to secure fresh loans that the successor entity requires.

By focusing only on the interests of the citizenry of the successor state, the purported odious debt doctrine also ignores global human rights. In successions, the amount of debt can run into the hundreds of billions of dollars. Canceling debts outright could have a calamitous effect on creditor institutions. It might be tempting to imagine creditor corporations and states to be inhuman legal entities. But beneath the legal construct of a state is its citizens, and behind the legal construct of a corporation is its shareholders and employees who live off their investments or wages. The purported odious debt doctrine fails to protect the human rights of these people from the destabilizing effects on global capital markets of canceling outright debts deemed to be odious.

#### B. Discouraging Loans to Oppressive Regimes

Some modern proponents of the purported doctrine of regime debts argue that it would discourage creditors from extending to oppressive regimes loans that would perpetuate those regimes and their human-rights abuses.<sup>94</sup> Although this proposal may be superficially attractive, it creates several problems. Creditors may not have known at the time of lending that their loans would be

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90. Press Release, International Monetary Fund, IMF Approves Membership of Federal Republic of Yugoslavia and US\$151 Million in Emergency Post-Conflict Assistance (Dec. 20, 2000), <http://www.imf.org/external/np/sec/pr/2000/pr0075.htm> (requiring structured debt repayment of the predecessor state's debts as a condition for membership in the International Monetary Fund (IMF)); Press Release, World Bank, Federal Republic of Yugoslavia Joins World Bank (May 8, 2001), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20014354~menuPK:51062078~pagePK:34370~piPK:34424~theSitePK:4607,00.html> ("The conditions for succession to Bank membership were that FRY would . . . enter into final agreement with the Bank on the loans of SFRY it assumes . . .").

91. CHENG, *supra* note 24, at 265 (providing evidence that the willingness of the Czech Republic and Slovakia to assume the entire debt of the Czech and Slovak Federal Republic (CSFR) helped both successor states retain access to capital markets).

92. CHENG, *supra* note 24, at 355 (providing evidence that the IMF and World Bank used fresh loans as leverage for repayment by the Russian Federation of Soviet loans).

93. Letter of Intent from the Government of Iraq to Rodrigo de Rato, Managing Director, International Monetary Fund (Sept. 24, 2004), ¶ 4, available at <http://www.imf.org/External/NP/LOI/2004/irq/01/index.htm>.

94. See SEEMA JAYACHANDRAN & MICHAEL KREMER, THE BROOKINGS INST., ODIUS DEBT 2 (2005), <http://www.brookings.org/views/papers/kremer/200504mkremer.pdf>.

used for oppressive purposes, and it would be unfair to penalize them for such lending. The suggestion that such unfairness would be reduced if debts were considered odious only when creditors knew that their loans would be used for oppressive purposes<sup>95</sup> is no solution. If this test were subjective, every creditor would simply opt not to know whether their loans would be used for oppressive purposes. If this test were objective in the sense that creditors would be required to engage in due diligence to determine if their loans would be used for oppressive purposes, it would place an overly onerous burden on financial institutions to make political assessments. This would either be simply impossible or require the retention of political consultants, which would raise the transaction costs of loans that would then have to be passed on to developing debtor states.

More fundamentally, this approach to regime debts presumes that it is always in the global interest not to support oppressive regimes. This presumption is not universally correct. If there is an oppressive regime with nuclear or chemical weapons that requires financial assistance to avoid its implosion, refusing to extend new loans might cause its ruling elite to make irrational decisions about the use of its armaments, or even to lose these arms to insurgents and terrorists. If there is a regime that oppresses its people as well as harbors potential terrorists within its borders, permitting that regime to implode might make gangs and militias in its territory more harmful to the world than the regime itself.

There are many different paths to good state governance and normalization of interstate relations. Some paths are longer or require light footsteps. The purported doctrine of regime debts would force creditor states, institutions, and corporations to tread heavily and march quickly when dealing with oppressive regimes, even when such approaches would damage global order.

#### IV

##### A POLICY-ORIENTED APPROACH TO SUCCESSION

In the absence of a legal rule canceling oppressive debts *ipso jure* on the occurrence of succession, and since, in any event, the purported regime-debts doctrine does not adequately support the relevant global policies, is there an alternative approach to the international law of succession that is both descriptively accurate and normatively appealing? One alternative could be to describe and appraise the decisionmaking processes in state and government successions.<sup>96</sup> Contemporary successions indicate that this complete international decisionmaking process does generally account for, and balance the demands of, human rights and global stability. As a general matter, in

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95. Khalfan et al., *supra* note 39, at 89.

96. See generally Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109 (2006) ("[I]nternational law is a global process of interactions among state and non-state participants. Participants generally deploy power and invoke legal and social norms in pursuit of interests and in response to the strategies of other participants.").

recent successions, courts,<sup>97</sup> governments,<sup>98</sup> and financial institutions<sup>99</sup> have all deployed their power and authority to ensure that commercial obligations are generally preserved in spite of succession,<sup>100</sup> in order to minimize the disruptive effects of succession on the global economy.<sup>101</sup>

Within the overall trend towards continuity of obligations, the international decisionmaking process accommodates human-rights concerns in more nuanced ways than the brute doctrine of odious debts. When state or government succession occurs, participants in the international system may claim that preexisting commercial obligations should be terminated or adjusted. These participants might be the successor government, the media, NGOs, or other states that have an interest in the cancellation of those obligations. Other participants may then respond to the claims that obligations should be cancelled. This process of signaling and responding may occur in multiple venues, including diplomatic talks between states, commercial negotiations with private creditors, and in national and international tribunals. Eventually, an international decision is reached. When the debts are grossly unjust or when they would genuinely debilitate the successor state, there has been a tendency to adjust these obligations. When, however, the obligations continue to provide benefits to the territory that underwent succession, these obligations tend to be preserved. Through this flexible decisionmaking process, rather than the dogmatic application of rules, international law balances the competing policies of preserving the global infrastructure and of attending to human rights according to the specific circumstances of each succession.

Contemporary state and government successions provide evidence of this decisionmaking process. In recent successions, participants in the international decisionmaking process have not confined themselves to the narrow issue of financial debts as proposed by the purported odious debt doctrine. Instead,

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97. See *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, slip op. 1997 I.C.J. (Sept. 27), reprinted in 37 I.L.M. 162, 197 (Jan. 1998) (finding the Czech Republic bound by a treaty concluded by Czechoslovakia); *Russian Federation v. Pied-Rich B.V.*, Supreme Court, 28 May 1993, RvdW (1993) No. 117, S & S (1993) No. 91, NJ (1994) No. 329, in 25 *Netherlands Yearbook of International Law* 512 (1994) (holding that Russia had to abide by a maritime agreement between the Soviet Union and the Netherlands); *The "Guiseppe Di Vittorio"*, [1998] 1 *Lloyd's Rep.* 136 (A.C. 1997); *The "Guiseppe Di Vittorio"* (No. 2), [1998] 1 *Lloyd's Rep.* 661 (Q.B.D. 1997) (holding that the Ukraine succeeded to the Soviet Treaty of Merchant Navigation).

98. See *Hong Kong-Japan Agreement for the Promotion and Protection of Investment*, art. 15(2), May 15, 1997, 36 I.L.M. 1423 (noting that Hong Kong agreed to protect Japanese investors for fifteen years beyond Hong Kong's transfer to the People's Republic of China); CHENG, *supra* note 24, at 358 (noting that in the dissolution of the Soviet Union, Austria initially insisted that obligations terminated on succession, but in 1995 capitulated and accepted Russia's continued responsibility for Soviet obligations).

99. *WORLD BANK, CZECH AND SLOVAK REPUBLIC-SUCCESSION TO MEMBERSHIP STATUS OF THE CZECH AND SLOVAK FEDERAL REPUBLIC 2* (Dec. 23, 1992) (noting that the Czech and Slovak Republics were allowed to become members of the IMF and World Bank only after agreeing to succession of debt).

100. Cf. Schachter, *supra* note 23, at 258-59 ("As a matter of policy, the case of presuming continuity makes sense today when the state system is increasingly fluid.").

101. See CHENG, *supra* note 24, at 8-13 (discussing the global costs of successions that must be ameliorated).

decisionmakers apply a policy analysis to all obligations, including treaty obligations. When the Republic of Namibia gained independence in 1990, an international decision was taken to deviate from the general policy of continuity regarding treaty obligations concluded by South Africa.<sup>102</sup> This was because South Africa's occupation was considered illegal and oppressive.<sup>103</sup> However, treaties concluded by the United Nations Council for Namibia were not considered to have lapsed if they provided advantages for the people of Namibia.<sup>104</sup>

In 1991, when the Baltic States reverted to independence after decades of illegal Soviet occupation, the Baltic States did not reject all Soviet obligations on grounds of odiousness. Instead, international decisionmakers terminated some obligations<sup>105</sup> but preserved others that were necessary to avoid disruptions to the commercial system. Sweden and Estonia confirmed that territorial delimitations during Soviet occupation would remain unchanged to avoid disruptions to their fishing industries.<sup>106</sup> Finland and Estonia agreed that sixteen key agreements concluded during Soviet occupation would remain in force for a period of three years while new arrangements could be made, if necessary.<sup>107</sup> The costs for both the Baltic States and their bilateral partners of terminating all international commercial arrangements formed over forty years of Soviet rule would simply have been too high.

International practice also indicates that, unlike the purported doctrine of regime debts, obligations that might be oppressive and that were incurred without the consent of the governed may not be terminated. Instead, they may survive succession in a modified form that may be fairer to the parties and prevent disruptions to global commerce. The obligations entered into by the Communist governments of the Soviet Union and Yugoslavia could well have been regarded as regime debts by their nonsocialist successor states. But the successor states and other international decisionmakers did not cancel these obligations. Instead, they generally accepted the continuity of debt and treaty

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102. John Quigley, *Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations From Human Rights Obligations?*, 15 MICH. J. INT'L L. 491, 513 (1994) ("[The International Court of Justice] called on States not to apply to Namibia any treaties they had with South Africa . . .").

103. G.A. Res. 41/39, ¶ 6-7, U.N. Doc. A/RES/41/39 (Nov. 20, 1986); G.A. Res. S-14/1, ¶ 2-3, U.N. Doc. A/RES/S-14/1 (Sept. 20, 1986).

104. ANDREAS ZIMMERMAN, STAATENNACHFOLGE IN VÖLKERRECHTLICHE VERTRÄGE 849 (2000).

105. See Jan Klabbbers & Martti Koskeniemi, *Succession in Respect of State Property, Archives and Debts, and Nationality*, in STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION 118, 128 (J. Klabbbers et al. eds., 1999) (noting that in *Skopbank v. Republic of Estonia*, the Helsinki District Court held Estonia not responsible for any portion of the debts of the Soviet Union).

106. Klabbbers et al., *supra* note 105, at 314 (noting the request for parliamentary ratification of bilateral agreement on fisheries concluded between the governments of Sweden and Estonia).

107. See Marja Lehto, *Succession of States in the Former Soviet Union: Arrangements Concerning the Bilateral Treaties of Finland and the Soviet Union*, 4 FINNISH Y.B. INT'L L. 194, 214-17 (1993).

obligations,<sup>108</sup> subject to adjustments that would save the successor states from being debilitated by these obligations.<sup>109</sup> In 1993, the Russian Federation accepted the totality of Soviet debt in exchange for various debt reschedulings and swaps.<sup>110</sup> In 1997, Macedonia agreed with the London Club that it would assume \$364 million of Macedonia's \$644 million presuccession debt, and rescheduled payments over fifteen years with four grace periods.<sup>111</sup> Bosnia-Herzegovina also agreed in that year with the London Club to assume a \$404 million debt, representing a reduction in its portion of total liability for Socialist Federal Republic of Yugoslavia (SFRY) debt, and on favorable rescheduled terms.<sup>112</sup> In 2005, Serbia and Montenegro accepted their portion of SFRY debt and effectively rescheduled it by refinancing it with bonds due in 2010 and 2024.<sup>113</sup> These decisions were taken to preserve the global commercial infrastructure and to integrate the successor state into it.<sup>114</sup>

The succession of the Timor-Leste government in 2003 lends further credence to the view that participants in succession do not cancel odious-regime obligations outright, but may instead adjust these obligations to balance the competing policy goals of fairness and supporting global commerce. When East Timor achieved independence from Indonesia, a question arose as to whether it would continue to be bound by the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 1989 (the Timor Gap Treaty). Under the terms of the Timor Gap Treaty, Indonesia and Australia would share revenues from the exploitation of the Timor Sea, which was rich in oil and gas.

If the purported regime-debt doctrine could be applied to nondebt obligations, this doctrine would simply have cancelled the Timor Gap Treaty.

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108. See, e.g., Joint Declaration on Bilateral Treaty Relations, Neth.-Slovn., July 31, 1992, *reprinted in* Klabbers et al., *supra* note 105, at 286 (providing for the continuation of certain treaties between Slovenia and the Netherlands).

109. See, e.g., Mladjan Dinkic, Minister of Finance of the Republic of Serbia, Letter of Support, Mar. 7, 2005, *in* Republic of Serbia Offering Circular, Mar. 7, 2005 (on file with author) (explaining that Serbia and Montenegro's responsibility for SFRY debt was rescheduled to facilitate the stronger economic performance of Serbia and Montenegro).

110. See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 382-83 (2001); BENEDICTE VIBE CHRISTENSEN, *THE RUSSIAN FEDERATION IN TRANSITION: EXTERNAL DEVELOPMENTS* 24-25, 34-36 (1994).

111. See THE ECONOMIST INTELLIGENCE UNIT, COUNTRY PROFILE: YUGOSLAVIA (SERBIA-MONTENEGRO) & MACEDONIA 1996-1997 53 (1997).

112. See THE ECONOMIST INTELLIGENCE UNIT, COUNTRY PROFILE: BOSNIA AND HERCEGOVINA (BiH) & CROATIA 1997-1998 23 (1997).

113. Republic of Serbia Offering Circular, Mar. 7, 2005.

114. See Gerhard Hafner, *Austrian Diplomatic Practice in International Law* 1990/91, 44 AUSTRIAN J. PUBLIC & INT'L L. 295, 314 (1993). See also Gerhard Hafner, *Austria and Slovenia: Succession to Bilateral Treaties and the State Treaty of 1955*, *in* SUCCESSION OF STATES 127 (M. Mrak ed., 1990) (noting that Austria and the successor states of the SFRY regarded preexisting treaties as remaining in force to ensure the unimpaired maintenance of relations, particularly in the economic field); Mladjan Dinkic, Minister of Finance of the Republic of Serbia, Letter of Support, Mar. 7, 2005, *in* Republic of Serbia Offering Circular, Mar. 7, 2005 (explaining that Serbia and Montenegro accepted SFRY debt to, *inter alia*, "restor[e] normal relations with the international investor community").

The Timor Gap Treaty was clearly odious because it had been concluded by an illegal occupier, Indonesia, without the consent of or benefit to the East Timorese. But, although the Timor Gap Treaty was formally cancelled, the United Nations Transitional Administration in East Timor (UNTAET), which governed East Timor between Indonesian occupation and Timor-Leste's independence, exchanged notes with Australia in 2000 to provide that all material provisions of the Timor Gap Treaty would continue to apply for a transitional period.<sup>115</sup> UNTAET then negotiated a "Timor Sea Agreement," which preserved the commercial arrangements over the Timor Sea for the continued exploitation of resources but divided revenues between East Timor and Australia in a ratio of nine to one.<sup>116</sup> In succession, even if an obligation is odious, decisionmakers may adjust, rather than terminate, the obligation. As the Foreign Minister for Australia stated in 2000, it was important to "avoid a legal vacuum" and to "provide commercial certainty."<sup>117</sup>

Notably, this international decision was not reached through the invocation of doctrine. It was reached because the power of various decisionmakers was aligned behind the adjustment of the Timor Sea arrangements. The global media had focused the world's attention on Indonesia's abusive regime in East Timor.<sup>118</sup> This increased domestic pressure on the United States and Australian governments to support East Timorese interests. The United Nations Security Council, by Resolution 1272, authorized UNTAET to govern East Timor and prepare it for independence.<sup>119</sup> UNTAET, being a United Nations field mission, had to promote the human rights of the East Timorese. Australia had been heavily involved in UNTAET through the deployment of Australian troops and had limited diplomatic space to deviate from the U.N.'s goals of supporting the East Timorese. This alignment of interests and power of the media, governments, and the U.N. behind the adjustment of the Timor Sea arrangements resulted in a relatively smooth transition from an odious treaty to the Timor Sea Agreement, a more equitable one.

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115. Exchange of Notes Constituting an Agreement Between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, Feb. 10, 2000, 29 I.L.M. 269. See also VIVIAN LOUIS FORBES, CONFLICT AND COOPERATION IN MANAGING MARITIME SPACE IN SEMI-ENCLOSED SEAS 219-20 (2001); Michael White & Jeffrey Weeks, *Australian Maritime Law Update: 2000*, 32 J. MAR. L. & COM. 371, 382-84 (2001).

116. See Press Release, UNTAET, Timor Sea Arrangement, Negotiated by U.N., Approved by East Timor Cabinet (July 3, 2002), <http://www.un.org/peace/etimor/news/N030701.htm>.

117. Press Release, Government of the Commonwealth of Australia, Timor Gap Treaty Negotiations to Begin (Sept. 18, 2000), [http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media\\_Releases\\_2000\\_September\\_Timor\\_gap\\_treaty\\_negotiations\\_to\\_begin](http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2000_September_Timor_gap_treaty_negotiations_to_begin).

118. CHENG, *supra* note 24, at 192 ("The graphic video footage of unarmed East Timorese civilians being gunned down by Indonesian soldiers firing M16 machine guns indiscriminately and without warning shocked the world.").

119. S.C. Res. 1272, ¶¶ 1, 2(e), U.N. Doc. S/RES/1272 (Oct. 25, 1999).

Proponents of the purported regime-debt doctrine have claimed that the government succession in Iraq was a perfect opportunity for its application.<sup>120</sup> Many of the debts incurred during Saddam Hussein's dictatorship were without the consent of or benefit to the Iraqis.<sup>121</sup> However, the purported doctrine of regime debts as traditionally conceived would not apply to these debts because Iraq underwent only government, not state succession.

It is noteworthy that the United States' call for debt cancellation was not merely for the benefit of the Iraqis. It also benefited the U.S. government. On May 22, 2003, the U.N. Security Council charged the United States with the international obligations of an occupier in Iraq.<sup>122</sup> The U.S. government had also made representations to its domestic constituencies that it would not withdraw forces from Iraq until it had established peace and democracy there.<sup>123</sup> In order for the U.S. government to minimize the international and domestic political costs of a prolonged occupation in Iraq, it needed to establish the conditions for peace, which included a stable economy. Economic stability would have been further delayed if Iraq remained saddled with its \$140 billion debt. Under these circumstances, U.S. elected officials had a strong political interest in Iraq's debt cancellation.

U.S. corporations, some of which had ties to the political leaders of the U.S. government, also stood to benefit from debt cancellation, albeit indirectly. U.N. Security Council Resolution 1483 created an Iraqi Development Fund, into which Iraqi oil revenues and other Iraqi assets were channeled.<sup>124</sup> The Coalition Provisional Authority used these funds to award reconstruction contracts, overwhelmingly to U.S. corporations. For example, Halliburton subsidiary Kellogg Brown & Root, which is reported to have ties to U.S. Vice President Cheney, received sixty percent of all contracts financed by Iraqi funds.<sup>125</sup> United

120. Anderson, *supra* note 28, at 401-02; Detlev Vagts, Editorial Comment, *Sovereign Bankruptcy: In Re Germany (1953)*, In *Re Iraq (2004)*, 98 AM. J. INT'L L. 302, 303 (2004); Sandra T. Vreedburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COMM. L.J. 559, 590 (2004). See also S.C. Res. 1483, *supra* note 1, ¶ 15 (welcoming "the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems").

121. Anderson, *supra* note 28, at 436 ("The debt was not contracted with the consent of the Iraqi people and it did not benefit them."); Azez J. Hassan, Deputy Minister of Finance of the Republic of Iraq, Remarks (May 4, 2005) (on file with author) ("[M]uch of Saddam's debt financed only mischief and destruction.").

122. S.C. Res. 1483, *supra* note 1, at pmb1.

123. President George W. Bush, Remarks by the President to New Hampshire Air National Guard, Army National Guard, Reservists and Families at Pease Air National Guard Base (Oct. 9, 2003), <http://www.whitehouse.gov/news/releases/2003/10/20031009-9.html> ("Our goal in Iraq is to leave behind a stable, self-governing society. . . . We will complete our job."); President George W. Bush, Remarks by the President from the U.S.S. Abraham Lincoln (May 1, 2003), <http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html> ("The transition from dictatorship to democracy will take time. . . . Our coalition will stay until our work is done."); President George W. Bush, Radio Address, Operation Iraqi Freedom (Apr. 5, 2003), <http://www.whitehouse.gov/news/releases/2003/04/20030405.html> ("Our fighting forces will press on until their oppressors are gone and their whole country is free.").

124. S.C. Res. 1483, *supra* note 1.

125. See OPEN SOC'Y INITIATIVE, REVENUE WATCH REP. NO. 7, DISORDER, NEGLIGENCE AND MISMANAGEMENT: HOW THE CPA HANDLED IRAQ RECONSTRUCTION FUNDS 2 (2004),

Nations Security Council Resolution 1483 immunized Iraq's oil revenues from legal process until the end of 2007,<sup>126</sup> and U.S. Executive Order 13,303 granted immunity under U.S. law without a sunset date.<sup>127</sup> However, it is not beyond the realm of possibility that U.S. government policy strategists and general counsels of U.S. corporations desired, out of an abundance of caution, to further protect their interests in Iraq's revenues by canceling preexisting debt, which had been owed mainly to France and Germany.<sup>128</sup> This protection would provide additional security for oil revenues in the Iraqi Development Fund, which could then be used to pay U.S. corporations involved in rebuilding Iraq's infrastructure.

Beneath the rhetoric of freeing Iraq from oppressive debts, the claim by the United States for the cancellation of Saddam's regime debts was really a claim of a victorious conqueror not to be encumbered by the debts of the conquered, that is, to be freed from war debts as conceived by Grotius. Like the U.S. foreign policy in Cuba a century ago, the U.S. government, as the victor in a military conflict, sought to avoid any of the financial burdens of the conquered.<sup>129</sup>

Even without U.S. interests clouding the analysis of Iraq's succession, evidence as of autumn 2006 indicates a decision to reject the purported doctrine of odious debt regarding Iraq's succession. Because Iraq required access to new capital, it did not seek to cancel its arrears to the International Monetary Fund. Instead, in 2004, it paid its arrears amounting to Special Drawing Rights 55.3 million.<sup>130</sup>

Iraq's Paris Club debt was not entirely cancelled, as would have been required under a purported odious debt doctrine. Instead, it was restructured so

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<http://www.iraqrevenuewatch.org/reports/092404.pdf>. See also INT'L ADVISORY AND MONITORING BOARD OF THE DEV. FUND FOR IRAQ, REPORT COVERING THE PERIOD FROM THE ESTABLISHMENT OF THE DFI ON MAY 22, 2003 UNTIL THE DISSOLUTION OF THE CPA ON JUNE 28, 2004 5 (2004) (expressing concern that contracts were awarded to a Halliburton subsidiary without competitive pricing).

126. S.C. Res. 1483, *supra* note 1, ¶ 22.

127. See Exec. Order No. 13,303, § 1(b), 68 Fed. Reg. 31,931 (May 22, 2003). See also Exec. Order No. 13,364, 69 Fed. Reg. 70177 (Nov. 29, 2004); GELPERN, *supra* note 22, at 394–95 (discussing Executive Order 13,303 and United Nations Security Council Resolution 1483); Vreedenburgh, *supra* note 120, at 576–77 (discussing how the Executive Orders might insulate U.S. oil companies from liability).

128. See Vreedenburgh, *supra* note 120, at 588 (noting that France and Russia were the largest holders of Iraqi debt).

129. See *Hearing on FY 2004 Appropriations Before the Subcomm. on Defense of the H. Comm. on Appropriations*, 107th Cong. (2003) (statement of Paul Wolfowitz, Deputy Secretary of Defense) (“[T]here’s a lot of money to pay for this that doesn’t have to be U.S. taxpayer money, and it starts with the assets of the Iraqi people.”); *Iraq Stabilization and Reconstruction: International Contributions and Resources: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 8 (2003) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs) (“... Iraq itself will rightly shoulder much of the responsibility.”).

130. Memorandum of Econ. and Fin. Policies for 2004–05 from the Gov’t of Iraq to Rodrigo de Rato, Managing Dir., Int’l Monetary Fund, ¶ 4 (Sept. 24, 2004) (“Following the international recognition of our government, we have taken all necessary steps to normalize our relations with the IMF, including . . . payment of Iraq’s arrears to the Fund . . . .”) (on file with author).

that Iraq would continue to be responsible for twenty percent of that debt over a twenty-three year period with a six-year grace period for principal and six years of full or partial interest capitalization.<sup>131</sup> This international decision was not based on the explicit policy argument that the debts were incurred without the consent of the Iraqis and without benefit to them, but that the preexisting debt stock was “unsustainable.”<sup>132</sup> In other words, this international decision supported the trend to adjust preexisting obligations to balance the needs for stability in capital markets and for the successor state or government’s continued access to capital against the need to protect the successor from being debilitated by preexisting debts.

The international decision concerning non-Paris Club claimants also supports the trend toward adjusting obligations rather than canceling them entirely. The Paris Club settlement provided that Iraq would not provide more favorable terms to other creditors.<sup>133</sup> Accordingly, under the settlement program with commercial lenders that concluded on July 18, 2006,<sup>134</sup> commercial debt equaling not more than \$35 million was swapped for cash at 10.25%.<sup>135</sup> Commercial debt greater than \$35 million was swapped for one of two new loans: a syndicated loan of 5.80% notes or privately placed bonds. Both loans mature in 2028 and were exchanged for approximately 20% of the preexisting debt.<sup>136</sup>

Some succession issues, such as the disposition of Saddam-era oil concessions, have not been fully resolved.<sup>137</sup> However, international practice as regards Iraq has so far been consistent with the decision trend in other recent

131. Remarks of Azez J. Hassan, Deputy Minister of Finance of the Republic of Iraq, 2 (May 4, 2005) (describing Paris Club agreement); Presentation at Meeting with Iraq’s Commercial Claimants 5 (May 4, 2005) (noting “restructuring agreement reached with [Iraq’s] Paris Club creditors in November 2004, providing for eighty percent debt reduction) (both copies on file with author); Paris Club, Iraq Debt Treatment—Nov. 21, 2004, [http://www.clubdeparis.org/en/countries/countries.php?CONTINENT\\_ID=&DETAIL\\_DETTE\\_PAGE=1&IDENTIFIANT=397&PAY\\_ISO\\_ID=IQ](http://www.clubdeparis.org/en/countries/countries.php?CONTINENT_ID=&DETAIL_DETTE_PAGE=1&IDENTIFIANT=397&PAY_ISO_ID=IQ) (last visited Nov. 14, 2006).

132. Hassan, *supra* note 131, at 2.

133. Paris Club, Debt Treatment—Nov. 21, 2004—Comparability of Treatment Provision, [http://www.clubdeparis.org/en/countries/countries.php?CONTINENT\\_ID=&DETAIL\\_DETTE\\_PAGE=4&IDENTIFIANT=397&PAY\\_ISO\\_ID=IQ](http://www.clubdeparis.org/en/countries/countries.php?CONTINENT_ID=&DETAIL_DETTE_PAGE=4&IDENTIFIANT=397&PAY_ISO_ID=IQ) (last visited Nov. 14, 2006); Remarks of Azez J. Hassan, Deputy Minister of Finance 2 (May 4, 2005) (“Our agreement with the Paris Club included an undertaking by Iraq to seek from all other external creditors a treatment not more favorable than that accorded to the Paris Club.”) (on file with author).

134. Press Release, Republic of Iraq, Ministry of Fin., Iraq Announces Conclusion of Commercial Debt Settlement (July 18, 2006) (on file with author).

135. Press Release, Republic of Iraq, Ministry of Fin., Iraq Announces Terms of Commercial Debt Settlement Offer (July 26, 2005) (on file with author) [hereinafter Iraq Settlement Offer Press Release].

136. Republic of Iraq—JP Morgan Chase Bank Trust Indenture (Nov. 16, 2005) (providing terms); Iraq Settlement Offer Press Release, *supra* note 135; Press Release, Republic of Iraq, Ministry of Fin., Iraq Announces Launch of Debt-for-Debt Exchange Offer (Nov. 16, 2005) (all copies on file with author), available at [http://www.eyidro.com/doc/TRUST\\_INDENTURE.pdf](http://www.eyidro.com/doc/TRUST_INDENTURE.pdf) (discussing terms).

137. See Erin E. Arvedlund, *The Struggle for Iraq: For Oil Contracts, Russia Will Waive Most of Iraq’s \$8 Billion Debt*, N.Y. TIMES, Dec. 23, 2003, at A10 (discussing reassignment of Iraqi oil leases); Carola Hoyos, *Lukoil Optimistic on Iraq*, FIN. TIMES, Jan. 31, 2006, at 8 (discussing oil development negotiations); Rachel Stevenson, *ConocoPhillips Eyes Iraq After Lukoil Deal*, LONDON INDEP., Sept. 30, 2004, at 47 (noting dispute over administration oil leases).

successions. When succession occurs, decisionmakers tend to adjust obligations pragmatically to balance the need for commercial stability with the need to permit a successor state to develop economically.

Several factors present in the East Timor succession that led to the adjustment of obligations were also present in the Iraq succession. In both cases, significant domestic pressure was exerted on governments to rectify the abuses of the predecessor regime. In the Iraq case, the global media, NGOs, and scholars widely promoted the idea that the debts of the Saddam regime were odious.<sup>138</sup> Elected government officials may have had to moderate their claims for repayment to avoid alienating constituents who had become sympathetic to the plight of the Iraqis as a result of the media and scholarly attention on the issue. In both cases, the U.N. Security Council exerted its power and authority in support of the adjustment of obligations. In the Iraq case, the U.N. Security Council resolved that member states should immunize Iraqi assets from lawsuits<sup>139</sup> and urged member states to “reduce substantially Iraq’s sovereign debt.”<sup>140</sup> In both cases, a decisionmaking state deployed its power in support of the adjustment of obligations. In the East Timor case, it was Australia. In the Iraq case, it was the United States.<sup>141</sup>

## V

### CONCLUSION

The contemporary trend to adjust oppressive obligations on the occurrence of succession addresses many of the policy shortcomings of the purported doctrine of odious debts. This trend applies not only to state succession, but also to government successions, such as the regime change in Iraq. Decisionmakers account for not just the injustices of the past, such as in the modification of the Timor Sea Treaty, but also the capacity of successor states and governments to discharge presuccession obligations, as in the adjustment of the debts of the SFRY and the Soviet Union.

In considering what adjustments are appropriate, the benefits of reducing obligations are balanced against the burdens of such a reduction both on the successor state and on other participants in the global system. Where the need for commercial stability is the predominant consideration, commercial obligations may pass unimpaired to the successor territory. Recent examples include the decolonizations of Hong Kong and Macau, in which commercial treaty obligations and contracts were almost completely unaffected by

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138. *See supra* nn. 3, 4, 120.

139. S.C. Res. 1483, *supra* note 1, ¶ 22; S.C. Res. 1518, ¶2, U.N. Doc. S/RES/1518 (Nov. 24, 2003).

140. S.C. Res. 1546, *supra* note 1, ¶ 28.

141. 149 CONG. REC. E2450, E2452 (daily ed. Nov. 23, 2003) (statement of Rep. Leach) (“[W]e should press vigorously for Saddam-era debt . . . to be written off.”); 149 CONG. REC. H8470, H8470 (daily ed. Sept. 23, 2003) (statement of Rep. Maloney) (speaking in support of H.R. 2482, the “Iraqi Freedom from Debt Act”); Press Release, The White House, President’s Statement on Iraqi Debt (Nov. 21, 2004) (encouraging non-Paris Club creditor nations to agree to debt reduction for Iraq).

succession.<sup>142</sup> Where the need for stability is balanced against the need to address past injustices or to promote economic development in the successor state, international decisionmakers account for the needs and interests of all global participants. Most often, the succession outcome involves some continued responsibility for obligations, subject to modifications to permit the successor to discharge these obligations in a fashion and at a pace that it is able to do so. The rescheduling of the debts of the Soviet Union, the SFRY, and Iraq are consistent with this trend.

Although there are some potential concerns about the decisionmaking process in succession, international law is developing responses to these concerns. Just as successor states can manipulate a purported odious debt doctrine to claim that debts should be cancelled,<sup>143</sup> the contemporary decisionmaking process in state succession is also subject to distortion by powerful or collusive decisionmakers. Debtors may, for example, harness the power of NGOs and media groups to encourage domestic constituents of creditor governments to forgive debt that a debtor government incurred irresponsibly, but not odiously.

The potential for such manipulation could be somewhat limited by the U.N. Security Council. It may issue Chapter VII resolutions providing guidance or binding instructions on particular successions, as with East Timor and Iraq. Granted, the Security Council's decisionmaking process is itself subject to abuse and may lead to outcomes that reflect the interests of its members. But one could hope that the different permanent members of the Council, with their divergent interests and their veto powers, would tend to restrain any resolution from deviating too far from the collective interests of the Security Council's members.

Conceptualizing odious debts as a decisionmaking process may cause some unease among attorneys and legal scholars accustomed to legal rules and doctrines. If the world were rule-bound, outcomes might appear to be more predictable. But successions are so intensely political that rigid predictability may preclude desirable outcomes that are unique to the facts of each individual succession.<sup>144</sup> In any event, centuries of successions have proved that there is no doctrine of odious debts and that searching for rules to control the transmission or termination of debts on succession is a futile exercise.<sup>145</sup> The alternative is to

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142. See CHENG, *supra* note 24, at 216-36 (providing evidence that in the successions of Hong Kong and Macau, most commercial treaty obligations and contracts were unaffected because the interests of decisionmakers were aligned towards continuity); SHAW, *supra* note 12, at 913 (“[A] high level of succession is provided for [obligations in the decolonization of Hong Kong].”).

143. See U.N. Int'l Law Comm'n Yearbook 1426th Meeting, *supra* note 27 (noting comments by International Law Commission member Tsuruoka that the idea of odious debt was “extremely difficult to . . . apply objectively in practice”).

144. See Schachter, *supra* note 23, at 259 (stating, in the context of succession, that “particularities call for avoiding rigidities and for taking into account of context in specific cases”).

145. Cf. Schachter, *supra* note 23, at 260 (“Enticing as these [doctrinal] works [on state succession] may be to students of legal and political philosophy, they offer little guidance to the solution of actual problems.”).

understand decision trends and to deploy strategies to promote one's desired outcomes.<sup>146</sup> Broadly speaking, these strategies may include advancing diplomatic or commercial claims backed by power and authority, as well as aligning interests of other participants, including the media and NGOs, behind one's preferred outcomes. By understanding the decision trends in succession, attorneys advising states and corporations may better serve their clients' interests. Legal scholars may also be in a better position to appraise the problems of succession and to propose solutions to harmonize the conflicting global policies at stake when successions occur.

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146. See W. Michael Reisman, *Foreword* to TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS*, at x (2006) ("Lawyers are deeply involved in successions, and it is precisely because of the absence of rules that a different conceptual approach is required."); Bowman, *supra* note 47 ("When doctrine does not reflect practice—when there are as many (or more) exceptions to a rule as instances of following it—the time is ripe for a complete rethinking of that doctrine.").