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# RESTRUCTURING THE ODIIOUS DEBT EXCEPTION

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## I. INTRODUCTION

As governments change leadership from one regime to the next, often in innocuous fashion, it is generally assumed that the financial status and obligations of the state governed remain unchanged.<sup>1</sup> If the opposite

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<sup>1</sup> See *infra* note 13.

were the case, international sovereign lending would be impossible for want of certainty. Exceptions to this rule do exist,<sup>2</sup> and none is more significant, timely, or unclear than the doctrine of Odious Debt. This doctrine purports to annul an infamous class of a predecessor government's debts: those proceeds that a tyrant has literally or effectively stolen, leaving the population she once ruled to pick up the check.

Odious Debt has been the subject of academic debate since Alexander Sack first coined the term in the 1920s.<sup>3</sup> No formal Odious Debt doctrine has entered into force in international law,<sup>4</sup> yet concerns of morality and practicality have motivated lawyers, jurists, economists, and even politicians to persist in championing one. Recently, the regime change in Iraq has breathed new life into this debate, making odious debt the topic of op-ed pages<sup>5</sup> as well as academic writings.

To relieve the former subjects of a deposed dictator from liability for the odious debts that were contracted by the tyrant is a noble goal. A problem, however, is that the doctrinal solution is unworkable.<sup>6</sup> Courts are ill-suited to screen debts or regimes<sup>7</sup> for "odiousness."

Seeking a viable solution to the odious debt problem, authors have proposed to alter Sack's original principle,<sup>8</sup> some have defended the doc-

<sup>2</sup> These exceptions are generally confined to instances of *state* succession rather than *governmental* succession. See *infra* note 13.

<sup>3</sup> ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] 157-84 (1927) *discussed in* Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1218 (2007); Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 403 (2005).

<sup>4</sup> See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306 [hereinafter 1983 Succession Convention] (attempting to codify the current state of customary law regarding the duties of succeeding states, and including no provision for the repudiation of Odious Debts); *Report of the International Law Commission on the Work of Its Thirty-third Session*, [1981] Y.B. Int'l L. Comm'n vol. II, pt. 2, 78-79, U.N. Doc. A/CN.4/SER.A/1981/Add.1(Part 2) (recording the I.L.C.'s rejection of proposed Articles defining odious debts because it "was of the opinion . . . that the rules formulated for each type of succession of States might well settle the issues raised" in those Articles).

<sup>5</sup> See, e.g., Ayad Allawi, Op-Ed., *Freedom Over Tyranny*, WALL ST. J., Aug. 25, 2004, at A10 (arguing for debt cancellation); Mark Medish, Op-Ed., *Make Baghdad Pay*, N.Y. TIMES, Nov. 4, 2003, at A25 (arguing against the cancellation of Iraq's debts).

<sup>6</sup> For these arguments, see *infra* Part II.B.

<sup>7</sup> See *infra* note 34 and accompanying text.

<sup>8</sup> See, e.g., Omri Ben-Shahar & G. Mitu Gulati, *Partially Odious Debts? A Framework for an Optimal Liability Regime*, 70 LAW & CONTEMP. PROBS. (forthcoming 2008) (arguing that creditors, because they are better suited than the populace to prevent odious lending, should incur partial liability for odious debts);

trine as legally binding,<sup>9</sup> and some see good reason to abandon his vision altogether.<sup>10</sup>

Unlike much of the scholarship concerning odious debt, I aim to reconstruct an independent legal doctrine that is both judicially administrable and applicable to a wide variety of debts, while at the same time striking a balance between the competing and important concerns of justice to the debtor and certainty for the creditors. En route to my conclusions, I critically review the strengths and weaknesses of the arguments for and against an odious debt exception, and propose a new legal rule to govern the enforceability of loans given to sovereigns that spend money on odious purposes: the Odious Expenditure Doctrine.

The key to this novel conceptualization of the odious debt problem is that it replaces the traditional objects of analysis—the debts or regimes in question—with a new analytical target: the debtor's *expenditures*. This shift rids the doctrine of those questions with which courts have little experience, replacing them with a judicially familiar task. For decades, the law of taxation has reliably sorted expenditures for favorable or unfavorable tax treatment, and the Odious Expenditure Doctrine simply coopts this framework for a similar purpose.

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Seema Jayachandran, Michael Kremer, & Jonathan Shafter, Applying the Odious Debts Doctrine While Preserving Legitimate Lending 19-22 (Dec. 2005) (unpublished manuscript, available at [http://www.economics.harvard.edu/faculty/kremer/files/Odious\\_Debt\\_Doctrine.pdf](http://www.economics.harvard.edu/faculty/kremer/files/Odious_Debt_Doctrine.pdf)) (proposing a “Due Diligence” model: an international institution that would declare states “odious debt prone” before lenders incur the risk of debt cancellation); Joseph Stiglitz, *Odious Rulers, Odious Debts*, ATLANTIC MONTHLY, Nov. 2003, at 39 (advocating creation of an International Bankruptcy Court).

<sup>9</sup> See, e.g., Ashfaq Khalfan, Jeff King & Bryan Thomas, ADVANCING THE ODISIOUS DEBT DOCTRINE (2003) (offering a comprehensive survey of the odious debt doctrine and arguing for its applicability as a part of public international law).

<sup>10</sup> These scholars generally do not deny that the problems of odious debt should be redressed, but merely substitute alternative means for resolution for a singular rule of odious debt. See, e.g., Buchheit, et al., *supra* note 3, at 1230-59 (arguing that principles of municipal law can expunge odious obligations); Adam Feibelman, *Contract, Priority, and Odious Debt*, 85 N.C. L. REV 728, 730-733 (2007) (arguing that sovereigns and creditors can, by way of contract, cure the problem of odious debt); Adam Feibelman, *Equitable Subordination and Sovereign Debt*, 70 LAW & CONTEMP. PROBS. (forthcoming 2008) (offering the “doctrine of equitable subordination and other related lender liability doctrines” as alternative solutions to the problems of odious debt); Gelpern, *supra* note 3, at 393 (“The fact that public and private creditors seem to prefer the existing tools [of sovereign debt reduction] weighs heavily against the new norms [including the Odious Debt Doctrine].”). Another viewpoint analyzes a dictator's incentive and concludes that *any* odious debt rule—even an administrable one—is unlikely to increase public welfare. Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 33, 43 (Summer 2007).

When the Internal Revenue Service challenges a deduction claimed as a business expense, it does not look to what the taxpayer in question told her financier the funds were to accomplish, nor does the Agency assess whether this taxpayer is of the ilk that tends to engage in non-deductible expenses.<sup>11</sup> These methods of inquiry are inefficient and unreliable as a mechanism for accurate taxation. Rather, the I.R.S. investigates the only reliable determinant of whether the taxpayer is indeed guilty of misfiling her taxes: the nature of the expenditures themselves.<sup>12</sup>

At base, what makes a debt “odious” is not the party who contracts it, the creditor who lends it, or the terms of its transfer. What makes a debt odious is the villainy it funds. Realizing this distinction, the Odious Expenditure Doctrine begins by sorting the odious expenditures from the benign using principles of taxation. Then, the Doctrine discounts the value of these expenditures according to concerns for justice, market certainty, and debt sustainability, producing a workable rule of sovereign debt adjudication. The goals of the Odious Debt Doctrine are laudable, and certainly applicable to contemporary problems of sovereign indebtedness; through a rule based on the analysis of Odious Expenditures, these goals can be judicially enforceable as well.

The main body of this Article proceeds in three Parts. Part II sketches Sack’s conception of “odious debt” and the doctrine that it has inspired, making clear the critiques of odious debt as a doctrine. Part III outlines the proposed Odious Expenditure Analysis, replete with exceptions and an illustration of the doctrine as applied. Part IV addresses the question of implementation, exploring the options that international law provides for bringing the Odious Expenditure Doctrine into force. A brief conclusion follows.

## II. THE ODIUS DEBT “DOCTRINE”

Very few doctrines in the area of international economic law have sparked as much debate and skepticism as the Odious Debt Doctrine. The only certainty about it is that currently, the Doctrine—if it can even be so termed—has had little purchase in courts. Many of the doctrine’s critics question whether the rule can even resolve some of the most common issues in sovereign debt disputes. This Part retraces the basic princi-

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<sup>11</sup> Of course, the I.R.S. does highlight a list of characteristics that may indicate that deductions have been misidentified (or unidentified), *see, e.g.*, Dep’t of the Treasury, Internal Revenue Serv., Market Segment Specialization Program: Commercial Banking 2-1 to 2-6 (July 1997), <http://www.irs.gov/pub/irs-mssp/combank.pdf> (explaining the pre-audit selection process for the commercial banking industry), but these practices are undertaken for the interest of efficient auditing, not to determine the accuracy of the returns filed.

<sup>12</sup> *See, e.g.*, James V. Grimaldi, *Smithsonian Head’s Expenses “Lavish,” Audit Says*, WASH. POST, Feb. 25, 2007, at A1 (reporting on the results of an audit of the Smithsonian secretary’s purported business expenses).

ples of the Odious Debt debate, beginning with a brief overview of Alexander Sack's rule, followed by a discussion of the salient criticisms.

### A. *Origins*

Much like any other entity or individual, governments face liquidity problems. From time to time, they find solutions through sovereign lending. Like many other government obligations, loan agreements survive the specific government which contracted them. The basic international legal rules of governmental and state succession require that a successor accede to the debts of its predecessor.<sup>13</sup> There are, however, exceptions to this rule, including hostile debts<sup>14</sup> and war debts,<sup>15</sup> which in certain

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<sup>13</sup> Successor *governments* succeed to the obligations of their predecessors, whereas successor *states* may not. See ERNST FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 1-8, 600-23, 669-83 (1931) (defining state succession and its consequences in a variety of circumstances); 1 D. P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 5-6 (1967) (noting the "conceptual chasm . . . between change of sovereignty and change of government; in the one instance a problem of substitution in the possession of rights and obligations [is] raised; in the other, continuity of these rights and obligations [is] presumed."); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. a. (1986) [hereinafter RESTATEMENT] ("Under international law, the capacities, rights and duties [of states] appertain to the state, not to the government which represents it. When the state ceases to exist, its capacities, rights, and duties terminate. They are not affected by a mere change in the regime or in the form of government or its ideology."); Buchheit et al., *supra* note 3, at 1203-04. The instances in which a successor state does not adopt its predecessor's debts are few. See FEILCHENFELD, at 669-83 (discussing the effects of total annexation, dismemberment, establishment of protectorates, and cessions on the public debts of a state); 1 O'CONNELL, at 373-453 (discussing successor states' obligations in the context of total succession, partial succession, and local debts). It is the view of the United States that successor states are not bound by "the public debt of the predecessor" in the absence of either an agreement between the predecessor and the successor, see RESTATEMENT, *supra*, § 209(2), or any of the enumerated exceptions, see *id.* at § 209(2)(a)-(c) (requiring succession to the predecessor's debts where the predecessor is partially annexed, wholly absorbed, or divided via secession). As will be seen *infra*, text accompanying note 30, it is unclear whether the doctrine of Odious Debt is meant to apply only within *state* succession context, or also in the more common occurrence of *governmental* succession.

<sup>14</sup> "Hostile" debts are those contracted by the government to the detriment of its people. See Buchheit et al., *supra* note 3, at 1214-16 (citing the 1898 Treaty of Paris as an example). For a discussion of the arguments articulated in the negotiation of this treaty, see *infra* notes 66-71 and accompanying text.

<sup>15</sup> "War" debts are those contracted by a government to defeat an enemy which eventually overthrows the government. See Buchheit et al., *supra* note 3, at 1212-14 ("[I]f the rebels get inside the presidential palace, they are not obliged to honor loans incurred by the prior occupants to purchase the bullets employed in the effort to dissuade the rebels from their recent enterprise.").

situations may be legally voided.<sup>16</sup> In 1927, Alexander Sack, the world's preeminent scholar on public debt, proposed to add the category of "odious" debts to the list of exceptions.

Reasoning from prior debt disputes,<sup>17</sup> Sack posited that debt contracted by a sovereign is "odious" and therefore a successor regime<sup>18</sup> should be exempt from the obligation to repay if: (1) the predecessor regime that incurred the debt was "despotic," (2) the purpose of the debt was antithetical to "the needs or . . . interest of the State," and (3) the creditors were subjectively aware of the prior two factors at the time the debt was taken.<sup>19</sup> Underlying this rule are two contradictory concerns, the product of which is a doctrine limited in both scope and administrability. At base, Sack's worry is that the populace might be liable for debts to which it did not consent. A "despotic" ruler who does not represent her subjects necessarily lacks the legitimacy to act on their

<sup>16</sup> *Id.*

<sup>17</sup> Buchheit et al. indicate that Sack may not have been establishing a new exception to the baseline rule of state succession, but rather codifying the existing exceptions and lending memorable language to their cause. *See id.* at 1219-20.

From the War-Debt and Hostile-Debt exceptions, Professor Sack drew the idea of loans that were used only to "strengthen" the governing regime, "suppress a popular insurrection" or were otherwise "hostile" to the interest of the people of the country. From Taft's decision in the *Tinoco* Arbitration, Sack gleaned the requirement that the lender know about the illegitimate purpose of the borrowing before the loan could be branded objectionable, as well as the notion that such a debt was "personal" to the ruler who commissioned it.

*Id.* at 1220 (internal citations omitted). The examples alluded to above from which Buchheit et al. argue Sack drew his inspiration may be quickly summarized: (1) After defeating the South African Republics in the Boer Wars, the British repudiated all of the debts incurred by the vanquished Republics during the conflict. *Id.* at 1212-13; *see generally* FEILCHENFELD, *supra* note 13, at 380-96; 1 O'CONNELL, *supra* note 13, at 378-79. (2) Having signed Cuba over to the United States following the Spanish American War, Spain was unsuccessful in convincing the Americans to pay debts which Spain had contracted in Cuba's name. Buchheit et al., *supra* note 3, at 1214-15; *see generally* FEILCHENFELD, *supra* note 13, at 329-43; 1 O'CONNELL, *supra* note 13, at 412-13. (3) The *Tinoco* Arbitration refers to a conflict, adjudicated by former President William Howard Taft, which declared unenforceable the loans contracted by an unpopular dictator of Costa Rica who used the state's credit to procure funding from the complicit and accommodating Royal Bank of Canada for his escape and retirement. Buchheit et al., *supra* note 3, at 1216-17; *see generally* William H. Taft, *Arbitration Between Great Britain and Costa Rica*, 18 AM. J. INT'L L. 147 (1924).

<sup>18</sup> It is unclear whether the Odious Debt "Doctrine" applies only in the limited circumstances of state succession. *See* Gelpert, *supra* note 3, at 411 (stating that true state succession is not required for Sack's three elements to be satisfied). This paper does not address whether the Odious Debt or Odious Expenditure Doctrines should apply as an exception to the international laws of state succession, but the question will be revisited in greater detail *infra*.

<sup>19</sup> *See* PATRICIA ADAMS, ODIUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 165-66 (1991).

behalf. She is not an agent and has no implied or actual authority to bind the state.<sup>20</sup> This is not to say that every specific act of such a ruler lacks popular consent. Indeed, it can be argued that constructive consent cures acts that have even a slight benefit to the population of a State.<sup>21</sup> Therefore, if the debt in question satisfies the first two prongs of the “odious” test, the complete lack of consent has been demonstrated. Sack maintains that in this situation the 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 . . . .”<sup>22</sup>

At the same time, Sack also sought to protect creditors’ interests. Accordingly, a secondary concern limits the scope of the debtor’s rights. It would be similarly unjust to hold an honest creditor liable for the fraud of a ruler who claims specious consent for her actions. Thus, only those creditors who actually knew prior to extending debt that the ruler was “despotic” and that her expenditures would not benefit the State can be said to “have committed a hostile act” worthy of divestiture.<sup>23</sup> In addition to being unjust, the cancellation of a debt without notice to the creditors would create uncertainty and chill sovereign lending.<sup>24</sup> The consequences of artificially high interest payments and other restrictions to capital would affect even those sovereigns who have not shown themselves to be odious. Manifestly, the concerns of creditors cannot be wholly omitted from the Odious Debt analysis.

One question precedent to the application of Sack’s rule of Odious Debt—or, for that matter, any rule excusing a new regime from liability for any of its forerunner’s commitments—is whether legal state succession has actually taken place. Strictly speaking, public international law recognizes state succession only in instances of territorial exchange or state disintegration.<sup>25</sup> Mere changes in government do not suffice and

<sup>20</sup> See Buchheit et al., *supra* note 3, at 1237-45 (arguing that agency law can serve as a proxy for these concerns).

<sup>21</sup> Such a situation is possible; Choi & Posner note several dictatorships that have made wise economic decisions resulting in long-term public benefit, including Chile’s Augusto Pinochet, South Korea’s Park Chung Hee, and Singapore’s Lee Kuan Yew. Choi & Posner, *supra* note 10, at 44.

<sup>22</sup> Adams, *supra* note 19, at 165.

<sup>23</sup> *Id.*

<sup>24</sup> See Jaychandran et al., *supra* note 8, at 5 (“A precondition to the proper functioning of financial markets is a stable body of legal rules governing the full investment cycle . . . . Without a known and transparent playing field of legal governance, the risk premium for making any investment is too high to qualify as anything but speculative gambling.”); Choi & Posner, *supra* note 10, at 46 (noting the insecurity that ex-post judicial debt cancellation introduces to the sovereign lending market).

<sup>25</sup> See FEILCHENFELD, *supra* note 13, at 669-83 (discussing the effects of total annexation, dismemberment, establishment of protectorates, and cessions on the public debts of a state); 1 O’CONNELL, *supra* note 13, at 373-453 (discussing successor

thus do not enable the new government to make a legal claim that the prior regime's obligations should be cancelled.<sup>26</sup> This question is often overlooked in the odious debt literature; some authors and advocates simply equate the legal consequences of governmental and state succession.<sup>27</sup> In many contemporary cases, including that of Iraq,<sup>28</sup> it is unlikely that a genuine state succession has occurred, in which case the public international law of state succession simply recognizes no effect on the rights and obligations of the state.<sup>29</sup>

Whether, as some have argued,<sup>30</sup> state succession is a legal prerequisite to the cancellation of debts that qualify as odious under Sack's analysis is

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states' obligations in the context of total succession, partial succession, and local debts); *see also* LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 348 (4th ed., 2001) ("Issues of state succession may arise when a state absorbs all of a predecessor state, . . . takes over part of the territory of another state, . . . becomes independent of another state of which it had formed a part, or . . . has separated into a number of states."); Buchheit et al., *supra* note 3, at 1208 ("Under a strict application of the doctrine of state succession, sovereign debt is thus congenital, adhesive, and ineradicable.").

<sup>26</sup> *See* FEILCHENFELD, *supra* note 13, at 1-8, 600-23, 669-83 (defining state succession and its consequences in a variety of circumstances); 1 O'CONNELL, *supra* note 13, at 5-6 (noting the "conceptual chasm . . . between change of sovereignty and change of government; in the one instance a problem of substitution in the possession of rights and obligations [is] raised; in the other, continuity of these rights and obligations [is] presumed."); *see also* DAMROSCH ET AL., *supra* note 25, at 348 ("The rights, capacities and obligations of a state appertain to the state as such and are not affected by changes in its government."). It should be remembered that even in cases where state succession has legally taken place, the baseline rule of international law requires the predecessor state's commitments to bind the successor state. *See supra* note 13.

<sup>27</sup> *See, e.g.*, Jubilee Iraq, Paying for the Executioner's Bullets: Iraqi Views on Debt and Reparations, <http://www.jubileeiraq.org/iraqiviews.htm> (last visited Jan. 28, 2008) (ignoring the question of whether regime change in Iraq is a case of state succession). *But see*, Gelpert, *supra* note 3, at 405 (noting the possibility that Iraq, *inter alia*, may not clear "[t]he high bar for showing state succession . . .").

<sup>28</sup> The borders of Iraq, for the time being, remain unchanged. If, however, Iraq disintegrates into smaller states, a genuine issue of state succession may result.

<sup>29</sup> *See* Vienna Convention on Succession of States in Respect to Treaties parts II-IV, Aug. 23, 1978, 1946 U.N.T.S. 3 (providing rules for state succession to treaties only in instances where the borders of the predecessor state do not persist); 1983 Succession Convention, *supra* note 4, arts. 14-18 (attempting to codify rules for the ownership of property, archives, and debts only in instances where the borders of the predecessor state do not persist—this treaty is not currently in force). For a discussion of the state of customary international law regarding the allocation of debts in the context of the dissolutions of the former Soviet Union, Yugoslavia, and Czechoslovakia, see Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355 (2001).

<sup>30</sup> *See, e.g.*, Jeff King, *The Doctrine of Odious Debt Under International Law: Definition, Evidence and Issues Concerning Application*, in *ADVANCING THE ODIOS*



not the focus of this Article. Indeed, the difference between state and governmental succession has been unclear for some time.<sup>31</sup> Of course, to allow the odious debts of new governments as well as new states to be subject to the doctrine has significant implications regarding the breadth of cases to which the doctrine could apply. Normatively, this may or may not be preferable, but this question is reserved for future inquiry. The examples used in this Article draw from both instances of governmental and state succession to illustrate the arguments advanced, but their value as examples is not dependent upon the application of the Doctrine to instances of governmental succession.

## B. Critiques

A rule outlining a means by which odious debts may be cancelled is almost universally accepted as normatively preferable.<sup>32</sup> The Odious Debt Doctrine, however, is problematic for two important reasons: first, the Doctrine is judicially inadministrable because it requires judges to answer inherently political questions, and second, it is excessively narrow in scope.

Administrability<sup>33</sup> poses an insurmountable problem for the Sackian rule of Odious Debt. The question of popular consent commonly devolves into a discussion of the contracting *regime's* odiousness, not that of the debts themselves.<sup>34</sup> Once the question becomes whether a system

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DEBT DOCTRINE, *supra* note 9, at 47 (citing state practice, commentators, and the *Tinoco Arbitration* as proof that the “doctrine” of odious debt applies outside context of strict state succession).

<sup>31</sup> See 1 O’CONNELL, *supra* note 13, at 6 (“At the present time the boundary between change of sovereignty and change of government often wears thin to the point of disappearance. . .”).

<sup>32</sup> Choi and Posner, however, make a strong argument that an effective Odious Debt Doctrine would actually decrease public welfare in all but a few cases. Choi & Posner, *supra* note 10, at 40-43.

<sup>33</sup> The discussion of administrability, both in this Part and in Part III refers to *judicial* administrability—the ability of a court to accurately and systematically apply the rule. Ben-Shahar and Gulati point out that it is equally important for the parties, particularly the creditors, to be able to administer the governing rule. See Ben-Shahar & Gulati, *supra* note 8.

<sup>34</sup> Buchheit et al. notice this phenomenon explicitly. See Buchheit et al., *supra* note 3, at 1225 (noting “the tendency of some modern commentators to allow the adjective ‘odious’ to migrate away from modifying the word ‘debt’ into a position where it instead modifies the word ‘regime.’”). For examples of this “odious regime” analysis, see Gelpert, *supra* note 3, at 393 (“The [Odious Debt] doctrine is often cited for the proposition that the countries emerging from nasty dictatorships can repudiate their debts, because those debts came about without the consent of or benefit for their people.”); Jayachandran et al., *supra* note 8, at 17 (“[I]n cases where the claim rests upon allegations that the debtor regime’s structure of government was insufficiently democratic to form a basis for popular consent to government policies then the

of government lacks the requisite quantum of democracy to be characterized as “odious,” comparisons between a tribunal’s ability to decide whether the government is sufficiently “democratic” and Justice Potter Stewart’s infamously vague standard inexorably follow.<sup>35</sup> Truthfully, these questions are nearly intractable in an adjudicative setting,<sup>36</sup> and for Odious Debt to become an enforceable legal rule, this problem must be solved.

Additionally, the balance struck between the interests of debtor consent and creditor complicity produces a conjunctive rule with narrow application. Because each of the factors must be satisfied before a debt can be properly termed “odious” and therefore written off,<sup>37</sup> Sack’s rule necessarily covers only the most egregious of cases. As Buchheit et al. note, the breadth of Sack’s rule spans little more than the core cases: those in which funds are used to oppress the specific population whose credit secures the debt,<sup>38</sup> and those where the ruler flatly steals the debt proceeds,<sup>39</sup> provided that in each case, the creditor had specific knowledge of the situation.<sup>40</sup> The insidious practice of graft is especially prob-

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capacity of a judicial forum is . . . questionable.”); see also Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?* 70 *LAW & CONTEMP. PROBS.* (forthcoming 2008) (proposing that the UN and the IMF should decide which regimes are odious based on whether a given regime engages in either “systematic suppression” of a domestic population or “systematic plundering” of a state’s assets).

<sup>35</sup> See, e.g., Jaychandran et al., *supra* note 8, at 18 (“Unfortunately, the ‘I know it when I see it’ standard of judicial review is hardly the basis for a system with sufficient ex ante clarity to prevent excessive interference with legitimate sovereign lending.”). See also Buchheit et al., *supra* note 3, at 1228 (“One is tempted, strongly tempted, to adopt an approach along the lines of Justice Holmes’ rule-of-thumb for distinguishing an unconstitutional statute (‘does it make you want to puke?’) or Justice Stewart’s ‘I know it when I see it’ standard for pornography.”).

<sup>36</sup> Patrick Bolton and David Skeel propose, therefore, that political and financial international institutions, such as the UN and the IMF, would be better suited to implement an “odious regime” doctrine. See Bolton & Skeel, *supra* note 34.

<sup>37</sup> Buchheit et al., *supra* note 3, at 1218 (“Like a Las Vegas slot machine, all three cherries must simultaneously come into alignment before the Sackian odious debt bell starts to ring.”)

<sup>38</sup> See *id.* at 1214-16 (describing the repudiation of the debt Spain had contracted to fund the suppression of a Cuban rebellion, and for which Spain had promised “Cuban revenue streams”).

<sup>39</sup> See *id.* at 1216-17 (citing the *Tinoco Arbitration* (discussed *infra*) in which debt issued to the state of Costa Rica by the Royal Bank of Canada during the short reign of Frederico Tinoco was cancelled because Tinoco fled the country with every cent of the loan as his government crumbled).

<sup>40</sup> Sack would even countenance *negligent* lending. See ADAMS, *supra* note 19, at 165-66 (noting Sack’s requirement that the lender have subjective knowledge of the debtor’s intent to steal the debt proceeds).

lematic for Sack's rule.<sup>41</sup> When a dictator steals a percentage of the debt proceeds, yet puts the bulk of the debt to good use (Buchheit et al. suggest "the construction of a new hospital for children with terminal diseases"<sup>42</sup>), Sack's doctrine is not definitive. Of course, Sack would frown upon the dictator's personal enrichment via the people's credit, but would he rather the hospital not exist?<sup>43</sup> Sack's three-pronged rule is unfit to resolve this dilemma. Another problem with the scope of Sack's conceptualization is that it fails to account for the fungibility of money. Funds procured for a non-odious purpose can easily be used for an odious one. Even if a one-to-one misappropriation cannot be demonstrated, a debt contracted for and spent on virtuous purposes can make possible a host of odious expenditures.<sup>44</sup> For example, a debt that funds the construction of the Buchheit Children's Hospital, could enable funds from another revenue stream (e.g. tariffs or income taxes) to be appropriated for truly odious purposes. Again, Sack's Odious Debt analysis provides no protection in this situation.

Sack's distillation of an emerging practice among states in the early twentieth century has spawned an incomplete doctrine that has yet to become effective. Whether he intended these rules to take hold in courts presiding over sovereign debt disputes is unclear, but it is certain that any such possibility has been dashed by the rule's practical problems. The Part that follows will present a new rule which aims to recast Sack's "doctrine" in a more feasible manner.

### III. THE ODIIOUS EXPENDITURE DOCTRINE

While Sack's rule of Odious Debt is laudable for its ambition, the twin concerns of judicial administrability and narrow scope prevent it from achieving legal significance. In order to become an effective legal norm,<sup>45</sup>

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<sup>41</sup> "Graft" in this sense is to be distinguished from "pork barrel politics." The latter does involve a personal benefit to the official who delivers a legislative victory (often in the form of government expenditure) to a segment of the population (usually the official's personal constituency). The difference that this Article draws between graft and pork is the manner of benefit conferred to the official: Graft involves actual financial payments to the official, while pork wins the official the good will (and votes) of her constituents.

<sup>42</sup> Buchheit et al., *supra* note 3, at 1219. This problem is identified elsewhere in the literature. See, e.g., Choi & Posner, *supra* note 10, at 43 ("If a \$10 million loan is used to build a \$9 million bridge, with government ministers skimming off the extra \$1 million, is this an odious debt?").

<sup>43</sup> Choi and Posner have devised a model of the Odious Debt Doctrine's effect on public welfare that considers the utility that the public derives from odious investments similar to the Buchheit Children's Hospital. *Id.* at 37-43.

<sup>44</sup> Choi and Posner note this shortcoming of the Odious Debt Doctrine explicitly. *Id.* at 44.

<sup>45</sup> International law, of course, is produced either through the adoption of positive law or through custom. Alternatively, it is possible for the Doctrine to take root first

the rule must be reformed to address these concerns while preserving Sack's goals of moral justice to the successor state and predictability for creditors. This Part proposes such a reform.

The objectives of administrability and scope can be achieved by focusing not on the odiousness of the debt at issue, or that of the regime which contracted for it, but rather by examining the uses to which the debt has been put. Drawing on principles of taxation law, Section III.A proposes a judicially administrable method for determining which expenditures qualify to be counted against the sovereign's debt burden. This initial analysis reflects Sack's concern for the debtor state by identifying those expenditures which injured the interests of the population. If the analysis were to end here, the second goal of market security through predictable debt cancellation would fall by the wayside. To address this concern, Section III.B explains the Cancellation Analysis, which discounts the total amount of odious expenditures that are eligible for cancellation.

This Odious Expenditure Doctrine would serve as an affirmative defense available to a debtor faced with legal action by creditors seeking overdue debt service. The rule is both wider in scope and more precise in application than Sack's model: wider in scope because it applies to all debts contracted after an initial odious expenditure, and more precise in application because it allows cancellation of only a slice of each qualifying debt. The result is an administrable rule that balances both the interests of the successor regime and those of its creditors.

#### A. *Odious Expenditure Analysis*

As noted above, it is the shift from odious *debt* to odious *regime* analysis that makes Sack's "doctrine" judicially inadministrable; judges simply cannot systematically distinguish between odious and non-odious governments.<sup>46</sup> By focusing on Sack's first criterion, scholars choose a compelling reason to adopt a debt cancellation policy, but they simultaneously hamstring attempts to introduce a workable rule into the canon of international law. To solve this problem, this Article proposes the opposite: instead of undertaking a hopeless inquiry into a given regime's democratic attributes, the doctrine should jettison the first criterion, and focus on Sack's second prong. Thus, the "odiousness" analysis should begin and end with the nature of the previous regime's *expenditures*. Not only is this analysis administrable, it also remains true to Sack's concern for moral justice to the successor state.

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in domestic law. Potential methods for implementing the Odious Expenditure Doctrine are discussed *infra* in Part IV.

<sup>46</sup> See Bolton & Skeel, *supra* note 34, (noting that the UN and the IMF, when compared to other possible decisionmakers—including courts—are "well-accustomed to addressing politically sensitive matters.").

## 1. Definition

The tractability of this expenditure-based analysis turns on the definition of “odious.” Sack’s stipulation that only those debts contracted in furtherance of “the needs or . . . interest of the State” should be considered non-odious<sup>47</sup> can be interpreted in various ways. One possible approach would seek to quantify the net benefit to the state of every government outlay, from domestic educational spending to the price of the ruler’s personal air travel accommodations. Where “odiousness” is the question, how does one decide whether the patriotic benefit of viewing the head of state descending from an opulent jumbo jet can justify the plane’s multi-million dollar price tag? Could those funds have been put to a more productive use? On the other hand, do we expect our officials to fly coach? What ought to determine the “reputational” value that such an airliner imparts to a government? To decide these questions is similar on the score of administrability to discerning whether an entire regime is “odious.” Financial marketeers might protest that such an inquiry provides insufficient clarity to inform their lending practices.<sup>48</sup>

A far more practical and predictable standard would emulate the principles that the U.S. Tax Code employs to distinguish between business and personal expenses for the purpose of deductibility. Just as the odious expenditure analysis seeks to screen payments that benefit the ruling regime to the exclusion of the general population, the Internal Revenue Code aims to distinguish personal expenses from tax-deductible, income-producing expenditures.<sup>49</sup> Under federal tax law, dollars spent on personal consumption are nondeductible,<sup>50</sup> but in some cases the determination whether an expense is business-related or personal can be difficult. For instance, are prodigious salaries, corporate spiritual advisers, far-fetched insurance policies, and bribes genuine costs of producing income? In order to make this determination, Congress chose to define deductible business expenses as those that are “ordinary and necessary” in the conduct of “any trade or business . . . .”<sup>51</sup> This “ordinary and necessary” standard has been construed by courts to encompass those expenditures

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<sup>47</sup> ADAMS, *supra* note 19, at 165.

<sup>48</sup> See *supra* note 24 and accompanying text.

<sup>49</sup> Because the U.S. tax system seeks to tax *income*, it allows for the non-taxation of costs incurred in producing that income. See I.R.C. § 162(a) (establishing a deduction for “all the ordinary and necessary expenses paid or incurred . . . on any trade or business . . . .”). Generally excluded from this deduction are “personal, living, or family expenses.” *Id.* § 262(a). For idiosyncratic policy reasons, the tax code allows for some personal expenses to be deducted, *see, e.g., id.* § 221, (allowing for the deduction of interest paid on qualified education loans), but these exceptions do not undermine the applicability of the general rule to the odious debt context.

<sup>50</sup> *Id.* § 262(a).

<sup>51</sup> *Id.* § 162(a).

which arise with “normalcy in the particular business.”<sup>52</sup> This implies that seemingly business-related but idiosyncratic disbursements—such as the company chaplain and the insurance policy—are not deductible,<sup>53</sup> while arguably unnecessary expenditures such as high executive salaries are deductible as long as they accord with the industry norm.<sup>54</sup> Implicit in this rule is the determination that expenditures which are not *ordinary* business practices within a community are probably not *necessary* to running that business. Rather, such expenses are more likely to be personal consumptive choices than genuine revenue-enhancing expenditures; otherwise peer businesses would elect to incur a similar expense.<sup>55</sup>

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<sup>52</sup> *Deputy v. du Pont*, 308 U.S. 488, 496 (1940).

<sup>53</sup> *See, e.g., Goedel v. Commissioner*, 39 B.T.A. 1, 12 (1939) (denying a deduction for a stock dealer’s payment of premiums on insurance on the life of the President of the United States because the “expenditure is so unusual as never to have been made . . . by other persons in the same business, *when confronted with similar conditions . . .*”) (emphasis in original); *Trebilock v. Commissioner*, 557 F.2d 1226, 1226 (6th Cir. 1977) (affirming the denial of a deduction for the cost of hiring a religious minister to provide spiritual counsel “to petitioner and his employees . . .”).

<sup>54</sup> I.R.C. § 162(a)(1) does state that only “reasonable” salaries are deductible, but this is not a rule of nondeductibility for high salaries, but rather a rule that polices the boundary between dividend payments (which are not deductible) and salary payments. *E.g., Rapco, Inc. v. Commissioner*, 85 F.3d 950, 954 n.2 (2d Cir. 1996). Some specific salary disbursements, however, are not deductible. *See* I.R.C. § 162(m)(1) (“In the case of any publicly held corporation, no deduction shall be allowed under this chapter for . . . employee remuneration . . . to the extent that the amount . . . exceeds \$1,000,000.”).

<sup>55</sup> A classic case dealing with the distinction between taxable (consumptive) and non-taxable (revenue-enhancing) expenditures is *Welch v. Helvering*, 290 U.S. 111 (1933). The Court held that the funds Welch spent to discharge debt for which he had been absolved (through his former company’s bankruptcy) should nevertheless be treated as a business expense incurred “for the development of reputation and good will . . .” *Id.* at 113. In his analysis, Justice Cardozo enunciated the meaning of the “ordinary and necessary” requirement:

We may assume that the payments to [Welch’s erstwhile creditors] were necessary for the development of [his new] business, at least in the sense that they were appropriate and helpful . . . . He certainly thought they were, and we should be slow to override his judgment. But the problem is not solved when the payments are characterized as necessary . . . . There is need to determine whether they are both necessary and ordinary. . . . Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack . . . . The situation is unique in the life of the individual affected, *but not in the life of the group, the community, of which he is a part.*

*Id.* at 113-14 (emphasis added).

Applying this tax principle to a regime's expenditures produces a baseline rule of expenditure analysis that can efficiently differentiate odious from non-odious spending. Simply put, a tribunal<sup>56</sup> charged with deciding whether an expenditure is odious should look to prevailing international spending practices<sup>57</sup> to determine whether a specific expenditure is ordinary and necessary. If the expenditure in question is found to be abnormal when compared with state practice,<sup>58</sup> then it should be deemed odious. Practically speaking, only a small proportion of state expenditures should be designated as "odious" under this rule, because the presumption would be that a state expenditure is "ordinary and necessary" absent a showing to the contrary. By relying on state practice to inform the rule of odiousness, this analysis parallels<sup>59</sup> the accepted procedure for establishing a rule of customary international law.<sup>60</sup>

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<sup>56</sup> This discussion assumes that such a tribunal exists. Part IV, *infra*, will discuss matters of implementation and how these relate to the parties' accessibility to various court systems.

<sup>57</sup> Part II.A.2, *infra*, will discuss instances where the prevailing international practice should be determined with regard to the debtor's peer states rather than the global community writ large.

<sup>58</sup> As the spiritual adviser and insurance policy discussed above were abnormal business practices, and therefore nondeductible expenses, then so should any abnormal state expenditure be deemed odious.

<sup>59</sup> The parallel between the rule of Odious Expenditure Analysis and the state practice prong of customary international law does not imply doctrinal reliance of the former upon the latter. The similarity here is noted only to emphasize that state practice is a reliable and useful tool for international legal rulemaking.

<sup>60</sup> In order to establish a rule of customary international law it must be established that state practice is sufficiently uniform on the point asserted, and that this conformity results from *opinio juris*—a general understanding that the behavior is legally required. *See, e.g.*, RESTATEMENT, *supra* note 13, § 102(a), & cmts. b-c (1986) (establishing customary law as a source of international law, and providing a definition); Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 [hereinafter "ICJ Statute"] (including "international custom, as evidence of a general practice accepted as law" among the international laws that the Court will apply). On the state practice prong, claims that a customary rule exists must establish that the rule is acknowledged by a sufficiently broad group of states. *See* North Sea Continental Shelf (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3, 43 (Feb. 20) (declining to acknowledge a customary rule that the "equidistance principle" guides the determination of offshore boundaries because, *inter alia*, the principle was not employed by a sufficient number of interested, i.e. coastal, states). Customary law has been acknowledged by a variety of courts, even the Supreme Court of the United States. *See, e.g.*, Paquete Habana, 175 U.S. 677, 708 (1900) (determining and applying a rule of customary law which forbids the seizure of fishing boats as war prizes). The position of customary law among the canon of international legal sources is currently secure, but this was not always the case: during the height of legal positivism, customary rules were largely ignored by courts. *See, e.g.*, S.S. "Lotus", 1927 P.C.I.J. (ser. A) No. 10, at 18-31 (Sept.

Initially, it is clear that Sack's archetypal odious expenditures—a ruler's outright theft of the debt proceeds, and debt contracted for the sole purpose of repressing a population—would clearly be deemed odious under the tax-inspired analysis. Essentially analogous to the core "personal" expenditures of I.R.C. § 262, these expenditures in no way resemble accepted techniques of proper governance. With regard to a ruler's expropriation of debt proceeds for her own personal use, Former President, Chief Justice, and Sole Arbitrator William Howard Taft's comments in what has become known as the *Tinoco Arbitration*<sup>61</sup> indicate that such expenditure cannot be deemed ordinary and necessary. Taft held that the Royal Bank of Canada was not entitled to repayment of a loan it had extended to the embattled ruler of Costa Rica, Frederico Tinoco, and his brother Jose, because

this money was to be used by the retiring president . . . for his personal support after he had taken refuge in a foreign country. . . . The case of the money paid to the brother, the Secretary of War, and the appointed Minister to Italy, is much the same. The government book entry charges him with this as a payment for expenses to be incurred in the establishment of a legation in Italy. It includes the salaries and expenses for four years. To pay salaries for four years in advance is a most unusual and absurd course of business. All the circumstances should have advised the Royal Bank that this [loan] was for personal and not for legitimate government purposes (emphasis added).<sup>62</sup>

Taft's reasoning, though binding only on the parties to the dispute,<sup>63</sup> constitutes strong evidence that an expropriation of state funds for the

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7) (finding that because no positive rule of international law forbids the criminal prosecution of a French citizen by the Turkish Republic, the prosecution may proceed). In order to escape from any future liability under an emerging customary norm, a state may make use of the Persistent Objector Doctrine, which removes from liability a state which "unambiguously and persistently registers its objection to the recognition of the practice as law." Humphrey Waldock, *General Course on Public International Law*, in 106 RECUIEL DES COURS 1, 49-53 (1962); see also RESTATEMENT, *supra* note 13, § 102 cmt. d., reporters' note 2 (1986). This doctrine was explicitly noted as an alternative ground for the Court's holding in the *Asylum Case*. See *Asylum (Colombia v. Peru)* 1950 I.C.J. 266, 277-278 (Nov. 20) ("Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it."). Because it could result in undesirable exceptions to the Odious Expenditure Analysis, the persistent objector doctrine is not incorporated into this analysis.

<sup>61</sup> William H. Taft, *Arbitration Between Great Britain and Costa Rica*, 18 AM. J. INT'L L. 147 (1924).

<sup>62</sup> *Id.* at 168.

<sup>63</sup> As with most decisions of international courts and tribunals, the determination was without precedential weight, and binding only on the litigants in the dispute at



personal use of the ruler is not a common practice among states,<sup>64</sup> and is, therefore, odious under the proposed rule.<sup>65</sup>

Expenditures that oppress a domestic population—Sack’s second paradigmatic example of odious expenses—also fail the “ordinary and necessary” test. As seen in the resolution to the Spanish American War of 1898, it is not the practice of states to pay back such loans. Prior to the conclusion of this war, Spain had contracted debt which helped finance the suppression of a popular rebellion in Cuba.<sup>66</sup> In the 1898 Treaty of Paris, the two sides negotiated a truce in which the United States won sovereignty over Cuba.<sup>67</sup> The problem was that in exchange for the loan, Spain had assigned to the creditor the right to collect from Cuban income.<sup>68</sup> The peace treaty included no provision for disposing of this debt.<sup>69</sup> but the United States refused to accede to this particular Cuban obligation based in part on the principle that these loans could not have been contracted for the benefit of the Cuban people, and therefore must be treated as the personal debts of the Spanish Crown.<sup>70</sup> As was the case with the *Tinoco* decision, the weight of this authority is persuasive as applied to the odious expenditure analysis; it cannot be said that future actors are legally bound by the outcome of this agreement,<sup>71</sup> but the treaty and the American repudiation of the Cuban debt support the proposition that such debts are not the ordinary and necessary practice in the international community.

More importantly, the proposed framework is capable of coping with the challenges of graft and fungibility. As noted above, Sack’s formulation offers no help when a would-be creditor is faced with the decision whether to loan funds to a sovereign, ninety-five percent of which would construct the Buchheit Children’s Hospital, the remaining five percent of

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hand. See, e.g., ICJ Statute, *supra* note 60, art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

<sup>64</sup> It is true that in a hypothetical and unfortunate world, it may become common for rulers to make off with state funds. Part III.A.2.c *infra* discusses this and other challenges to the “ordinary and necessary” rule of odious expenditures.

<sup>65</sup> Note that the purchase of pricey jets for air travel is arguably distinct from the behavior of the Tinoco brothers. It is probably the norm among even middle-income states to furnish comfortable travel and living accommodations for heads of state, and possibly even the highest ranking executive aides.

<sup>66</sup> See FEILCHENFELD, *supra* note 13, at 330-32 (cited in Buchheit et al., *supra* note 3, at 1214); 1 O’CONNELL, *supra* note 13, at 412-13.

<sup>67</sup> See Treaty of Peace Between the United States and Spain, U.S.-Spain, art. I, Dec. 10, 1898 (“Spain relinquishes all claim of sovereignty over and title to Cuba.”).

<sup>68</sup> See FEILCHENFELD, *supra* note 13, at 332-34, cited in Buchheit et al., *supra* note 3, at 1214); 1 O’CONNELL, *supra* note 13, at 412-13.

<sup>69</sup> See Treaty of Peace Between the United States and Spain, *supra* note 67.

<sup>70</sup> See FEILCHENFELD, *supra* note 13, at 337-43, cited in Buchheit et al., *supra* note 3, at 1214-15); 1 O’CONNELL, *supra* note 13, at 412-13.

<sup>71</sup> See *supra* note 63.

which would line the breast pocket of the ruler's finely-tailored suitcoat.<sup>72</sup> Under my reconceptualization, the analysis would proceed as follows: an investigation would be made concerning the state practice and international law, and if it is determined that such forms of graft are either widely despised or even illegal, then the five percent would be deemed odious and that dollar amount would become eligible for cancellation.<sup>73</sup> Similarly, the fungibility problem is adequately handled by this analysis; at this initial stage, it is the value of the *expenditure* that would be subject to the odious expenditure rule, and not that of the *debt* contracted to fund it. Therefore, when a loan to construct a children's hospital liberates funds from the debtor's fisc to be spent on weapons for the brutal suppression of a domestic population, the amount spent on the weapons would be deemed odious, irrespective of the value of the loan or cost of the hospital.<sup>74</sup>

## 2. Challenges to Tractability

With the proposed modifications, the Odious Expenditure Analysis is capable of addressing both the archetypal Sackian odious debts and a few cases that Sack's rule cannot handle. Nevertheless, those applications may overstate the ease with which judges can determine the "odiousness" of certain regime expenditures. To be sure, the question of odiousness can be more complicated. This Section acknowledges that in some cases a more nuanced odious expenditure analysis is necessary. It identifies specific situations in which the baseline odious expenditure analysis is under- or over-inclusive with respect to the desired classification of certain expenditures, and proposes three addenda to the baseline rule which address these inaccuracies. Finally, it sketches possible solutions to the "floodgates" problem—governments that arguably engage in too many odious expenditures to permit adequate adjudication of them all. In the end, this Section argues that situations challenging the tractability of the Odious Expenditure Analysis do not defeat the rule's administrability.

### a. *False Negatives and False Positives*

It is possible to think of situations where the baseline Odious Expenditure Analysis will select imperfectly for truly "odious" expenditures. Before identifying these categories, it is helpful to revisit the precise concerns that animate the various rules of odious debt. As discussed above,<sup>75</sup> Sack's rule of odious debt is concerned with justice for the debtor's population, namely, protecting the population against the repay-

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<sup>72</sup> See *supra* note 42 and accompanying text.

<sup>73</sup> As will become apparent in Part III.B, *infra*, not all odious expenditures will necessarily be cancelled.

<sup>74</sup> Obviously, a debtor could, in good faith, be ignorant of the ruler's plans to use the funds in this way, and this problem will be addressed in Part III.B, *infra*.

<sup>75</sup> See Part II.A, *supra*.

ment of debts that are, “contrary to the interests of the nation,” contracted by a previous “despotic” regime.<sup>76</sup> Therefore, the Odious Expenditure Analysis would ideally select those government outlays which do not benefit the population at large. But as I will show, the baseline rule is not always accurate, and gives rise to both false negatives and false positives.

Dealing first with the false negatives, some expenditures would satisfy the ordinary and necessary test, despite the fact that in many cases they are ill-advised and deleterious to the interests of the general population. The archetypal regime-serving and population-hostile appropriations—those financing direct, physical violence against the citizenry—are clearly odious, but could, at least hypothetically, be deemed normal under the baseline rule. Because the prevailing state practice on any particular issue can change, the normalcy analysis of odious expenditures is essentially dynamic. Even though at present governments do not normally fund systematic murderous rampages against their people,<sup>77</sup> the situation is at least imaginable for the sake of argument. If at some unhappy point in the future such would become the case, it would be an unfortunate rule that would exclude such expenditures from the debt-cancellation equation. A just doctrine of odious debt will find a way to systematically include these cases within the class of odious expenditures.

This Article has already raised a less acute, but no less problematic case of under-inclusion. As mentioned above, the purchase of first-rate airliners for the personal use of high-ranking governmental officials and heads of state may in many cases qualify as a legitimate expenditure because many states use government funds for this purpose. Even though most states find this practice acceptable, the question remains whether this rule of non-odiousness should apply globally. It stands to reason that in some instances where the state chooses to skim on essential expenditures on behalf of its population—for example, infrastructure maintenance or public health and safety—in order to purchase a fleet of jumbo jets for its rulers, the expenditure would become indistinguishable from the expenditures that constructed the lavish palaces of Saddam-era Iraq.

Finally, the baseline analysis is capable of producing false positives: expenditures that may not be common globally, but might nevertheless promote the welfare of the general population. An example of this category would be government outlays to provide universal health care. On a global scale, this is probably not a common expenditure; nevertheless, such beneficent expenditures on behalf of the general population are far

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<sup>76</sup> See ADAMS, *supra* note 19, at 165 (translating Sack’s expression of the “doctrine” of odious debt).

<sup>77</sup> This rampage would clearly qualify as a crime against humanity. See Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

from the class of outlays that could be rightly considered contrary to the public interest.

Having identified the primary classes of error inherent in the baseline analysis, the next three subsections append the foundational rule to address these concerns.

b. *Internationally Illegal Acts*

As a partial solution to the problem of false negatives, an addendum to the baseline rule would classify any expenditure concomitant to an internationally<sup>78</sup> illegal act of the previous regime as odious regardless of whether it is otherwise “ordinary and necessary.” This *illegality exception* finds its support in the very body of law that inspired the primary rule itself—the U.S. Tax Code.

Unsurprisingly, the Tax Code does not allow for the deduction of bribes and other illegal expenditures, even if such payments are common within a particular trade or business.<sup>79</sup> Generally, an illegal expenditure under the tax code is defined as a payment that is itself a criminal act under the laws of the United States, or state law that is “generally enforced.”<sup>80</sup> For obvious policy reasons, it would be perverse for the federal government to exclude from taxation any financial transactions it otherwise intends to deter. The illegality exception is somewhat larger in the context of expenditures relating to drug sales. In a “trade or business [consisting] of trafficking in controlled substances,” any expenditure made “in carrying on” this activity cannot be deducted.<sup>81</sup> This language encompasses expenditures that—unlike bribes—are not themselves illegal, such as the payment of debts and boat docking fees,<sup>82</sup> yet the law treats them as inherently illegal expenditures if they are made with sufficient connections to the drug trade. Most assuredly, this anomaly is the product of the politics regarding drug crimes.

This illegality exception resists a straightforward application to the sovereign debt context because there are few expenditures that by themselves constitute an internationally illegal act. Nevertheless, deterrence—both of the state to commit the underlying act and of the lender to disburse the funds that allow it to happen—is certainly one of the policy concerns that should animate a rule of odious debt. If, as indicated

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<sup>78</sup> In order to qualify under this exception, the government’s act must violate an *international* law. Domestic law does not inform the scope of this exception, rather it informs state practice and thus contributes to the definition of what is “ordinary and necessary” under the initial odious expenditure analysis.

<sup>79</sup> See I.R.C. § 162(c) (establishing a rule of nondeductibility for all “illegal bribes, kickbacks, and other payments” as an exception to the general rule of deductibility found in I.R.C. § 162(a)).

<sup>80</sup> *Id.* § 162(c).

<sup>81</sup> *Id.* § 280E.

<sup>82</sup> See *Sundel v. Comm’r*, 75 T.C.M. (CCH) 1853 (U.S. Tax Ct. 1998).

above, state practice were to change significantly so that international crimes such as genocide become normal expenditures of a government, and there were no other rule to include these expenditures within the definition of “odious,” any deterrence that could be had would be forfeited. To prevent this case, it is necessary to add to the analysis a rule that deems odious government outlays attendant to such acts.

Crimes within the jurisdiction of the International Criminal Court pursuant to the Rome Statute<sup>83</sup> would serve as internationally illegal acts for the purposes of odious expenditure analysis. Certainly these crimes, especially when directed at a domestic population, are central to what Sack determined to be against “the needs and . . . interests of the State.”<sup>84</sup> Outside of this class of crimes, the illegality exception has little justification. Of course, there are other methods by which a government can break international law, but because these breaches generally protect rather than attack domestic interests, they should not be considered as exceptions to the “ordinary and necessary” analysis of odious expenditures.

For example, a government could impose a discriminatory and burdensome regulation on imported goods in violation of the law of the World Trade Organization.<sup>85</sup> Since such a breach *protects* the domestic producers of the competing goods rather than *harms* them, any expenditures incurred to impose this tax<sup>86</sup> should not be considered odious for the purpose of this analysis. Of course, not every breach of a state’s international obligation uniformly benefits all domestic constituencies. A tax benefiting a domestic producer of a competing foreign product imposes a parallel cost on the domestic consumers of that product. Nevertheless, this harm can be justified as an attempt to grow the domestic economy as a whole, and thus fails to provide sufficient cause to be included within the illegality exception.

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<sup>83</sup> The crimes within the jurisdiction of the International Criminal Court include “(a) [t]he crime of genocide; (b) [c]rimes against humanity; (c) [w]ar crimes; (d) [t]he crime of aggression.” Rome Statute, *supra* note 77, at art. 5.1. Because its definition has yet to be agreed upon, the crime of aggression is not currently actionable under this treaty. *See id.* at art. 5.2.

<sup>84</sup> ADAMS, *supra* note 3, at 165. Sack never mentions acts such as genocide specifically in his analysis of what may satisfy this standard, but it cannot be denied that such acts are not in the state’s interest.

<sup>85</sup> *See* General Agreement on Tariffs and Trade (GATT) art. III(4), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin . . .”).

<sup>86</sup> Such expenditures could include the employment of personnel and equipment to inspect imports and prosecute violations.

c. *The Peer State Standard*

While the illegality exception cures the problem of under-inclusiveness with respect to the small number of cases that involve the commission of an international crime, a second addition to the baseline Odious Expenditure Analysis is also necessary. The peer state standard—a more tailored measure of state practice—would, where applicable, help generate an outcome that more accurately determines which of the debtor’s expenditures should be labeled odious.

As noted above, to establish a customary rule of international law, the proponent must show that the prevailing state practice conforms to the proposed rule.<sup>87</sup> In doing so, it is not uncommon for courts to limit the state practice analysis to only those states that have an interest in the proposed rule<sup>88</sup> or share common characteristics—such as geographical location<sup>89</sup>—with the state in question. While courts have been willing to apply this narrower sample of state practice in identifying a customary rule, they generally require a more rigorous demonstration of adherence within the relevant community of states. In the *Asylum Case*, the International Court of Justice articulated this higher standard as requiring a showing of “constant and uniform usage practised by the States in question.”<sup>90</sup> Applying this standard, the Court rejected Colombia’s claim that Peru was bound to comply with a local customary rule requiring the surrender of a Peruvian political dissident because Colombia had granted him status as a political refugee.<sup>91</sup> Taking notice of the “fluctuation and discrepancy in the exercise of diplomatic asylum” within Latin America, the Court ruled that no such customary rule existed within that region.<sup>92</sup> Similarly, the Court in *North Sea Continental Shelf* denied that uniform adherence among the signatories to a treaty establishing a specific method of offshore border demarcation is sufficient to establish a cus-

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<sup>87</sup> See *supra* note 60 (describing customary international law). This discussion explains that the repudiation of state practice, while sufficient to except the objector from the purview of an emerging customary rule, has no effect for the purposes of the Odious Expenditure Analysis. The same holds true for the Peer State Standard as well.

<sup>88</sup> See, e.g., *North Sea Continental Shelf*, 1969 I.C.J. at 43 (considering, for the purpose of deciding whether a customary rule of offshore boundary delimitation exists, only those states “whose interests were specially affected”—i.e. those which are not land-locked); see also RESTATEMENT, *supra* note 13, § 102 cmt. e.

<sup>89</sup> See, e.g., *Asylum*, 1950 I.C.J. at 277-78 (noting that it is possible to establish a local custom, but that no such rule controls this case); see also RESTATEMENT, *supra* note 13, § 102 cmt. e.

<sup>90</sup> *Asylum*, 1950 I.C.J. at 276; see also *North Sea Continental Shelf*, 1969 I.C.J. at 43 (requiring “extensive and virtually uniform” adherence among “States whose interests are specifically affected.”).

<sup>91</sup> See *Asylum* 1950 I.C.J. at 277-78.

<sup>92</sup> *Id.* at 277.

tomary rule binding all maritime states to employ that method regarding their own borders.<sup>93</sup>

For the same reasons that underlie this particularized custom rule—namely that it would be unjust to bind a state to, or allow a state to benefit from, an international custom to which it is not subject—it is apposite to adopt a corresponding rule in the odious expenditure context: the peer state standard. Such a rule would allow either a creditor or the debtor to define those expenditures that are “ordinary and necessary” not by the prevailing international standard, but by the types of expenditures common among a group of the debtor’s peers. In application, this rule requires that the proponent demonstrate that the debtor is one of a peer group<sup>94</sup> among which the “constant and uniform”<sup>95</sup> practice regarding the type of expenditure in question is opposed to that of the global community. Applying this metric to the hypothetical situation in which a regime has purchased high-end jetliners for the use of top officials to the exclusion of necessary public expenditures, the debtor would simply compare this practice to that of its peer states. Much of the argument surrounding this comparison would involve the definition of the debtor’s peer group. A variety of variables may be used to demonstrate similarities among a group of states. In this example, geographic location, alternative transportation modes available, security concerns, and even GDP figures seem relevant.

Assuming that the expenditure in question is universally disfavored, one would expect the empirics to yield few, if any, peer states which adopt similar spending practices. It is, however, possible that no uniform abstention of such expenditures could be found in any analogous peer group, in which case the argument for odiousness is weakened. It stands to reason that if no peer group can be said to uniformly eschew any type of expenditure, the exclusion of such expenditure from this odious analysis is not a *false* but a *true* negative.

#### d. *The Public Benefit Exception*

Departing from the approach that the Odious Expenditure Analysis has offered thus far, in order to adequately address an important case of false positives—those expenditures that are abnormal but nevertheless wholly benign—it is necessary to append a blanket exclusion of bona fide public benefit expenditures. If the creditor can show that certain expenditures exclusively benefit the state’s domestic population or any subset

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<sup>93</sup> See *North Sea Continental Shelf*, 1969 I.C.J. at 41-46. The rule’s proponents also put forth unsuccessful arguments that the treaty had crystallized, *id.* at 41, or codified, *id.* at 32, a pre-existing customary rule of international law.

<sup>94</sup> This group could be defined along a number of variables, including gross domestic product and geography.

<sup>95</sup> This language indicates that the higher standard for uniformity found in *Asylum* and *North Sea Continental Shelf* applies.

thereof,<sup>96</sup> then that expenditure should be excluded from the odiousness analysis. The prime examples here are expenditures to ensure that every citizen has access to health care. This type of expenditure is not only outside the core cases Sack identified as odious,<sup>97</sup> but rather the absolute opposite: by definition, none of these funds has benefited the regime at the expense of the domestic population.

e. *Intractability by Volume*

Finally, an important concern with the Odious Expenditure Analysis is that judges, while able to apply the analysis on an expenditure-by-expenditure basis, may be unable to adjudicate an entire case because the number of expenditures that would need to be analyzed might be overwhelming. Indeed, if every government outlay that was arguably odious under the analysis above were heard by the tribunal presiding over debt litigation, the quantity of expenditures could prove unwieldy, rendering adjudication of debt disputes unmanageable.<sup>98</sup> There exist, however, features of the Odious Expenditure Doctrine that would mitigate this problem, and even if it is found that they are insufficient, additional limitations can preserve the administrability of this doctrine.

While it is common for parties in litigation to exhaust every colorable claim that may aid their case, there is a good reason to expect a departure from that rule in odious debt litigation. Namely, the reputational costs involved in repudiating sovereign debt are likely to bring market sanctions on any future debts the sovereign intends to issue.<sup>99</sup> For fear of

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<sup>96</sup> Indeed, it is possible that a biased ruler would authorize expenditures that only benefit a segment of the population, intending to exclude the forlorn remainder. While these discriminatory expenditures are objectionable, they are not odious. Only the *expenditure* of funds can possibly help create a debt that is then passed on to the next regime, and therefore only expenditures can be counted in the odious expenditure analysis. Furthermore, it is not within the purview of the Odious Expenditure Doctrine to ensure equal protection under the domestic laws of a state. A possible exception to this approach could include cases where a ruler has expended funds to the exclusive benefit of her own family. These expenditures could be deemed odious on the theory that they are indistinguishable from funds that are stolen by the ruler herself. In fact, we have already seen such a case: recall that part of the loans that Frederico Tinoco contracted in the name of Costa Rica went to his brother Jose, ostensibly to establish a legation in Italy. See *supra* notes 61-62 and accompanying text.

<sup>97</sup> These core cases are expenditures that suppress a domestic uprising and those which are received exclusively and personally by the ruler. See *supra* note 17.

<sup>98</sup> Cf. Gelpert, *supra* note 3, at 412 (asserting that proving a link between the debt proceeds and every expenditure would be impossible).

<sup>99</sup> See Jayachandran et al. *supra* note 8, at 8-12; see also Gelpert, *supra* note 3, at 402-03 (noting that Iraq did not attempt wholesale repudiation of its debts). It is conceded that there may be some good reasons to assume that these reputational costs may not provide adequate deterrence. See Soren Ambrose, *Social Movements*



gaining a reputation as an overzealous debt litigator, the debtor may not present every arguably odious expenditure for adjudication. Of course, the marginal reputational costs associated with each individual expenditure may be negligible once litigation has commenced, but reputational costs will have some effect on the debtor's litigation strategy. Additionally, the second component to this rule—which will be explained below<sup>100</sup>—contains factors that decrease the number of expenditures that will be presented to the tribunal for adjudication. For reasons of creditor justice, market security, and sustainability, this Article's proposal requires that the total dollar amount of odious expenditures be further discounted before the amount of challenged debt is finalized. Obviously, the amount cancelled cannot exceed the value of the outstanding debts, and for reasons that will be explored below, the amount must also be discounted according to the debtor's ability to pay; thus these limitations set a ceiling for possible debt cancellation. These limiting factors will provide a chilling effect on the number of expenditures the debtor will present to the tribunal for analysis, for if the total dollar amount of odious expenditures exceeds the ceiling, the excess will not benefit the debtor. Indeed, the tribunal itself, before performing the Odious Expenditure Analysis, could begin by calculating this ceiling, reserving the expenditure-by-expenditure inquiry for only the necessary claims, and thus obviating the need for an exhaustive investigation into each of the debtor's expenditures.

If these limitations fail to preserve the workability of the Doctrine, a gatekeeping rule which excludes all expenditures that fall below the threshold could be established. Just as the amount in controversy prerequisite for establishing diversity jurisdiction<sup>101</sup> ensures that the dockets of American federal district courts are manageable, so could this requirement be employed to limit odious expenditure claims to an appropriate amount.

Having identified all of the odious expenditures eligible for cancellation, I proceed, in the next Section, to calculate the amount of debt that will be written down. The Cancellation Analysis, as will be seen, ensures that no undue profits befall the debtor, and that the creditors forfeit only a reasonable amount of their lendings.

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*and the Politics of Debt Cancellation*, 6 CHI. J. INT'L L. 267, 267 (2005) (arguing that governments should “repudiate debt payments that handcuff their capacity to improve people's lives and inhibit democratic self-determination of countries' most salient policy decisions.”). Indeed, in the wake of the massive Argentine bond swap, in which many creditors took a sixty-five percent haircut, see *Argentina's Debt Restructuring: A Victory by Default?*, THE ECONOMIST, Mar. 3, 2005, creditors may be less ashamed to repudiate their obligations.

<sup>100</sup> See Part III.B, *infra*.

<sup>101</sup> See 28 U.S.C. § 1332(a) (2000).

## B. Cancellation Analysis

The analysis proposed in this Article does not end with the identification of the odious expenditures. To do so would, as Sack feared, foist an unjust burden upon the creditors: because it is not certain that the odious expenditures were the product of *any* debts, to cancel the flat amount of these expenditures would hold the creditors wholly liable for a harm that they may have had no part in causing. Putting fairness aside, such a rule would also have significant negative consequences on the sovereign debt market. If creditors have no reliable way to segment the market, they will be forced to include risk premiums on every sovereign debt issued, regardless of whether the particular sovereign debtor has or will engage in odious expenditures. The result would be to artificially reduce every sovereign's access to debt. Sack's requirement that creditors have specific knowledge of the ruler's odious intent as a prerequisite to repudiation avoids both the injustice and market access problems, but at a high cost.

To address the concern of creditor justice while avoiding the problem of narrow applicability that plagues Sack's rule, the Odious Expenditure Doctrine provides an intermediate step between the identification of odious expenditures and debt cancellation—the Cancellation Analysis. Only after a debtor has demonstrated that the value of its recognizable odious expenditures exceeds its own ability to pay would the tribunal be empowered to write down the debts owed by the successor regime. This section proceeds by first explaining the process by which the total value of the odious expenditures is to be filtered through the limiting factors of outstanding debt value and sustainability, and provides an example of how this process functions. Following this discussion, the issue of redundancy—that the product of the Odious Debt Doctrine reflects current settlement outcomes—is addressed explicitly.

### 1. Filtering the Eligible Claims

After the relevant odious expenditures have been identified according to the process described above, the next step is to calculate these expenditures. In the regular case, the creditors would bring a suit for repayment against the debtor, and, as expected, it would be their initial burden to show the amount of debts outstanding. The burden of evaluating the odious expenditures would then shift to the debtor as the party asserting the Odious Expenditure Doctrine as an affirmative defense. Gelpern argues that linking the debt proceeds to odious expenditures would be too complex and unwieldy to be demonstrated in court,<sup>102</sup> but proof of valuation under the Odious Expenditure Doctrine does not require a paper trail

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<sup>102</sup> See Gelpern, *supra* note 3, at 412 (“[I]t would be impossible to deliver large-scale relief quickly where an arbiter or a national court had to evaluate the use of proceeds for every loan contract.”).

connecting each loan to an odious expenditure. At this stage, the debtor must only provide an amount representing the odious expenditures themselves. This can be done in a variety of ways: the debtor could provide evidence of the previous ruler's personal enrichment via bank records, or the market price for odious personal extravagances. Similarly, if the odious expenditure is one of violence against a domestic population, the debtor could demonstrate the market price of the weapons used. The point here is that the *valuation* of the expenditure is to be demonstrated, regardless of whether there is an evidentiary trail to the debts incurred. Once a dollar amount is attached to the odious expenditures, that amount will be discounted according to the amount of debt at issue and the debtor's ability to pay those debts.

To determine which debts qualify for reduction, it is preferable to depart from Sack's unbending commitment to explicit creditor culpability as a prerequisite to debt rollbacks. Sack's requirement that the debtor prove each creditor's specific knowledge of the predecessor regime's intent to misuse the borrowed funds ensures that the Odious Debt Doctrine will not be broadly applicable.<sup>103</sup> Instead, this Article proposes a better means for protecting the creditor's interests without sacrificing the applicability of the Doctrine. The Cancellation Analysis makes eligible for cancellation two classes of sovereign debt. First, any debts issued to a regime after its first odious expenditure<sup>104</sup> will be counted as eligible. Second, the Analysis incorporates Sack's narrow rule; those debts issued prior to the regime's first odious expenditure, but with the creditor's subjective awareness that the debtor intends to use the funds for odious purposes, would be eligible for cancellation. If the value of all qualifying odious expenditures exceeds the total value of all of the loans that qualify under either prong of this standard, the sum of the loans (including any interest due) serves as an upper limit for the amount of odious expenditures eligible for cancellation. This number will be referred to as the *recognizable odious expenditures*. To introduce an illustration that will be revisited below, if a previous regime has saddled its successor with \$170 million in debt, no more than that amount will be recognizable.

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<sup>103</sup> See Jaychandran et al., *supra* note 8, at 19-20 (noting the narrow scope of Sack's rule and instead proposing a legal regime that would require creditors to exercise "due diligence" regarding whether certain "odious debt prone" states will spend their funds odiously).

<sup>104</sup> Because the regime's proclivity to undertake odious expenditures is the issue, it does not matter if the initial expenditure involved the misappropriation of sovereign debt proceeds or another revenue stream. Whether this expenditure is indeed odious is resolved by the analysis proposed in Part III.A, including any amount-in-controversy requirement that may be appended to the baseline analysis.

The question remains how to legally recognize the initial odious expenditure of a given regime. Like Jayachandran et al.,<sup>105</sup> I assume that creditors have the wherewithal to discover whether certain regimes are likely to engage in odious expenditures,<sup>106</sup> but I prefer that courts, rather than diplomats, decide whether legal consequences should attach. Jayachandran et al. would empower a vaguely defined “international organization” comprised of “diplomatic political appointees from member states” to decide whether a regime is “Odious Debt prone.”<sup>107</sup> Once so labeled, new creditors to such a regime would be required to perform a “due diligence” inquiry to ensure that their funds, if lent, would not be used for odious purposes.<sup>108</sup> If these creditors fail to undertake such an inquiry, they risk forfeiture of their rights to collect in the event of regime change.<sup>109</sup> It seems that a creditor who performs the due diligence is sheltered from debt cancellation even if the debt proceeds eventually are spent for odious purposes.

The Cancellation Analysis offers a more direct approach that would remove any potential safe harbor for creditors. Instead of empowering an international body of diplomats to decide whether a regime is likely to make odious expenditures, it should be the behavior of the putatively odious regime itself that puts creditors on notice. This rule anticipates that the Odious Expenditure Doctrine will typically arise in *ex post* litigation; a tribunal sitting in judgment over a case brought by the creditors for repayment would identify, after these debts have been contracted and the expenditures made, the earliest odious expenditure of the regime and make recognizable all debts contracted after that date.<sup>110</sup> This rule of strict liability encourages lenders to carefully investigate the reputations

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<sup>105</sup> See Jayachandran et al., *supra* note 8, at 20 (requiring lenders to investigate whether their funds will be put to odious purposes by certain creditors).

<sup>106</sup> Indeed, the rules proposed in both Jayachandran et al. and this Article would hold the creditor strictly liable (subject to various discounts) for any loans made after a regime has been identified as prone to odiousness. For an economic justification of at least partial creditor liability for the odious expenditures their loans enable, see Ben-Shahar & Gulati, *supra* note 8.

<sup>107</sup> Jayachandran et al., *supra* note 8, at 19. Bolton and Skeel advocate a similar proposal in that they would have the UN and the IMF serve as the decision maker regarding whether a regime is odious. See Bolton & Skeel, *supra* note 34.

<sup>108</sup> See Jayachandran et al., *supra* note 8, at 20 (placing lenders “on notice that to guarantee their loans will be enforceable in the event of regime change, they must utilize reasonable best practices of due diligence to ensure that the borrowed funds will only be utilized for pre-specified, legitimate purposes” if they lend to regimes that have been labeled “odious debt prone.”).

<sup>109</sup> *Id.*

<sup>110</sup> If this is how the rule would operate in the context of litigation, it stands to reason that it would effect debt settlement disputes in a similar manner. Parties to a debt dispute which could be litigated would be able to value the likelihood of debt cancellation and negotiate a settlement, assuming perfect information. For a broader

of regimes before they lend funds, or else risk judicial cancellation of any right to repayment in the event that the debtor is found to have been prone to odious expenditures.

The Cancellation Analysis is more direct than the Jayachandran et al. proposal, while at the same time approximating their concerns for creditor justice and the foreseeability of debt cancellation. An international organization's determination that a regime is "Odious Debt prone" does provide certainty for creditors under the law, but at the expense of accuracy. Where the Jayachandran et al. proposal diverges from mine—namely where an "Odious Debt prone" regime has not committed an odious expenditure—it selects imperfectly for potential odiousness. Diplomats are political actors; they are appointed officials who represent their respective governments. The only instances where one can be sure that a body of such persons has correctly labeled a regime "Odious Debt prone" are those in which the regime in question has demonstrated this tendency by actually engaging in odious expenditures. In the absence of an initial odious expenditure, an "Odious Debt prone" label may well be a politically-motivated false positive. A simpler approach would be to allow a judge—under the procedure proposed in Part III.A—to answer the question of odiousness based on the only reliable determinant: the regime's own expenditures. Of course, creditors remain free, even after the initial odious expenditure, to lend funds to the offending regime, but these lenders would face an increased risk of nonpayment since they would be contributing to the recognizable odious expenditures that are available for cancellation in the event of post-regime change litigation.

From the creditor's standpoint, strict liability may seem overly harsh, particularly in the current sovereign debt market. The financial practices of Sack's day, where "large multinational banks" owned the lion's share of sovereign debt, supported the assumption that only the negligent creditor would be ignorant of the debtor's odious expenditures.<sup>111</sup> Today's market, however, does not seem to support such an assumption. Because bondholders, not banks, own much of the recently acquired sovereign debts, the average creditor is likely unaware of the sovereign's spending practices.<sup>112</sup> Indeed, the eventual plaintiff seeking to collect the debts owed may not even be the original bondholder from whom the sovereign originally contracted the funds.<sup>113</sup> Ben-Shahar and Gulati note that these

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discussion of the effects of the Odious Expenditure Doctrine on out of court settlements, see Part III.B.2, *infra*.

<sup>111</sup> Ben-Shahar & Gulati, *supra* note 8.

<sup>112</sup> *See id.* ("individual holders are often atomistic and don't even know what bond they are holding in their portfolios at any given point in time.").

<sup>113</sup> *See id.* ("The argument can be made that not only are these creditors unlikely to know much about the behavior of the governments that they are lending to, but that the original creditors who did the lending are almost never going to be the ones eventually suing to get paid on their debt instruments.").

problems do not wholly undermine the idea of creditor liability: the bond underwriters are likely to unearth the debtor's spending practices during the due diligence inquiry, and a liquid bond market should reflect any risk of cancellation in the price of the bond itself.<sup>114</sup> Even absent these solutions, strict liability under the Cancellation Analysis is not unforgiving. The bondholder who finds herself governed by the rule this Article proposes may not lose 100% of the repayment otherwise due, for the sustainability analysis will remove from consideration a portion of each of the debtor's obligations.<sup>115</sup>

Additionally, the judicial identification of the initial odious expenditure need not occur after a debt is lent; a risk-averse creditor could petition a court of proper jurisdiction to issue a declaratory judgment<sup>116</sup> regarding the odiousness of the specific expenditures of a potential debtor before the funds are lent. In this way, if the would-be lender's due diligence investigations are inconclusive, a reliable means of determining future risk is available. Interestingly, this *ex ante* mechanism may be used by interests adverse to a regime that has contracted odious debts, such as domestic opposition groups, who wish to hasten financial market sanctions that would make it more difficult for the regime to fund its odious expenditures.<sup>117</sup>

A further limit on the amount of debt available for cancellation under the Odious Expenditure Doctrine is the successor regime's ability to pay. To determine the amount to be paid, the tribunal would sum the net present value of the bona fide expenses that the debtor faces over the debt service period—i.e. the “ordinary and necessary”<sup>118</sup> costs of running the government, including debt service that is excluded from this calculus<sup>119</sup>—and subtract that from the net present value of the debtor's expected income for the same period. Returning to the example, if the debtor's bona fide operating costs are \$1.2 billion, and its tax revenue is

<sup>114</sup> *Id.* at 35-37.

<sup>115</sup> This would also be true of the bank which lent with full knowledge that the debtor has engaged in odious spending in the past.

<sup>116</sup> Such a judgment, if sought from a U.S. federal court, may be barred if there is no impending litigation. See Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (requiring a “case of actual controversy” as a prerequisite for litigating an action for declaratory judgment in federal court).

<sup>117</sup> The ability of these enemies of the regime to win a declaratory judgment would be subject to the rules of standing that apply in the particular court in which they bring suit.

<sup>118</sup> This refers to those expenditures which are generally accepted as *not* odious by the international community. Of course, the exceptions to the baseline Odious Expenditure Analysis apply here as well. See Part III.A, *supra*.

<sup>119</sup> As was discussed *supra*, there is a class of debts which are not subject to this proposed rule, namely, debts issued prior to the first odious expenditure and with regards to which expenditures the creditors had no knowledge at the time the debt was contracted.

\$1.3 billion, the recognizable odious expenditures cannot exceed \$100 million. If the result is negative (e.g., if the operating costs increase to \$1.4 billion, and the tax revenue remains unchanged) the ability to pay would be valued at \$0. The economic projections of a state's financial fortunes can be unreliable, but the burden again would be the debtor's to provide a well-founded estimate. Of course, the creditors can dispute a proffered estimate, and it would then fall to the tribunal to determine the acceptable dollar amount, based on the merits of the claims. The sustainability analysis is focused solely on the debtor's ability to pay, ignoring completely the creditor's ability to forego payment. The justification here is that the creditors, unlike the successor regime, freely chose to enter the sovereign debt market, and by doing so have assumed (and presumably have priced into the debt contract) any risk that the investment may not yield the desired returns. Also, as noted above,<sup>120</sup> debtors have little incentive to litigate for debt cancellation in excess of what they can afford to service because the reputational costs increase with the amount of debt cancelled.<sup>121</sup>

Once the dollar values of the recognizable odious expenditures and the debtor's ability to pay have been determined, the amount of debt that the tribunal may cancel is equal to the amount of recognizable odious expenditures that exceed the debtor's ability to pay. That is to say, that  $D = O - P$  where  $D$  is the amount of debt that is judicially cancelled,  $O$  is the value of the recognizable odious expenditures, and  $P$  is the debtor's ability to pay; if  $D$  is negative, no odious expenditures will be cancelled<sup>122</sup> under this rule.<sup>123</sup>

By way of simplified<sup>124</sup> illustration, suppose that a predecessor regime—which had no outstanding debts but a record of past odious

<sup>120</sup> See *supra* note 99 and accompanying text.

<sup>121</sup> The reputational costs here referred to are those taken into account on the sovereign debt market. Presumably, the act of repudiation (which is essentially similar to the decision to litigate an odious debt claim) brings with it market sanctions. Should the debtor seek to issue sovereign debt in the future, the prior repudiation would likely serve to increase the risk premium the sovereign must pay for the new debt. Given the scale of recent debt repudiations, see, e.g., *Argentina's Debt Restructuring*, *supra* note 99, at 67, there is reason to doubt that these costs are significant, or at least that policymakers with little stake in the credit rating of the next regime will heed them.

<sup>122</sup> Cancellation is not necessarily the only option. A tribunal could propose, facilitate, or approve a rescheduling of the debtor's financial obligations such that the net present value of the new agreement approximates  $D$ .

<sup>123</sup> Such an outcome would indicate either that the debtor is prospering economically or the predecessor regime incurred only a small amount of odious expenditures. Normatively, this result seems justifiable in either instance.

<sup>124</sup> The debts in this illustration are due over the period of one year, so as to represent the net present value of long term debt service, and the successor regime accedes to \$0 in assets from its predecessor.

expenditures—spent \$200 million on a campaign of domestic genocide<sup>125</sup> in year 1. In order to finance these expenditures, this predecessor took out a commercial bank loan of \$100 million in year 1 which must be retired in year 2 with a payment of \$110 million. After the expenditures, the predecessor contracted a second form of debt: it issued bonds worth a total of \$50 million in year 1, and these bonds would come due in year 2 for a total payment of \$60 million. The \$100 million loan was made with specific knowledge by the creditor that the predecessor intended to fund a campaign of domestic genocide, but neither the investment bank that issued the bonds, nor the bondholders knew of these plans. Nevertheless, both the loan creditor and the bond creditors are liable for at least a portion of the odious expenditures in the event that a successor regime would raise the Odious Expenditure Doctrine as a defense in later litigation.<sup>126</sup> During year 1, the predecessor regime spent \$1.4 billion on non-odious expenditures, and took in \$1.45 billion in annual tax and tariff revenue. To review, the Predecessor's total operating budget for year 1 is balanced: \$1.6 billion in expenditures<sup>127</sup> and \$1.6 billion in revenue.<sup>128</sup> On December 31 of year 1, a virtuous successor regime successfully took power from the predecessor regime. In year 2, the successor's income from tariff and tax revenue fell to \$1.3 billion, but through a series of belt-tightening measures, the non-odious costs of running the government fell to \$1.2 billion not including the debt service payments of \$170 million that had become due. These figures are summarized below:

## FINANCIAL SUMMARY

	Year 1	Year 2
Expenditures		
<i>Non-Odious</i>	(\$1,400)	(\$1,200)
<i>Odious</i>	(200)	(0)
<i>Debt Service (Loan)</i>	(0)	(110)
<i>Debt Service (Bonds)</i>	(0)	(60)
Income		
<i>Taxes &amp; Tariffs</i>	\$1,450	\$1,300
<i>Loan</i>	100	0
<i>Bonds</i>	50	0
Total	\$0	(\$70)

\* numbers in millions

<sup>125</sup> Clearly, these expenditures are odious. See *supra* Part III.A.2.b. I assume for the sake of illustration that these amounts are easily demonstrable at the litigation stage.

<sup>126</sup> Recall that under the Cancellation Analysis, a regime's history of odious expenditures will make eligible for cancellation all debt contracted thereafter. See *supra* note 104 and accompanying text.

<sup>127</sup> \$200 million in odious expenditures + \$1.4 billion in non-odious expenditures.

<sup>128</sup> \$1.45 billion in tax and tariff revenue + \$100 million in loan revenue + \$50 million in bond revenue.



If this case were to reach the litigation stage, the Odious Expenditure Doctrine would allow the cancellation of \$70 million<sup>129</sup> in debt to be divided pro rata<sup>130</sup> among the creditors.

## 2. Justifying Redundancy

The outcome of the Cancellation Analysis closely tracks the ideal outcome of sovereign debt restructurings: the debtor's obligations are reduced, and the creditors avoid an entire loss. Gelpern has advanced this similarity as a weakness of any odious debt proposal: that such rules would be redundant to the "lower cost," pre-existing sovereign debt restructuring practices.<sup>131</sup> Offering Iraq as an example, Gelpern argues that because the Iraqi government could have chosen to repudiate its Saddam-era debt as "odious" but nevertheless successfully restructured the debt, to advocate a rule of Odious Debt is to champion a second-best solution to a problem that does not need one.<sup>132</sup>

The redundancy that this rule achieves with respect to the ideal underlying practice actually *supports* its adoption, largely because this ideal is rare in practice, and difficult to achieve from the debtor's point of view. It is in the successor regimes' best interest to attempt debt restructuring before litigation, because the reputational costs of seeking repudiation at the outset of a negotiation will likely reap high risk premiums and decreased access to capital on the regime's next loan.<sup>133</sup> But in most debt negotiations, noticeably unlike Iraq's situation,<sup>134</sup> the specter of creditor suits overshadows the restructuring talks, usually to the debtor's disad-

<sup>129</sup> Because the odious expenditures totaled \$200 million, but the successor regime faced payments due of only \$170 million, *O* is equal to the debt services costs, or \$170 million. *P* is valued at \$100 million (\$1.3 billion in revenue - \$1.2 billion of non-odious expenditures). Thus, *D* = \$170 million - \$100 million, or \$70 million.

<sup>130</sup> This means that the commercial bank and the bondholders would take a haircut of about \$45.3 million ( $(\$110 \text{ million} / \$170 \text{ million}) * \$70 \text{ million}$ ) and \$24.7 million ( $(\$60 \text{ million} / \$170 \text{ million}) * \$70 \text{ million}$ ) respectively. Interestingly, as the debt's interest rate increases, so does the creditor's exposure to debt reduction under this rule.

<sup>131</sup> Gelpern, *supra* note 3, at 407. For similar reasons, the International Law Commission decided to omit an Odious Debt section from its Articles on state succession. *See supra* note 4.

<sup>132</sup> *See id.* ("I suggest that countries often are able to get the same debt reduction benefit at a lower cost by going outside the doctrine and framing their decision as a financial restructuring, a composition rather than a repudiation. Iraq is a particularly good example . . .").

<sup>133</sup> *See* Jayachandran et al., *supra* note 8 at 8-12 (providing economic models for these costs).

<sup>134</sup> Both the United Nations Security Council and the United States immunized Iraqi petroleum and natural gas assets from legal attachment, thus effectively killing any creditor suits. *See* S.C. Res. 1483, ¶ 22, U.N. Doc. S/RES/1483 (May 22, 2003); Exec. Order No. 13,303, 68 C.F.R. 31931 (2003).

vantage.<sup>135</sup> Needless to say, it is the rare debtor that enjoys a moratorium on creditor lawsuits and an immunization of its most valuable assets. The Odious Expenditure Doctrine can help simulate the benefits Iraq enjoyed and thereby aid the unfortunate debtor that has no powerful allies who are able to force its creditors to negotiate a restructuring. If hauled before a tribunal, this rule will allow the debtor to assert a legal defense that will provide for an outcome that approximates the settlement it was unable to broker on its own. Indeed, with an affirmative defense to raise before a court, the debtor may be able to gain an upper hand at the settlement stage, making it more likely that the parties will mutually agree to forego litigation altogether.

Through the two-pronged approach outlined above, the Odious Expenditure Doctrine attempts to achieve Sack's goals of justice and security through a process that is well-suited for courtroom application to a broad scope of cases. The problem remains, however, how to bring this rule into force, and which courts should be litigating these disputes. The following Part discusses these issues.

#### IV. IMPLEMENTATION

Parts II and III discuss the need for a new rule of law that would allow the judicial cancellation of sovereign debts according to the Odious Expenditure Doctrine, and they explore how such a rule may be applied in an adjudicative setting. What they presuppose is that such a rule can be implemented. Of course, no existing court has recognized this rule, and it exists nowhere in international law.<sup>136</sup> This Part surveys the various options for implementation of the Odious Expenditure Doctrine.

##### A. *The Case For a Separate Doctrine*

As Buchheit et al. and Feibelman assert, doctrines such as agency law,<sup>137</sup> the defense of unclean hands,<sup>138</sup> an analogy to corporate veil-piercing,<sup>139</sup> and equitable subordination<sup>140</sup> may all be effective in persuading domestic courts, especially those with expertise in bankruptcy

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<sup>135</sup> To be sure, certain hedge funds—known as “vulture” funds—have turned hefty profits by purchasing distressed sovereign bonds and litigating these claims to the hilt. See, e.g., *Elliott Associates, L.P. v. Banco de la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999) (holding that under New York law, vulture funds are not prevented from litigating their bond claims, even though the bonds were acquired for the primary purpose of recovering the amount due). The ability of these funds to precipitate a “rush to the courthouse” colors debt negotiations, giving the creditors a valuable threat should they be unhappy with the debtor's demands.

<sup>136</sup> See *supra* note 4.

<sup>137</sup> See Buchheit et al., *supra* note 3, at 1237-45.

<sup>138</sup> See *id.* at 1235-37.

<sup>139</sup> See *id.* at 1245-51.

<sup>140</sup> See Feibelman, *Equitable Subordination*, *supra* note 10.

workouts,<sup>141</sup> to treat odious debt claims favorably. It is true that these domestic legal techniques are able to provide de facto odious expenditure cancellation as a theoretically sound, but second-best solution to the problem of odious debts. Relying on domestic courts to apply a mixed bag of legal doctrines to the problem of odious debt risks judicial refusal to adapt the current municipal laws to address odious debt concerns. Furthermore, there is a strong chance that the judge assigned to the case may not have the requisite ingenuity or expertise to adapt the litigation process into a mechanism for debt settlement.

To rely on domestic law solutions forfeits the broad applicability that an international solution can provide. If widely recognized, international law binds many states, not merely a few. For the Odious Expenditure Doctrine to take root, it must apply in every venue that is likely to adjudicate a sovereign debt dispute. Many contemporary sovereign debt cases involve bond issuances that include a choice-of-law provision.<sup>142</sup> These provisions select domestic laws to apply to any disputes that may arise over the debt, and sometimes even select a forum for adjudication. It stands to reason that one need only persuade the jurisdictions that supply the law applicable to these disputes to adopt a domestic analog to the Odious Expenditure Doctrine, and near-universal coverage would follow. The problem with this approach is that the jurisdictions may resist for fear of losing their preferred status among parties to a bond agreement; there is a surfeit of domestic courts in the world, each with the ability to adjudicate claims submitted to it.<sup>143</sup> Expert jurisdictions in New York, Paris, and London will likely have an advantage in the hierarchy of preferred jurisdictions, but genuine competition for these cases should not be dismissed out of hand. An international rule would slow this race to the bottom by setting a uniform procedure that binds every court that adjudicates sovereign debt disputes.

Instead of leaving the decision to implement the Odious Expenditure Doctrine to a domestic legislature or court, an international rule would allow litigants to a debt dispute to benefit from the Doctrine in either domestic or international courts. International law binds states to the commitments they undertake, and in doing so, it can harness the legal procedures of domestic courts, holding the state in which the case is litigated liable for a misapplication of the international legal principles it is

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<sup>141</sup> See Marcus Miller & Dania Thomas, *Sovereign Debt Restructuring: The Judge, the Vultures and Creditor Rights* 7-8 (Ctr. for Econ. Policy and Research, Discussion Paper No. 5710, 2006), available at <http://ssrn.com/abstract=923581> (arguing that strategic judges, following the example of Judge Griesa in the Southern District of New York, can serve as a sovereign bankruptcy surrogate by the way they adjudicate sovereign debt litigation).

<sup>142</sup> See, e.g., *Elliott Associates, L.P. v. Banco de la Nacion*, 194 F.3d 363 (2d Cir. 1999).

<sup>143</sup> See Ben-Shahar & Gulati, *supra* note 8.

bound to obey. Even if an international rule adopting the Odious Expenditure Doctrine exists, and the state of litigation undertakes an obligation to apply the rule domestically, it is not necessarily true that the defense is available in a domestic court. This analysis depends on whether the international rule itself is of a self-executing nature,<sup>144</sup> and this question can turn on the nature of the domestic legal regime.<sup>145</sup> Regardless of whether the state of litigation recognizes the Odious Expenditure Doctrine as self-executing, it is bound to apply the rule in its domestic courts or else risk liability on the international stage.<sup>146</sup> If the state of litigation denies the Odious Expenditure Doctrine's applicability, it will have breached an international legal obligation to the debtor.<sup>147</sup> Remedy for this breach is not always effective, but if the two states (the debtor and the adjudicating state) agree to litigate the issue before the International Court of Justice (ICJ),<sup>148</sup> or if both states have accepted compulsory jurisdiction to the Court,<sup>149</sup> then the ICJ will be able to hear the case and provide the debtor relief under this rule.<sup>150</sup> Alternatively, the debtor state may sue the adjudicating state for the breach in other tribunals with proper juris-

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<sup>144</sup> An international rule that is self-executing can be enforced in domestic court without being adopted as a domestic law. See *Foster & Elam v. Neilson*, 27 U.S. 253, 314 (1829).

<sup>145</sup> *Monist* states, such as the Netherlands, treat international law as binding invariably, while *dualist* states such as the United States, only regard treaties with certain features as self-executing. See DAMROSCH ET AL., *supra* note 25, at 160; see also, RESTATEMENT, *supra* note 13, § 111 cmt. h.

<sup>146</sup> If the adjudicating state has signed a treaty pledging that it would recognize the Odious Expenditure Doctrine with respect to the debtor, then an international legal obligation exists to do so, and failing to codify this doctrine in domestic law, or to decide against the applicability of this doctrine in its municipal courts constitutes a breach of this obligation. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, arts. 1-2, U.N. Doc. A/56/10 (2001) (defining breaches of international obligations as wrongful acts attributable to the breaching state).

<sup>147</sup> *Id.*

<sup>148</sup> See ICJ Statute, *supra* note 60, art. 36, para. 1. This agreement can be made on an ad hoc basis (through a *compromis*), or it could be included within the dispute settlement provisions of the treaty that provides the rule, in the form of a *compromissory clause*.

<sup>149</sup> *Id.* art. 36, para. 2.

<sup>150</sup> International courts are competent to hear sovereign debt cases. The predecessor to the ICJ, the Permanent Court of International Justice, has been charged with resolving sovereign debt disputes, though not involving a claim of odious debt. See *Case Concerning the Payment of Various Serbian Loans Issued in France* (France v. Kingdom of the Serbs, Croats and Slovenes) 1929 P.C.I.J. (ser. A) No. 20 (July 12) (adjudicating a series of bonds issued by the Serb-Croat-Slovene Kingdom); *Société Commerciale de Belgique* (Belgium v. Greece) 1939 P.C.I.J. (ser. A/B) No. 78 (June 15) (adjudicating a bond agreement in which the Greek government agreed to

diction, such as the European Court of Justice, or an ad hoc arbitral tribunal. In these circumstances, the protections of an international legal rule of Odious Expenditure Analysis would extend to regimes succeeding to the debts of a predecessor that had spent its funds odiously.

## B. *Options in International Law*

The options to implement the Odious Expenditure Doctrine on the international level are limited to positive international law, because the doctrine obviously fails the state practice requirement for establishing a rule of customary international law.<sup>151</sup> Regarding positive international law, there are a number of options regarding implementation: the rule could be adopted as a component to a new multilateral treaty, as an addendum to the various Bilateral Investment Treaties (BITs) that have been executed between states, or even as part of the body of sovereign bankruptcy rules to be administered by a Sovereign Debt Restructuring Mechanism (SDRM).<sup>152</sup> Each of these possibilities is discussed in turn.

### 1. Multilateral Treaty

The most straightforward means of introducing the Odious Expenditure Doctrine into international law is by treaty. It is not inconceivable that an Odious Expenditure Treaty or Convention may be formulated by a multilateral meeting of states, or even the United Nations General Assembly,<sup>153</sup> though for such a Treaty or Convention to enter into force a sufficient number of member states must ratify the document.

There are two primary ways to incorporate the Odious Expenditure Doctrine by treaty: it could either be the focus of a narrow, stand-alone treaty governing only the settlement of Odious Expenditure claims, or part of a broader treaty governing the rules of state succession. The latter option, if undertaken, would represent a departure from current efforts to codify this area of international law. In 1983, in fulfillment of a Gen-

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issue, as payment for services rendered, bonds to a Belgian firm). Neither of these cases arose out of a domestic adjudication.

<sup>151</sup> Indeed, even Sack's Odious Debt Doctrine cannot be argued to be a part of customary international law, given that the controversy surrounding its application in courts indicates that it fails the *opinio juris* requirement. For discussion of customary international law, see *supra* note 60.

<sup>152</sup> A complete index of all BITs in force can be found at UNCTAD Investment Instruments Online, [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch___779.aspx) (last visited Feb. 4, 2008).

<sup>153</sup> The General Assembly does not have lawmaking power per se, but it can instigate international conversations that may later produce a document that will enter into force pursuant to ratification by a significant number of member states. For a discussion of the UN and its lawmaking authority, see generally BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* (3d rev. ed., 2005).

eral Assembly resolution,<sup>154</sup> over ninety states met in Vienna to take part in a conference to discuss a new treaty that would establish international rules of state succession regarding property, archives, and debts.<sup>155</sup> The product of that conference, the *Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts*, which itself has not yet entered into force,<sup>156</sup> included no provision dealing with odious debts.<sup>157</sup> The International Law Commission has also discussed whether odious debts ought to be separately dealt with in a treaty governing state succession to the debts of its predecessor, and decided that that “the rules formulated for each type of succession of States might well settle the issues raised by the question and might dispose of the need to draft general provisions on it.”<sup>158</sup>

The foregoing examples demonstrate that significant barriers to implementing the Odious Expenditure Doctrine by way of multilateral treaty are familiar: (1) a consensus must be attained on which many states agree, and (2) policymakers must be convinced that a separate doctrine dealing with these debts is indeed necessary. It is beyond the scope of this Article to analyze the prevailing political preference regarding a treaty regime to deal with state succession to debt, but it must be acknowledged that the proponents of the odious debt doctrine<sup>159</sup> have work left to do. On the second point, the discussion above<sup>160</sup> regarding the justifications for a stand-alone doctrine, as opposed to an application of existing laws, is relevant. Even though the current legal regime may be able to encourage the settlement of many odious debts, there are cases that will fall through the cracks. A universal application of the Odious Expenditure Doctrine would ensure that all debtors have access to the procedure. While a multilateral debt succession treaty may be the most effective means of instituting a positive law rule of odious expenditure cancellation, it also requires heavy cooperation and transaction costs.

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<sup>154</sup> G.A. Res. 36/113, ¶ 2, U.N. Doc. A/RES/36/113 (Dec. 10, 1981).

<sup>155</sup> See Int'l L. Comm'n, Summary of the Work on Succession of States in Respect of Matters Other Than Treaties (June 30, 2005), [http://untreaty.un.org/ilc/summaries/3\\_3.htm](http://untreaty.un.org/ilc/summaries/3_3.htm).

<sup>156</sup> See *id.* (noting that the document remains open for accession, and will enter into force once fifteen states ratify).

<sup>157</sup> See 1983 Succession Convention, *supra* note 4, arts. 32-42 (dealing with succession to debts).

<sup>158</sup> *Report of the Int'l L. Comm'n on the Work of Its Thirty-Third Session*, *supra* note 4, at 79.

<sup>159</sup> See, e.g., Jubilee Iraq, <http://www.jubileeiraq.org/blog>, last visited Feb. 4, 2008; Odious Debts, <http://odiousdebts.org/odiousdebts/index.cfm> (last visited Feb. 4, 2008).

<sup>160</sup> See Part IV.A, *supra*.

## 2. Bilateral Investment Treaties

An unorthodox way to implement the Odious Expenditure Doctrine would be to amend the Bilateral Investment Treaties (BITs)<sup>161</sup> that have been negotiated between various states. Such an amendment would include a provision subjecting all future sovereign debts contracted by either party and held by creditors who are “persons”<sup>162</sup> of either party to the prescriptions of the Odious Expenditure Doctrine. These treaties pervade international economic relations: the number of BITs in effect have increased five-fold in the past twenty-five years,<sup>163</sup> introducing a new wave of dyadic legal protections that are generally aimed at increasing foreign investment through explicit creditor protections.

The protections that BITs afford to foreign investors are both substantive and procedural. Like most trade agreements, BITs include the familiar guarantees of national treatment,<sup>164</sup> most favored nation treatment,<sup>165</sup> and certain baseline privileges,<sup>166</sup> *inter alia*. To protect these rights, an aggrieved investor can legally bring a suit for damages in an arbitral hearing to be conducted under the rules of either ICSID (International Center for the Settlement of Investment Disputes) or UNCTRAL (United Nations Commission on International Trade Law), depending on the parties’ membership.<sup>167</sup> The outcome of this arbitral hearing is binding upon the parties and enforceable.<sup>168</sup>

Their prevalence and the relative ease with which they enter into force makes the amendment of these treaties an attractive option for instituting the Odious Expenditure Doctrine, but there are some significant drawbacks. Initially, the sheer number of BITs that would have to be renegotiated indicates that the task may be too great to achieve sufficient

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<sup>161</sup> For the purposes of this section, the United States’ 2004 Model BIT is used as a representative treaty. An “investment” for the purposes of this BIT would seem to include debts issued by a sovereign as well as private debts. *See, e.g.*, United States Model Bilateral Investment Treaty art. 1, [http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf) [hereinafter 2004 Model BIT] (defining salient terms).

<sup>162</sup> “Persons” in the context of BITs refers to an individual citizen or other entity, including corporations, that is affiliated with the party via citizenship or location of incorporation, respectively. *Id.*

<sup>163</sup> United Nations Conference on Trade and Investment, UNCTAD Analysis of BITs, (2004), [http://www.unctadxi.org/templates/Page\\_\\_\\_\\_1007.aspx](http://www.unctadxi.org/templates/Page____1007.aspx) [hereinafter UNCTAD Analysis].

<sup>164</sup> *See* 2004 Model BIT, *supra* note 161, art. 3 (guaranteeing that there will be no legal discrimination between foreign and domestic investors).

<sup>165</sup> *See id.* art. 4 (guaranteeing that no other party will be treated more favorably than the party with which the BIT in question is conducted).

<sup>166</sup> *See id.*

<sup>167</sup> Article 24 of the 2004 Model BIT governs this procedure, *id.* art. 24, as excepted by article 26.

<sup>168</sup> *See id.* art. 34.

coverage for the Odious Expenditure Doctrine to take root; the United States alone has signed forty-eight of these instruments.<sup>169</sup> This concern may be overcome if a critical mass of influential states insist on including such a provision within their BITs, thus exporting the practice to other states, and possibly creating an international culture of acquiescence to the Odious Expenditure Doctrine.<sup>170</sup>

Even if it were possible to spread an international culture of antagonism to odious expenditures, it is unclear whether any two parties would be interested in initiating such a movement. First, the function of a BIT is, at least partially, undermined by the very purpose of the Odious Expenditure Analysis. Given that parties agree to a BIT in order to provide security for individual investors, it is counter-intuitive to include within the treaty a clause by which the would-be investor could be divested of any return on her investment if she lends funds to the state itself. Upon closer investigation, this conflict is not all-encompassing, for BITs are aimed at fostering foreign investment in both private and public enterprises, and only funds lent to the state itself would be susceptible to cancellation as an odious expenditure. The private investments would remain fully protected. This realization raises another and more problematic issue, a state faced with signing a BIT that includes an odious expenditure provision would essentially agree to pay a premium for any debt it will later issue. By consenting to such a provision, the state would voluntarily enhance the risk to its financiers relative to those of other sovereigns. Put another way, the state agreeing to be bound by an odious expenditure provision will be devaluing itself as an investment opportunity. If faced with an ultimatum, this added cost may be subsumed by the concomitant benefits that the BIT offers, in which case the state may accept the clause at the behest of its treaty partner. The United States, for its relatively stable government and economy, seems well suited to demand the inclusion of an odious expenditure provision within its BITs, since its own risk premium is low.

The barriers to the inclusion of an odious expenditure provision within a sufficient number of BITs to usher in a wide-ranging regime of odious expenditure regulation seem insurmountable. However, an influential and motivated state could possibly begin a new international regime that regulates and deters these spending practices.

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<sup>169</sup> UNCTAD Analysis, *supra* note 152 (follow “Country List of BITs” hyperlink; then select “United States of America” from the dropdown menu).

<sup>170</sup> Acculturation can be an effective means of altering state behavior. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights*, 54 DUKE L. J. 621, 646-56 (2004) (explaining the acculturative effects of international law in the human rights context).



### 3. The Sovereign Debt Restructuring Mechanism

The Sovereign Debt Restructuring Mechanism (SDRM) is a regulatory apparatus that would supplant the current ad hoc system governing sovereign debt workouts.<sup>171</sup> In the wake of the Argentine debt crisis,<sup>172</sup> the IMF proposed the creation of the SDRM,<sup>173</sup> an idea which had been percolating in the law reviews for some time.<sup>174</sup> After receiving some initial support, the IMF's proposal was abandoned when the United States (and its substantial bloc of votes in the Board of Governors) came out against the idea.<sup>175</sup>

Given that the SDRM proposal has failed once, this discussion may be moot; but were it to regain currency, the inclusion of the rule proposed in this Article would fit well with the mechanism's underlying procedure. Where the SDRM would allow the debtor to instigate proceedings once convinced that its debt load is unsustainable,<sup>176</sup> the procedure could

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<sup>171</sup> See generally International Monetary Fund, *Proposals for a Sovereign Debt Restructuring Mechanism (SDRM)* (Jan. 2003), <http://www.imf.org/external/np/exr/facts/sdrm.htm>.

<sup>172</sup> For the IMF's account of the history, causes, aftermath, and lessons learned from this financial crisis, see generally INT'L MONETARY FUND, POLICY DEV. AND REVIEW DEP'T ET AL., *LESSONS FROM THE CRISIS IN ARGENTINA* (2003), <http://www.imf.org/external/np/pdr/lessons/100803.pdf>.

<sup>173</sup> See Anne Krueger, First Deputy Managing Dir., Int'l Monetary Fund, *Speech at the American Enterprise Institute: International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring* (Nov. 26, 2001) (transcript available at <http://www.imf.org/external/np/speeches/2001/112601.htm>) (proposing the SDRM).

<sup>174</sup> Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured?*, 53 EMORY L.J. 763, 763 (2004). As Bolton and Skeel note, the primary articles discussing the SDRM include Christopher Oechsli, *Procedural Guidelines for Renegotiating LDC Debts: An Analogy to Chapter 11 of the U.S. Bankruptcy Reform Act*, 21 VA. J. INT'L L. 305 (1981) (an early discussion); Kenneth Rogoff & Jeromin Zettlemeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49 IMF STAFF PAPERS 470 (2002) (reviewing the literature); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (2000) (providing a review of the normative justifications for applying bankruptcy law to sovereign debt workouts); see also Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299 (2005). For an overview of sovereign lending generally, and an argument against instituting an SDRM, see LEX RIEFFEL, *RESTRUCTURING SOVEREIGN DEBT* (2003).

<sup>175</sup> See John W. Snow, U.S. Sec'y of the Treasury, *Statement at the Meeting of the International Monetary and Financial Committee* (Apr. 12, 2003) (transcript available at <http://www.imf.org/external/spring/2003/imfc/state/eng/usa.htm>) ("The IMF's exploration of a sovereign debt restructuring mechanism has raised important issues. But clearly, given the reactions of markets and emerging market countries, we should move forward with collective action clauses. . . . [I]t is neither necessary nor feasible to continue working on SDRM.").

<sup>176</sup> See RIEFFEL, *supra* note 174, at 268.

employ the Odious Expenditure Doctrine as an initial screening rule where applicable.<sup>177</sup> The underlying SDRM proceedings that apply to states seeking to refinance their entire debt load—whether odious or not—would require first the disclosure of all relevant debts, and the registration of creditors.<sup>178</sup> Creditors would be compelled to cooperate with the mechanism's proceedings by limitations on the enforceability of their claims in outside proceedings.<sup>179</sup> Once the parties are identified and their claims assessed, the SDRM would proceed with bankruptcy-style debtor settlement proposals and creditor votes to approve; the proceedings would be mediated by the Dispute Resolution Forum (DRF)—a court specially established under this mechanism.<sup>180</sup>

As a part of the SDRM, the Odious Expenditure Doctrine would be a more rapid and debtor-friendly side procedure providing debtors who have suffered the odious expenditures of a prior regime a more direct route to a sustainable debt load. Instead of forcing the debtor to negotiate with the creditors to arrive at an agreeable write-down, the deserving debtors would be allowed to litigate its claims under the procedure outlined in Part III before the judges of the DRF. This system would presumably be preferable for those debtors who can easily prove the odiousness of the qualifying expenditures, but even for those who cannot, the availability of what would likely prove to be a creditor-hostile forum would play to the debtor's benefit when the creditors vote on whether to approve the debtor's proffered settlement plan in the general SDRM procedure. Normatively it seems apt to allow the victims of odious expenditures an advantage in expunging the debt that helped make them possible, and an SDRM that embraces the Odious Expenditure Doctrine would achieve this end.

Of course, the weaknesses of this track adopt the weaknesses of the SDRM itself. In order to enter into force, the SDRM must either be passed as an amendment to the IMF Articles of Agreement—requiring a qualified majority of the members' votes<sup>181</sup>—or be adopted by a sufficient number of member states<sup>182</sup> as an individual treaty. This is, indeed, a high bar to clear, but perhaps, in the unfortunate event that another

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<sup>177</sup> As proposed, the SDRM would apply equally to debtors who have no recognized odious expenditures, *id.*; these debtors would then proceed according to the procedure proposed.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 269.

<sup>181</sup> See Articles of Agreement of the International Monetary Fund art. XXVIII (a), July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (requiring “three-fifths of the members, having eighty-five percent of the total voting power” to agree to the amendment).

<sup>182</sup> Currently, the IMF includes 184 members. See The IMF at a Glance: Factsheet (Oct. 2007), <http://www.imf.org/external/np/exr/facts/glance.htm>.

debt crisis occurs, the once-defeated SDRM proposal will regain the momentum it once enjoyed.

At the end of the day, the options for implementing the Odious Expenditure Doctrine are not perfect, but they are available and should be pursued by those advocates seeking to implement a workable rule of odious debt cancellation into the realm of international law.

#### V. CONCLUSION

Critics of Sack's "doctrine" of Odious Debt have identified its shortcomings of scope and administrability, but his vision—to relieve those who have endured the odious acts of a vile regime for paying a second price for their suffering—should not be abandoned. This Article has put forth a proposal by which such a goal can be achieved in a workable and sufficiently inclusive manner, while at the same time respecting the balance between market certainty and debtor justice. By focusing its analysis on the expenditures of a regime, and not the demerits of its governmental structure, the Odious Expenditure Doctrine is a rule that allows courts to systematically adjudicate the nuances of contemporary odious debt claims. Thus, this new Doctrine is a viable solution to the problem of odious debts, a problem which has lingered without a definitive answer for over a century.

