

Zimbabwe's Odious Inheritance: Debt and Unequal Land Distribution

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The Zimbabwean government is currently engaging with the country's creditors in order to reduce Zimbabwe's high external debt burden. While recent debate has focused on the debts accumulated under Robert Mugabe's rule, this article seeks to re-examine the obligations that Zimbabwe inherited on achieving independence in 1980. It argues that the country would have been justified in repudiating the monetary debt it inherited from the colonial era, since there is no positive rule of customary international law that obliged Zimbabwe to assume responsibility for the colonial era debt and, moreover, the first democratically elected government would have

had good reason to invoke the (controversial) odious debt doctrine. The article also highlights what can be characterised as an even more odious obligation that the newly independent state inherited: a situation where most of the country's prime farmland had been alienated from the indigenous population, coupled with a lack of meaningful compensation from its former colonial ruler, the UK, to help rectify this injustice. The current negotiations may therefore provide an opportune moment for Zimbabwe to remind the international community of its odious inheritance as it seeks to negotiate down its current debt load.

Le gouvernement Zimbabwéen a entamé des discussions avec ses créanciers dans l'optique de réduire le fardeau de la dette extérieure du pays. Alors que les récents débats étaient dirigés vers la dette accumulée sous le régime de Robert Mugabe, cet article réexamine les obligations dont le Zimbabwe a hérité en réalisant l'indépendance en 1980. Le présent article défend que ce pays aurait pu légitimement répudier la dette contractée à l'époque coloniale puisqu'il n'existe pas de règle positive en droit international coutumier obligeant le Zimbabwe à assumer la responsabilité d'une telle dette. De plus, le premier gouvernement à avoir été élu

démocratiquement aurait eu des motifs valables pour invoquer la doctrine (controversée) de la dette odieuse. L'article met également en lumière une obligation d'autant plus odieuse dont l'état nouvellement indépendant a hérité : la majorité des terres agricoles du pays ont été enlevées aux peuples indigènes sans compensation significative pour rectifier cette injustice de la part du souverain colonial précédent, le Royaume-Uni. Par conséquent, la présente négociation relative à la baisse du fardeau de la dette est l'occasion pour le Zimbabwe de rappeler à la communauté internationale l'héritage odieux dont il a été victime.

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Whoever succeeds President Robert Mugabe, leader of Zimbabwe's governing Zanu-PF party, and the only ruler Zimbabweans have known since their state achieved independence thirty-five years ago, will doubtless be confronted with the ongoing problem of the country's troubled economy.¹ A major component of this is the state's high volume of external debt, equivalent to half of its GDP.² This is especially burdensome for ordinary Zimbabweans, around 70 percent of whom live in poverty.³ Not surprisingly,

¹ Mugabe celebrated his ninety-first birthday on 21 February 2015; an especially remarkable achievement in a country where average life expectancy is only 58 years. See The World Bank (citing statistics for the year 2012), *World Bank*, online: <data.worldbank.org/country/zimbabwe>.

² According to Zimbabwe's Ministry of Finance and Economic Development, public and publicly guaranteed external debt as at of June 2014 stood at US\$6.9 billion, representing 51 percent of GDP. This debt is forecast to increase to US\$7.26 billion by December 2014. See Zimbabwe, "2014 Mid-year Fiscal Policy Review Statement", presented by Finance Minister Patrick Chinamasa to the Zimbabwean parliament (11 September 2014) at 23 paras 86 & 88 <www.zimtreasury.gov.zw/2014-mid-term-fiscal-policy-review>. In 2008, Zimbabwe's external debt to GDP ratio was the highest among 33 African states, amounting to 186 percent of GDP: see Léonce Ndikumana & James K Boyce, *Africa's Odious Debts* (New York: Zed Books, 2011) at 101.

³ In 2011, 72.3 percent of the Zimbabwean population was classified as living below the national poverty line: see The World Bank, "Poverty headcount ratio at national poverty lines (% of population)", *World Bank*, online: <data.worldbank.org/indicator/SI.POV.NAHC>.

attempts are under way to secure debt relief from the country's creditors, although citizens' groups and anti-debt campaigners have long argued that many of these loans should never have been contracted in the first place, having brought no benefits to Zimbabwe or its citizens.

More specifically, it has been suggested that much of this debt merits nonpayment on account of its odiousness. That is, the debt was contracted without the consent of the vast majority of Zimbabweans, it failed to benefit them, and creditors were fully aware of these facts when the loans were made. In this respect, much attention has been paid to the debt accumulated under the long reign of Robert Mugabe's Zanu-PF administration. Indeed, the administration itself has been cited as the epitome of an odious regime, as it has turned increasingly autocratic, corrupt, and violent in the course of its three-and-a-half decades in power.⁴

This article, however, attempts to take a step back. It focuses on the odious obligations that Zimbabwe inherited on achieving independence in 1980, the existence of which have tended to be forgotten as the Mugabe regime's notoriety grows with each passing year. In this respect, a comparison can be drawn with the brutal and unlawful invasions of (mostly) white-owned farms post-2000, which, although clearly reprehensible, have perhaps served to mask the iniquities and violence of the colonialist era, when land theft and the forced relocation of Zimbabwe's indigenous population created the highly unequal pattern of land distribution that persists in the country to this day. In this regard, the argument is made that the inadequacy of compensation provided by Zimbabwe's former colonial ruler, Britain, to fund land redistribution created an additional odious obligation for the post-independence state—one that has proved extremely destabilizing for the country.

This article is divided into three sections. Section One sets the scene by briefly recounting the run-up to the end of white-minority rule in Zimbabwe and noting the monetary debt that the country inherited on finally achieving independence proper in 1980. Section Two then considers what rules of international law, if any, govern state succession to public debt, paying particular attention to the case of ex-colonies, and the relevance of the odious debt doctrine (ODD) to post-independence Zimbabwe. Particular emphasis will be placed on the war and subjugation debt exceptions out of which the concept of ODD was fashioned. Section Three then seeks to explain why Zimbabwe may nevertheless have decided to assume responsibility for the Rhodesian-era debt despite apparently having good grounds for disclaiming it. This will be followed by an examination of what is arguably another form of odious obligation that Zimbabwe inherited on independence: a situation in which the majority of the country's prime land had been alienated from the indigenous population without any meaningful compensation. It will be concluded that it might well be in Zimbabwe's interest to remind the international community of its odious inheritance as it seeks to negotiate down the country's debt burden.

⁴ Patrick Bolton & David Skeel, "Odious Debts or Odious Regimes?" (2007) 70 LCP 83 at 98. An odious regime is defined by the authors as one that systematically suppresses its people and/or is engaged in systematic looting.

1. A BRIEF HISTORY

As with South Africa and most other African nations, Zimbabwe (known variously throughout its colonial history as Southern Rhodesia, Rhodesia, and Zimbabwe-Rhodesia)⁵ suffered a long period of colonial exploitation prior to attaining independence, beginning in earnest with the arrival of Cecil Rhodes and the establishment of the British South Africa Company in the late 1880s to mine the country's mineral resources.⁶ It was to culminate in the issuing of a unilateral declaration of independence (UDI) from the United Kingdom in 1965 by the Rhodesian Front government⁷ of Ian Smith, aimed at resisting the implementation of black-majority rule that had occurred elsewhere in Africa, including the neighbouring states of Zambia (formerly Northern Rhodesia) and Malawi (formerly Nyasaland).⁸

UDI triggered a long war of liberation waged against the country's white-minority rulers⁹ on behalf of the two main opposition parties—Mugabe's Zimbabwe African National

⁵ Named after Cecil Rhodes, the founder of the British South Africa Company, which colonized much of the nation's territory on behalf of the British Crown in the late nineteenth century, the nation's official title throughout its colonial history was Southern Rhodesia. The Rhodesian Front government purported to change the name to Rhodesia in 1964 (the year in which Northern Rhodesia achieved its independence as Zambia), but neither the new title nor the legitimacy of the Rhodesian regime after its unilateral declaration of independence were recognized by the international community. The name Zimbabwe-Rhodesia was adopted in 1979, in the run-up to independence, with the country acquiring its present name, the Republic of Zimbabwe, on finally achieving independence in 1980. The pre-independence state is referred to as 'Rhodesia' here purely in the interests of economy.

⁶ Further discussion of this will be found at Part 3.2 below.

⁷ The Rhodesian Front party had been voted into power in 1962, with Winston Field as prime minister. After failing to make progress in securing independence from the British (who were insisting on greater African participation in the political process), and reluctant to take the ultimate step of a unilateral declaration, Field was replaced as prime minister by Ian Smith in April 1964. See Alois S Mlambo, "From the Second World War to UDI, 1940–1965" in Brian Raftopoulos & Alois Mlambo, eds, *Becoming Zimbabwe* (Harare: Weaver Press, 2009) 75 at 110; Ruth Weiss & Jane L Parpart, *Sir Garfield Todd and the Making of Zimbabwe* (London: British Academic Press, 1999) at 157.

⁸ All three states having formerly been united in the Federation of Rhodesia and Nyasaland (also known as the Central African Federation), created by Britain in 1953 and dissolved, in the face of mounting internal opposition, ten years later.

⁹ Native Africans make up the overwhelming majority of Zimbabwe's population (over 99 percent) and are mostly related to one of two ethnic groups: the Shona (who account for over 80 percent of the population) and the Ndebele (who comprise about 14 percent of the population, and mostly reside in the south west of the country). The remainder of the population, comprising less than one percent of the total, are made up of Europeans (mainly of British and South African ancestry), Asians (most of whom trace their ancestry to Indian settlers who came to the country in the decades following colonisation), and those of mixed race (largely of African and European ancestry, and referred to as 'Coloured' in the colonialist terminology). See Zimbabwe National Statistics Agency, *Zimbabwe Population Census 2012* (Harare: Population Census Office, 2012), online: Zimbabwe National Statistics Agency <www.zimstat.co.zw/dmdocuments/Census/CensusResults2012/National_Report.pdf> at 22; United States, Central Intelligence Agency, *CIA World Fact Book* (Central Intelligence Agency), online: Central Intelligence Agency <www.cia.gov/

Union (Zanu) and the Zimbabwe African People's Union (Zapu), led by Joshua Nkomo—which finally drove the crumbling Smith regime to reach an accommodation with a group of black nationalist leaders headed by Bishop Abel Muzorewa of the United African National Council.¹⁰ This in turn led to the election of a government of national unity in 1979, with Bishop Muzorewa acting as prime minister, followed by formal negotiations later that year at a constitutional conference convened at London's Lancaster House aimed at bringing the war to an end, and agreeing the basis on which Zimbabwe would become an independent state. Chaired by the then British Foreign Secretary, Lord Carrington, the conference involved members of the Rhodesian government, including Muzorewa and Smith, representatives of the Patriotic Front,¹¹ including Mugabe and Nkomo, and members of the UK government.¹² The conference resulted in an agreement on the terms of the new state's constitution, together with arrangements for the pre-independence period, including the implementation of a ceasefire.¹³ The country finally achieved independence as the Republic of Zimbabwe in 1980, when Robert Mugabe's Zanu-PF party was decisively voted into power in the country's first fully democratic elections,¹⁴ with Mugabe himself appointed prime minister.¹⁵

Zimbabwe's external debt at independence stood at just under US\$700 million, of which nearly US\$594 million was owed to private lenders, around US\$98 million to bilateral

library/publications/the-world-factbook/geos/zi.html>; Coenraad Brand, "The Anatomy of an Unequal Society" in Colin Stoneman, ed, *Zimbabwe's Inheritance* (Basingstoke: Macmillan, 1981) 36 at 37–38. In the year of independence (1980), the African population amounted to around seven million, while the European population was about 235,000 (*ibid* at 38).

¹⁰ Zanu and Zapu (the former supported mainly by the majority Shona population, and the latter largely by the Ndebele peoples) were formally merged under the Zanu-PF banner in December 1987. This followed a series of bloody battles fought between the parties' respective military wings principally in the Matabeleland region (predominantly Ndebele and Zapu-supporting), and culminating in the notorious Gukurahundi terror campaign, in which Mugabe's North Korean-trained Fifth Brigade tortured and killed not only their military opponents, but also many ordinary villagers. At least 10,000 civilians are thought to have died. Martin Meredith, *Mugabe: Power, Plunder, and the Struggle for Zimbabwe* (New York: Public Affairs, 2007) at 59-76; Stephen Chan, *Robert Mugabe: A Life of Power and Violence* (London: IB Tauris, 2003) at 24–36.

¹¹ A strategic alliance between Zanu and Zapu that had been formed in 1976.

¹² Legally, Rhodesia remained a British colony, as its purported claim to independence in 1965 was never formally acknowledged by any other state

¹³ For details of the agreement reached, see South Rhodesia, HMSO, *Report of Southern Rhodesia Constitutional Conference Held at Lancaster House London, September–December 1979* (21 December 1979), online: Zimbabwe Legal Information Institute <www.zimlil.org/files/Zimbabwe_1_Lancaster_House_Agreement_0.pdf>.

¹⁴ Achieving 62 percent of the vote on a turnout of 95 percent. Patrick Bond & Masimba Manyanya, *Zimbabwe's Plunge: Exhausted Nationalism, Neoliberalism and the Search for Social Justice* (London: Merlin Press, 2003) at 9.

¹⁵ Mugabe became president of Zimbabwe in December 1987, a position that combined the roles of head of state, head of government, and commander-in-chief of the state's defence forces. See Meredith, *supra* note 10 at 79.

creditors, and just over US\$5 million to multilateral providers.¹⁶ Much of this debt had been accumulated during the later years of the Rhodesian regime,¹⁷ after it had been ostracized by the international political community and repeatedly denounced as “illegal” and “racist” by both the UN General Assembly and the Security Council. The Smith government was censured not only for its segregationist policies and its refusal to countenance the advent of black-majority rule, but also for the repressive measures it employed towards the country’s citizens.¹⁸ Both the General Assembly and the Security Council expressed support for the liberation struggle, affirming the right of self-determination for the Zimbabwean people, and exhorting Britain, as the administering power, to do all it could to topple the regime.¹⁹ United Nations member states were repeatedly enjoined not to recognize the regime or to aid its survival in any way.²⁰ The official position towards post-UDI Rhodesia was therefore essentially the same as that adopted in respect of apartheid South Africa: both were regarded as pariahs by the international community of states.

In fact, most of the pre-independence loans—sourced from private creditors—were granted in violation of sanctions imposed on Rhodesia by the Security Council and hence would have been in breach of international law.²¹ In a resolution of May 1968, the Security Council, in addition to requiring UN members and their nationals to cease all trading activities with Rhodesia, banned any financial dealings with the regime. Thus, UN members were instructed:

not [to] make available to the illegal regime in Southern Rhodesia or to any commercial, industrial or public utility undertaking, including tourist enterprises, in Southern Rhodesia any funds for investment or any other financial or economic resources and [to] prevent their nationals and any persons within their territories from making available to the regime or to any such undertaking any such funds or

¹⁶ Bond & Manyanya, *supra* note 14 at 17. Hevina Dashwood, in her study of the Zimbabwean post-independence economy, puts the amount of external debt outstanding in 1980 slightly higher, at US\$786 million: Hevina S Dashwood, *Zimbabwe: The Political Economy of Transformation* (Toronto: University of Toronto Press, 2000) at 64.

¹⁷ Increasing from US\$22.2 million in 1975 to around US\$700 million by the time of independence in 1980. See *infra* note 25 and accompanying text.

¹⁸ See eg *Question of Southern Rhodesia*, Res 2622 (XXII), UNGAOR, 22nd Sess, Supp 16, UN Doc A/RES/2622 (1967) 45 [UNGA Res 2622]. The resolution repeatedly refers to the UDI government as “the illegal racist minority regime in Southern Rhodesia”, and “[c]ondemns the policies of oppression, racial discrimination and segregation practised in Southern Rhodesia, which constitute a crime against humanity” (*ibid* at paras 2, 7).

¹⁹ *Ibid* at para 7. The General Assembly urged the United Kingdom to use force to remove the UDI regime. The British government of Harold Wilson, however, although acting swiftly to impose trade and economic sanctions on Rhodesia following UDI, resiled from taking this ultimate step.

²⁰ A point made in the United Nations Security Council’s first resolution on the matter, passed the day after the Unilateral Declaration was issued, calling on member states “not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime” (*Southern Rhodesia*, SC Res 216, UNSCOR, 1965, UN Doc S/RES/216 at 8 para 2).

²¹ Under article 25 of the UN Charter, member states are obliged to implement Security Council decisions: Charter of the United Nations, 26 October 1945, 1 UNTS XVI art 25 [UN Charter].

resources and from remitting any other funds to persons or bodies within Southern Rhodesia²²

The comprehensive sanctions regime instituted by the United Nations was to prove less than watertight,²³ and this applied as much to the blanket ban on funding as to anything else. In particular, large loans were extended to the Smith government by foreign banks, with such transactions shrouded from public view as much as possible, so as to avoid detection.²⁴ As Patrick Bond and Masimba Manyanya observe:

²² United Nations Security Council, Resolution 253 (1968) of 29 May 1968, UNSCOR, S/RES/253 (1968) at 6 para 4; exempting payments made in respect of pensions; for medical, humanitarian and educational purposes; for the provision of news material; and, in special humanitarian circumstances, for food-stuffs. As well as prohibiting trade and financial assistance, the resolution also required UN members to block the transit of Rhodesian goods, or goods destined for Rhodesia, through their territories, and to prevent flights to and from Rhodesia. They were also to deny entry to anyone travelling on a Southern Rhodesian passport or thought to be ordinarily resident in Rhodesia and believed to have furthered or encouraged the unlawful actions of the regime, or be likely to do so (*ibid* at 6 paras 3, 5 and 6). A year-and-a-half earlier, the Council had, among other measures, placed Rhodesia under an arms embargo, banned the sale of oil and oil products to the country, and required member states not to import into their territories key Rhodesian commodities, namely: asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products, hides, skins, and leather: *Resolution 232 (1966) of 16 December 1966*, UNSCOR, S/RES/232 (1966) at 7 para 2 [*Res 232*]. This resolution invoked articles 39 and 41 of the UN Charter, in line with the Council's determination that the situation in Rhodesia "constitute[d] a threat to international peace and security" (*UN Charter, supra* note 21, arts 39, 41). Before mandating such sanctions, the Council had asked UN members to impose such measures voluntarily: see *Resolution 217 (1965) of 20 November 1965*, UNSCOR, S/RES/217 (1965) at para 8; and, especially *Res 232, supra* note 22 at 6 para 5, which called upon member states "not to render financial or other economic aid" to Rhodesia.

²³ On the flouting of the Rhodesian sanctions: see Joseph Mtisi, Munyaradzi Nyakudya & Teresa Barnes, "Social and Economic Developments during the UDI Period" in Raftopoulos & Mlambo, *supra* note 7, 115 at 133–136. As the authors explain, certain states refused to ratify the sanctions (China, Bangladesh, and North Korea, as well as non-UN members—at that time—West Germany and Switzerland) while others, including France and Spain were reluctant to do so in order to help solve what they regarded as essentially a British problem. Economic dependency on Rhodesia meant that Malawi, Zambia, and Botswana never implemented the sanctions fully. Unsurprisingly, South Africa and Portuguese Mozambique ignored the sanctions altogether (Mozambique implementing them when the country gained its independence in 1975). The United States later deviated from the sanctions regime in order to import chrome from Rhodesia, while the oil embargo was violated by major petroleum companies, including British ones (with, it was later to transpire, the knowledge of the British government). See Colin Stoneman, "Introduction" in Stoneman, *supra* note 9 at 4, 7, referring to the report resulting from the official UK government enquiry into the matter in the late 1970s.

²⁴ See Bond & Manyanya, *supra* note 14 at 17; referring to the example of a "US\$63 million deal for steel-making equipment for the Rhodesian Iron and Steel Company [that] included a US\$29 million loan split between the Austrian equipment vendor (Voest), the Union Bank of Switzerland, the European-American Bank and the Austrian Bank Girozentrale." In order to conceal the loan, "[a] South African 'dummy' corporation was established by the Rhodesians as the borrower, and a shell financier was set up in Zug, Switzerland 'to satisfy Swiss authorities.'" This covert arrangement

External loans during this period [the 1970s] were secretive, and omitted from the Schedule of National Debt. What is known from official accounts is that in 1975 the UDI regime's foreign debt amounted to US\$22.2 million. But the Smith regime hid a great deal, and by 1980 that figure had swollen to more than US\$700 million by some accounts.²⁵

Since the Smith regime was fighting to maintain control of Rhodesia at this point—literally so in terms of the protracted war it was waging against the national liberation forces of Zanu and Zapu—it seems reasonable to assume that the proceeds of many of these loans were devoted to aiding the survival of the regime and attempting to ensure the continuance of white-minority rule, rather than being employed for legitimate state purposes. This seems to be confirmed by the explosion in spending on defence and security measures that occurred at the time. According to Bond and Manyanya, “[b]etween 1971 and 1976, the budgets for defence rose by 600%, police by 300% and internal affairs by 400%. The budget deficit increased from 1.8% of GDP in 1976 to 13.5% in 1979.”²⁶

Certainly, anyone who lent money to the Rhodesian government after November 1965 must have been aware of the racist and repressive nature of the regime with which it was conducting business, given the opprobrium that the Smith government attracted following UDI and the increasing documentation of this in various UN resolutions. At the very least, such creditors should have been on notice that their funds might very well be used for purposes that were not beneficial, and indeed quite possibly inimical, to the population as a whole as the war escalated and internal repression intensified.²⁷ The same argument has been made

came to public notice only when a British banker revealed details of the deal to the UK newspaper the *Sunday Times*.

²⁵ *Ibid* at 17. Sue Onslow, “Noises Off: South Africa and the Lancaster House Settlement 1979–1980” (2009) 35(2) *JS Africa Stud* 489 at 494. South Africa also contributed a great deal towards the Smith government's defence expenditure, so that “[i]n 1979, support for the Rhodesian security forces cost Pretoria £1 million per day.”

²⁶ Bond & Manyanya, *supra* note 14 at 17.

²⁷ This also raises the problem of the fungibility of money in relation to loans to a repressive regime—that is, even if it can be shown that particular loan monies have been spent on legitimate state purposes, has this simply allowed funds from elsewhere (for example, tax revenues) to be diverted to odious ends? Furthermore, some loans may fund “dual-use” projects that could be used for both beneficial and non-beneficial purposes, depending on the circumstances. See Sabine Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective* (Aldershot: Ashgate, 2007) at 53. Michalowski points out “that infrastructure such as roads etc., might be used for military rather than civil purposes, in which case it should be open to the people of that state to rebut the presumption that loans financing such projects had been of benefit to them” (*ibid* at 53). There is also the argument that any loans to a repressive regime, irrespective of purpose, can only have the effect of cementing the regime in power and perpetuating the misery of those over whom it rules. In contrast, others suggest that, even if not all the proceeds of a loan are spent on legitimate state interests, the population of the state may nevertheless derive some benefit from the loan. For example, Albert Choi and Eric Posner, in discussing the possible effects of an odious debt doctrine, note that many dictators enrich themselves by pocketing part of the proceeds of a loan extended for public infrastructure projects, but that this does not necessarily mean that the citizens will not also benefit, provided the rest of the loan monies are spent as intended. Albert H Choi & Eric A Posner, “A Critique of the Odious Debt Doctrine” (2007) 70 *Law & Contemp Probs* 33 at 43–44.

in respect of creditors who have lent to the Zanu-PF government after the imposition of international sanctions against the regime in 2000.²⁸

Matters became even clearer after May 1968, when the Security Council forbade UN members and their nationals from providing any financial help to Rhodesia. Now, any creditor who lent funds to the Smith government would very likely be acting unlawfully,²⁹ and would in any case find it extremely difficult to argue that it believed the relevant loan monies would be employed for legitimate state purposes, rather than in the interests of the regime itself and possibly a minority of the country's citizens. Nor, of course, had the population consented to the contraction of this debt given that the vast majority of non-white Zimbabweans were deprived of the vote and therefore could not be said to have meaningfully agreed to any action purportedly carried out on behalf of the state by the Smith regime.³⁰

²⁸ See Kristina Rehbein, "How it could work—The alternative to the traditional debt relief processes for Zimbabwe—an illustration" (Jubilee: Germany, 2012) at 24, online: The European Network on Debt and Development <www.eurodad.org/files/pdf/520a390787e0e.pdf> (albeit going on to state that detailed evidence would still be required to determine what the loans had actually been used for).

²⁹ States that did not belong to the United Nations at the time, such as Switzerland, and West Germany before it joined in 1973, were, along with their nationals, technically under no legal obligation to comply with the organization's sanctions. However, the imposition of the UN embargo on lending to Rhodesia would have sent a further strong signal that the regime was regarded as illegitimate by virtually the entire international community and should not be helped in any way, including financially.

³⁰ Before independence, and the extension of the franchise to the whole of the Zimbabwean populace, electoral rights were primarily dependent on property, income and educational qualifications. Thus, without overtly discriminating on the ground of race, successive colonialist governments could nevertheless ensure that the right to vote remained almost entirely the preserve of the European population, which could much more easily meet the qualifying criteria. The 1961 constitution did introduce a 'B Roll' with less onerous qualifications than the 'A Roll', allocating 15 seats of the newly-expanded 65-member legislative assembly to representatives elected on the 'B Roll' vote (see Mlambo, *supra* note 7 at 109), but this did not significantly extend the franchise to non-white voters. Details of the criteria to be met by 'A Roll' and 'B Roll' voters, together with reference to the 'cross-voting' provisions that limited the number of 'B Roll' votes that could be counted in 'A Roll' constituencies and vice versa, can be found in Carl Watts, *The Rhodesian Crisis in British and International Politics, 1964-1965* (University of Birmingham, UK, PhD thesis, April 2006), online: University of Birmingham Research Archive e-theses depositary <etheses.bham.ac.uk/314/1/Watts06PhD.pdf> at 402-403 (citing United Kingdom, *Fact Sheets on the Commonwealth: Rhodesia* (London: HMSO, August 1965)). According to figures for registered voters as of April 30, 1963 (*ibid* at 403) there were 11,057 'B Roll' voters (10,214 Africans, 570 Europeans, 166 Coloureds [those of mixed race] and 107 Asians) and 92,975 'A Roll' voters (88,256 Europeans, 2,251 Africans, 1,275 Coloureds and 1,193 Asians). Hence, for every African voter registered, just over 7 white voters were registered. To place these figures in a broader context, the 1969 census for Rhodesia records the European population as standing at 228,044, compared with an African population of 4,818,000. See AKH Weinrich, *Black and white elites in rural Rhodesia* (Manchester: Manchester University Press, 1973) at 14-15. The 1969 constitution provided for a further extension of the franchise, purportedly to pave the way for gradual progress to majority rule, but this again was of limited impact. Mtisi, Nyakudya & Barnes, *supra* note 23 at 123.

Even debt incurred by Rhodesia before UDI in respect of a World Bank project has been condemned as odious. The World Bank made a number of substantial loans when the country formed part of the Federation of Rhodesia and Nyasaland (incorporating modern-day Zimbabwe, Zambia, and Malawi) in the late 1950s and early 1960s. In total, the World Bank lent around US\$140 million for a variety of projects, including the controversial Kariba Dam on the Zambezi River,³¹ the construction of which required the submersion of the native Tonga people's homeland, resulting in the loss of their livelihood and widespread disease.³² Built mainly to supply electricity to copper mines and smelters located in Northern Rhodesia, which were owned almost entirely by just two large conglomerates—the Anglo American Corporation and the Roan Selection Trust—the dam not only inflicted ecological damage on the surrounding area, but also proved to be of questionable economic benefit to the Zimbabwean and Zambian peoples.³³ In fact, so onerous did repayment of this debt become that the Smith government decided not to repay it, with the result that: “Kariba represented not only the largest dam of its era, but also the largest ever default by a government on a World Bank project.”³⁴

As Southern Rhodesia struggled to repay its share of the World Bank loan from the late 1950s onwards,³⁵ it was increasingly forced to turn to short-term commercial bank loans, eventually opting—after the United Kingdom had imposed financial sanctions in retaliation for UDI—to default on R\$82.6 million (roughly £55 million) of foreign debt. Most of this sum—R\$70 million (around £46 million)—was owed to the World Bank. Since Britain, being ultimately responsible for Southern Rhodesia, had acted as guarantor of the country's World Bank loans, it was obliged to repay the outstanding sum on its colony's behalf. No serious retaliatory measures were taken by the United Kingdom against Southern Rhodesia, even though some commentators believe that swift and decisive action in response to UDI could have toppled the Smith regime.³⁶ As a result, defaulting on Southern Rhodesia's foreign debt turned out to be highly beneficial for the Smith government, which was able to direct precious foreign reserves that would otherwise have been spent servicing the debt into paying for the repressive measures that would ensure its survival for another decade and a half.

Aside from the debt accumulated under the Smith regime, Zimbabwe was bequeathed an even more toxic legacy from the years of Rhodesian rule. The Lancaster House meetings had been convened in order to agree on a constitution for the new state³⁷—of crucial importance to the Smith entourage, desperate to entrench some form of protection for the minority white population before the first democratic elections took place. The issue of funding for land redistribution (prime farmland in particular being concentrated overwhelmingly in the hands

³¹ Bond & Manyanya, *supra* note 14 at 10.

³² *Ibid* at 11.

³³ *Ibid* at 11–13.

³⁴ *Ibid* at 14.

³⁵ The loan having been split fifty-fifty between Southern and Northern Rhodesia when the Federation uniting the two countries and Malawi was dissolved in 1963. See United Kingdom, *House of Commons Debates*, vol 686, 1064 at 1069–1070 (17 December 1963) (Duncan Sandys, then Secretary of State for Commonwealth Relations and for the Colonies). Northern Rhodesia became the Republic of Zambia on achieving independence in 1964.

³⁶ Bond & Manyanya, *supra* note 14 at 16.

³⁷ See *supra* note 13 and accompanying text.

of white Zimbabweans/Rhodesians) was raised at the conference, but, with consequences that were ultimately to prove disastrous, left unresolved.³⁸

2. LEGAL THEORY REGARDING STATE SUCCESSION TO SOVEREIGN DEBT

2.1 STATE SUCCESSION TO PUBLIC DEBT AND NEWLY INDEPENDENT STATES³⁹

In examining whether there exists a norm of international law requiring a government to discharge the debts incurred by a previous administration, a distinction is normally drawn between *state succession proper* and the much more common, and generally more straightforward, case of *governmental succession*. In the former situation, the change in administration is occasioned, or accompanied, by some form of transformation in the sovereignty of the state in question, with the result that one state is effectively replaced by another (or others) in regards to international responsibility for a particular territory. In the latter situation, one government succeeds another but the state itself retains its original identity (i.e. its international legal personality remains intact). The conventional view is that an incoming government may be justified in disowning the debts of the previous regime in the former case, but not in the latter, no matter how profound the ideological gulf between the incoming and outgoing regimes and regardless of the impact this may have on both the state's internal configuration and its relations with other states.

Certainly, with the exception of some high-profile repudiations, successor governments almost uniformly assume responsibility for the debts built up under previous administrations, demonstrating strict adherence to the principle of *pacta sunt servanda*.⁴⁰ Consequently, repudiation of external debt obligations in the context of governmental succession remains highly controversial.

However, the position with regard to state succession to sovereign debt is much less clear. It is arguably the case that, not merely are there certain exceptions to the general rule that a new sovereign entity is obliged to meet the debts contracted by its predecessor, but that there is in fact no such rule at all, owing to inconsistency in state practice and a lack of clarity as to the motivations of governments when debts are repaid.⁴¹ As a result, succession to public debt

³⁸ See *infra* notes 163–174 and accompanying text.

³⁹ The type of debt at issue here—whether termed public, state or sovereign debt—is national debt, incurred on behalf of the state as a whole, and excluding local debt (contracted by a sub-national political unit, such as a regional or local authority) and localized or territorial debt, which, although contracted by central government, is intended to benefit a particular region. Localized debt has nearly always been accepted by the successor state, since it is closely connected with (and has benefited) part of the territory subject to the succession, while local debt is unaffected by state succession, as the relevant municipal authority will continue to be bound by its obligations regardless of any change in state sovereignty.

⁴⁰ Most notably, the rejection by Russia's Bolshevik government, following the Russian Revolution of 1917, of the debt inherited from its Tsarist predecessor, and the refusal of the People's Republic of China to honour a number of debt obligations inherited from the imperial regime.

⁴¹ Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston: Little Brown, 1922) at 204–205; PK Menon, *The Succession of States in Respect to Treaties, State Property, Archives, and Debts* (Lewiston: NYL The Edwin Mellen Press, 1997) at v; Malcolm

can fairly be said to be reflective of the law surrounding state succession in general, where the issue of exactly what rights and duties pass from the predecessor to the successor state is one of the least resolved areas of international law.⁴²

This is perhaps not surprising given the fact that each instance of succession takes place in highly politicized circumstances, in which legal considerations (supposing they do exist and can be identified) find themselves, even more so than in other areas of international relations, at the mercy of *realpolitik*. As Eli Nathan observes:

[S]tate practice has not been based on legal doctrine, but rather on political expediency, on pragmatic solutions, and on the power relationships between the States involved. ... In so far as the effects of State succession in the process of decolonization are concerned, these too often resulted from the unequal relationship between the predecessor colonial power and the newly independent successor State.⁴³

Furthermore, repayment of public debt tends to be even more patchy in cases of *partial succession*—that is, where the original state survives, albeit in truncated form, divested of part of its territory and population (as is the case with decolonization), as opposed to those which involve total succession, where the predecessor state ceases to exist altogether, owing to some form of merger with another state, or as a result of dissolution. Sheltering under the rubric of partial succession are three broad subcategories: (1) cession or transfer, where part of the territory of a state is transferred to another state; (2) secession or separation, where part of the territory of a state separates from it either to form a new state or to join with an existing state; and (3) decolonization, in which a colony or dependency achieves its independence from the administering power. As will be appreciated, the first and third types of succession are now primarily of historical interest, while the second—secession—has risen to prominence over the past couple of decades, with recent examples being the separation of South Sudan from Sudan and the controversial cases of South Ossetia, Abkhazia (both Georgia) and Kosovo (Serbia).

Where a partial succession occurs, the state that actually contracted the debt remains in existence, and the creditor is still able to look to the original contracting party for repayment

N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 996; Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003) at 622; James L Foorman et al, “Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers” (1982) 1 U Ill L Rev 9 at 11; Tai-Heng Cheng, *State Succession and Commercial Obligations* (Ardsey, NY: Transnational Publishers, 2006) at 379.

⁴² Menon, *supra* note 41 at iii (“[p]erhaps no branch of international law has produced more uncertainty and disagreement than the law of succession which determines the concomitant rights and duties of States upon a territorial change of sovereignty”). See also Foorman et al, *supra* note 41 at 11.

⁴³ Eli Nathan, “The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts” in Yoram Dinstein, ed, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosanne* (Dordrecht: Martinus Nijhoff, 1989) 489 at 490. Nathan was the head of the Israeli delegation to both the UN conferences dealing with issues arising from state succession—the UN Conference on Succession of States in Respect of Treaties and the UN Conference on Succession of States in Respect of State Property, Archives and Debts.

(the former colonial power in cases of decolonization).⁴⁴ The presumption in such cases would seem to be that liability for the debt will remain with the contracting state; nor would it appear that the successor state owes any duty to its predecessor to take over responsibility for any of the debts in relation to the territory acquired.⁴⁵ State practice varies considerably (as does *opinio juris* in those cases where any legal opinion is expressed on the matter), indicating that no rule of customary international law has emerged obliging the successor state to repay any of the debt incurred by the predecessor state—whether the situation involves transfer, secession, or decolonization.⁴⁶

Turning to the case of ex-colonies in particular, such states sometimes accepted responsibility for part of the debt of their former rulers and sometimes not. The Philippines, which achieved its independence from the United States in 1934, consented in 1946 to assume all financial obligations entered into in respect of the islands.⁴⁷ India also agreed, after achieving independence in 1947, to accept responsibility for all the liabilities and guarantees of British India, whose legal personality it was deemed to continue, although it was to receive a contribution from Pakistan proportionate to the assets that Pakistan had received on partition.⁴⁸ In contrast, the United States never adopted any of the public debt contracted by the British government, with the peace and friendship treaties concluded between the two states in 1783 omitting all reference to the matter.⁴⁹ Texas, on attaining its independence from

⁴⁴ As O’Connell observes: “Where only part of the debtor State is absorbed, both its international personality and its fiscal competence remain undisturbed, although its paying capacity may be diminished. The debtor State is still the debtor” (DP O’Connell, *State Succession in Municipal Law and International Law* (Cambridge: Cambridge University Press, 1967) at 394). Hence, had Scotland opted for independence in the referendum held in September 2014, the remainder of the United Kingdom (as confirmed by the British Treasury) would have been responsible for repaying the country’s entire loan obligations prior to independence, with Scotland under no legal obligation to assume a portion of that debt. See UK, Her Majesty’s Treasury, *UK Debt and the Scotland Independence Referendum* (London: The Stationery Office, 2014).

⁴⁵ The matter is further complicated by the fact that there cannot be any transference of a debt obligation without the consent of the creditor (see e.g. Menon, *supra* note 41 at 173).

⁴⁶ For a survey of state practice in relation to succession to public debt: see especially “Report of the International Law Commission on the work of its thirty-third session (4 May-24 July 1981)” (UN Doc A/36/10) in *Yearbook of the International Law Commission 1981*, vol 2, part 2 (New York: UN, 1981) at 72 ff (UN Doc A/CN.4/SER.A/1981/Add.1) [*Commission’s Report*]; O’Connell, *supra* note 44; Ernst H Feilchenfeld, *Public Debts and State Succession* (New York: Macmillan, 1931).

⁴⁷ Under both its own constitution and by virtue of a treaty dated 4 July 1946 concluded with the US (see *Commission’s Report*, *supra* note 46 at 94 para 14).

⁴⁸ O’Connell, *supra* note 44 at 404. India and Pakistan have yet to agree on what this division of assets and liabilities should be. See “Pakistan Still Owes India Rs 300 Crore as Pre-Partition Debt”, *The Times of India* (6 July 2009), online: <timesofindia.indiatimes.com/india/Pakistan-still-owes-India-Rs-300-crore-as-pre-partition-debt/articleshow/4745392.cms>; Kazim Alam, “Post-Partition: India still owes Pakistan a little over Rs5.6b, says State Bank”, *The Express Tribune with the International New York Times* (16 July 2014), online: <tribune.com.pk/story/736390/post-partition-india-still-owes-pakistan-a-little-over-rs5-6b-says-state-bank/>.

⁴⁹ Feilchenfeld, *supra* note 46 at 53–54; O’Connell, *supra* note 44 at 396; *Commission’s Report*, *supra* note 46 at 92 para 5; Mohammed Bedjaoui, “Ninth report on succession of States in respect of matters other than treaties” (UN Doc A/CN.4/301 and Add.1) in *Yearbook of the International Law*

Mexico in 1840, explicitly denied that there was any rule of international law compelling it to assume responsibility for part of the Mexican debt.⁵⁰ Similarly, Libya, when it finally achieved its independence from Italian rule in 1951, was exempted from liability for any part of Italy's public debt by a resolution of the UN General Assembly.⁵¹

Even where such debt obligations were assumed, it is doubtful whether this constituted any evidence of the existence or emergence of a legal norm. When, for example, certain Latin American states, on gaining independence from Spain in the mid-nineteenth century, took over part of the Spanish public debt charged against their treasuries, this tended to form part of a wider arrangement involving concessions on the part of both the former colony and Spain.⁵² The various treaties of recognition were silent on the debt passing in accordance with any rule of international law applicable to state succession and, on the contrary, often referred to such debt as having been assumed by means of “a ‘voluntary and spontaneous’ decision.”⁵³

It is also the case that decolonization came to be regarded (at least, by states of the Global South and the then Communist states) as a distinct form of state succession, in which the former colony was regarded as being particularly deserving of exemption from the duty to take over responsibility for obligations incurred by its erstwhile ruler. In fact, it was the process of decolonization itself, ongoing throughout the 1950s and 1960s, that provided the impetus for the drafting of the two conventions dealing with matters arising from state succession: the *1978 Vienna Convention on Succession of States in Respect of Treaties* and the *1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983 Convention)*.⁵⁴ That the 1983 Convention has yet to come into force—more than three decades after its

Commission 1977, vol 2, part 1 (New York: UN, 1977) 45 at 94 para 291 (A/CN.4/SER.A/1977/Add.I).

⁵⁰ Texas did later assume part of the Mexican public debt, but insisted that it did so voluntarily, not because it was under any legal obligation to do so (see O'Connell, *supra* note 44 at 397).

⁵¹ See *Economic and financial provisions relating to Libya*, GA Res 388 (V), UNGAOR, 5th Sess, Supp No 20, UN Doc A/RES/388(V) (1950) 17 at 18.

⁵² *Commission's Report*, *supra* note 46 at 94 para 10. The relevant states were Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Uruguay, and Venezuela. Furthermore, the debt which these states assumed appears to have been either local debt, and therefore, strictly speaking, not the subject of state succession at all, or localized debt and hence of benefit to the state concerned (see *supra* note 39). The one apparent exception was Bolivia, which assumed responsibility even for debts incurred in waging war against the country in its fight for independence (see *Commission's Report*, *supra* note 46 at 94 para 11).

⁵³ *Ibid* at 94 para 10.

⁵⁴ See *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, 8 April 1983, 22 ILM 306 (not yet in force) [*1983 Convention*]. Despite requiring the support of just fifteen states to enter into force, the Convention has so far been acceded to by only seven: Croatia, Estonia, Georgia, Liberia, Slovenia, the Former Yugoslav Republic of Macedonia, and Ukraine. See also Anthony Aust, “Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts” (2009) United Nations Audiovisual Library of International Law, online: <legal.un.org/avl/ha/vcssrspad/vcssrspad.html>. Even the *1978 Convention* took eighteen years to come into force (achieving the requisite number of ratifications only in 1996), and still boasts only a paltry 22 states parties. See *Vienna Convention on Succession of States in Respect to Treaties*, 23 August 1978, 17 ILM 1488 (entered into force 6 November 1996) [*1978 Convention*]. See also Anthony

adoption—provides some indication of just how little agreement exists on what rights and duties should pass from a successor to a predecessor state. Indeed, because there was such a paucity of customary international law covering this area, the International Law Commission (ILC) was necessarily forced to engage in “progressive development of international law.”⁵⁵ And, with regard to the transmission of debt obligations in particular, it proved impossible to reconcile the interests of the creditor states of the North with those of the borrowing states of the South and the nations of the then Socialist Bloc.⁵⁶

In drafting the *1983 Convention*, the ILC took note of the extremely high levels of debt carried by many newly independent states—defined in the Convention as “a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible.”⁵⁷ Consequently, the *1983 Convention* differentiates between instances of decolonization and other situations in which a state loses part of its territory and resources. Whereas, in the case of a transfer of territory between states or the separation of part of a state, the Convention stipulates that, barring an agreement to the contrary, the successor state is to assume “an equitable proportion” of the debt of the predecessor state,⁵⁸ there is to be no such apportionment between a newly independent state and its former colonizer. Instead, no debts of the former ruler are to pass to a newly independent state unless the two countries agree they shall:

In view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.⁵⁹

Aust, “Vienna Convention on Succession of States in Respect of Treaties” (2009) United Nations Audiovisual Library of International Law, online: <legal.un.org/avl/ha/vcssrt/vcssrt.html>.

⁵⁵ In accordance with article 1(1) of its governing statute; *Statute of the International Law Commission*, GA Res 174 (II), UNGAOR, 2nd Sess, UN Doc A/RES/174(II) (1947) 105 art 1(1) [*Commission Statute*].

⁵⁶ Agreement could not even be reached on how the term “state debt” was to be defined. Its meaning was finally restricted to debt owed to other subjects of international law (including states and international organizations); see *1983 Convention*, *supra* note 54 art 33, reflecting the preferences of the non-aligned states and the Socialist bloc. Hence, an amendment proposed by the Brazilian delegation and strongly supported by the northern states, which would have expanded the definition to debt owed to private creditors, was rejected; see Nathan (*supra* 43 note at 506, n 38). The Convention was finally adopted, on April 8, 1983, by fifty-four votes to eleven, with eleven abstentions. Turkey, the non-aligned states, along with the Soviet Union and other socialist states voted in favour of adoption. Belgium, Canada, West Germany, France, Israel, Italy, Luxembourg, Netherlands, Switzerland, the United Kingdom, and the United States voted against. The following states abstained: Australia, Austria, Denmark, Finland, Greece, Ireland, Japan, Norway, Portugal, Spain, and Sweden. See Nathan, *supra* note 43 at 493, n 14; Menon, *supra* note 41 at xii, n 29.

⁵⁷ *1983 Convention*, *supra* note 54, art 2(e). An identical definition (save for some difference in punctuation) appears in article 2(f) of the 1978 Convention (*1978 Convention*, *supra* note 54, art 2(f)).

⁵⁸ *1983 Convention*, *supra* note 54, arts 37, 40. Similarly, article 41, dealing with the dissolution of a state, specifies that, unless otherwise agreed, the debt of the dissolved state is to be apportioned equitably among the successor states (*ibid*, art 41).

⁵⁹ *Ibid*, art 38(1).

Moreover, if any agreement on the passing of debt is concluded, then this:

Shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental economic equilibria of the newly independent State.⁶⁰

Admittedly, the ILC's efforts have had little effect in influencing legal norms governing state succession to sovereign debt, including those affecting former colonies. This is partly attributable to the fact that the Commission was reacting to a situation that was largely of historical interest by the time the *1983 Convention* was adopted, the great wave of decolonization that had precipitated and informed its drafting having petered out by this stage. However, it does stand as testament to the fact that many states (albeit not the northern, capital-exporting ones) recognized that newly independent nations were in a peculiarly vulnerable position and should not be required to assume responsibility for part of the colonizer's debt as a matter of course. And many newly independent states did not in fact automatically assume the debts incurred by their former colonial powers.⁶¹ Nor, it emerged, were there any clear international legal rules obliging the former colonies to assume the debts incurred by the colonizer.

In summary, given the inconsistency of state practice as regards the transmission of public debt from one sovereign to another, particularly in cases involving partial succession, it seems highly doubtful that a rule of international law exists obliging a successor state to assume responsibility for the debts incurred by its predecessor. Consequently, Zimbabwe, on gaining independence, could lawfully have refused to assume responsibility for the debts inherited from the Rhodesian era.

Moreover, the fact that many of the loans had been incurred for purposes that did not benefit the vast majority of Zimbabweans (and may, indeed, have been positively harmful to them) should have allowed the Zanu-PF government to reject such loans on the basis that they amounted to odious debt.

2.2 ODIIOUS DEBT

The odious debt doctrine and related concepts questioning the legitimacy and enforceability of certain public debt obligations have gained prominence over the past decade or so owing to a number of different initiatives and developments: the Jubilee 2000 debt cancellation campaign aimed at alleviating the unsustainable debt burden of the South;⁶² the efforts to reduce Iraq's debts accumulated under Saddam Hussein in the wake of the 2003 invasion;⁶³

⁶⁰ *Ibid.*, art 38(2).

⁶¹ See Jeff King, "Chapter One: The Odious Debt Doctrine Under International Law: Definition, Evidence and Issues Concerning Application" in *Advancing the Odious Debt Doctrine* (2003) Centre for International Sustainable Development Law Working Paper 13 at 31 (specifically referring to Israel, Guinea, Algeria, Tanzania, Rwanda, Burundi, and Eritrea), online: <www.cisdll.org>.

⁶² For an account of the movement, see A Pettifor, "The Jubilee 2000 Campaign: A Brief Overview" in Chris Jochnick & Fraser A Preston, eds, *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis* (Oxford: Oxford University Press, 2006) 297.

⁶³ Iraq's debt, amounting to around US\$120bn in 2003, was overwhelmingly bilateral, and the country's interim government, with the strong support of the United States, opted to enter into

Norway's decision in 2006 to cancel US\$80 million of debt that derived from loans incurred in the 1970s by various developing states as a result of an export campaign aimed at reviving the Norwegian shipping industry;⁶⁴ concerns expressed by some Western commentators that rising state powers (especially China) have fewer scruples about lending to repressive regimes in poorer nations or tying such loans to sufficiently stringent ethical and environmental standards;⁶⁵ an increased willingness on the part of states of the Global South to question and resist prevailing sovereign lending practices, invoking notions of odiousness and illegitimacy in the process;⁶⁶ and the global financial crisis of 2007–08, which has left many southern European states with precariously high debt levels, prompting some authors to make use of the odious debt trope in arguing that the ordinary citizens of those states should not be held responsible for their repayment.⁶⁷ More recently, the fall of Ukrainian president Viktor Yanukovich in late 2013 has brought forth calls for Ukraine to repudiate some of its allegedly odious debt,⁶⁸ as well as rekindling interest in the creation of a global sovereign debt restructuring mechanism. This was the subject of a recent UN General Assembly resolution,⁶⁹ which was itself given impetus by the standoff between Argentina and certain hedge funds seeking full repayment of Argentinean government bonds defaulted on in 2001.⁷⁰

a Paris Club restructuring arrangement in 2004. See, among others, Bessma Momani & Aidan Garrib, "Iraq's Tangled Web of Debt Restructuring" in Bessma Momani & Aidan Garrib, eds, *From Desolation to Reconstruction: Iraq's Troubled Journey* (Waterloo: Waterloo University Press, 2010) 157 at 158; Patricia Adams, "Iraq's Odious Debts" (2005) 526 *Policy Analysis* 1, online: <www.cato.org/sites/cato.org/files/pubs/pdf/pa526.pdf> [Adams, "Iraq's Odious Debts"].

⁶⁴ See Royal Norwegian Ministry of Foreign Affairs, Press Release, 118/06, "Cancellation of Debts Incurred as a Result of the Norwegian Ship Export Campaign (1976-80)" (2 October 2006) (Norway stated that it was cancelling these loans, incurred by Ecuador, Egypt, Jamaica, Peru, and Sierra Leone, on the basis that it shared responsibility for the debts in question.), online: <www.regjeringen.no/en/dep/ud/Documents/Reports-programmes-of-action-and-plans/Reports/2006/Cancellation-of-debts-incurred-as-a-result-of-the-Norwegian-Ship-Export-Campaign-1976-80.html?id=420457>.

⁶⁵ See e.g. Andrew Bounds & Sarah Laitner, "EIB 'Losing Out to Chinese Banks'", *Financial Times* (8 February 2007), online: <www.ft.com/cms/s/0/c57ef17e-b7ac-11db-bfb3-0000779e2340.html#axzz3P7K8YFm7>; Tom Ginsburg & Thomas S Ulen, "Odious Debt, Odious Credit, Economic Development, and Democratization" (2007) 70 *Law & Contemp Probs* 115.

⁶⁶ Most notably, Ecuador in 2008. For more discussion on this, see text accompanying note 201.

⁶⁷ See e.g. Jason Manolopoulos, *Greece's "Odious" Debt: The Looting of the Hellenic Republic by the Euro, the Political Elite and the Investment Community* (New York: Anthem Press, 2011), xiv–xv, 248–250. The author notes the applicability of the odious debt doctrine to much of the debt held by Greece and Ireland.

⁶⁸ See Mitu Gulati, "Ukraine's Odious Debt" (10 March 2014), *Eric Posner* (blog), online: <ericposner.com/mitu-gulati-on-ukraines-odious-debts>; Anna Gelper, "Ukraine's Odious Bonds: Part 1" (14 March 2014) *Peterson Institute for International Economics: RealTime Economic Issues Watch* (blog), online: <blogs.piie.com/realtime/?p=4251>.

⁶⁹ *Towards the establishment of a multilateral framework for sovereign debt restructuring processes*, GA Res 68/304, UNGAOR, 68th Sess, Supp 49, UN Doc A/RES/68/304 (2014).

⁷⁰ Beginning in 2005, the bonds in question were subject to a restructuring involving a 70 percent haircut that was eventually accepted by 93 percent of the bondholders. A New York federal court ruling (the restructured bonds being governed by New York state law) has prohibited

Recent years have also produced a variety of suggestions for updating and modifying the odious debt concept in order to facilitate its implementation, perhaps the most well known of which is Seema Jayachandran and Michael Kremer's "ex ante" model, proposing that, rather than labelling individual loans as odious once a despotic regime has fallen from power, it is preferable to designate the regime itself as odious whilst it is still in place, thereby depriving it of the lifeblood of further credit.⁷¹ In addition, the concept of odious debt has increasingly been conflated with, and is perhaps even being subsumed by, a much wider class of dubiously contracted liabilities—so-called illegitimate debts. In very general terms, an illegitimate debt is one that is in some way nonbeneficial to the population of the state responsible for its repayment and can extend, for example, to loans that have become prohibitively expensive (owing to the application of higher market interest rates) or which are regarded as injurious to the economic and social wellbeing of a nation (because monies devoted to debt servicing drain much needed funds from health, education and housing budgets). The discussion that follows, however, concentrates primarily on odious debt as traditionally defined, simply because the debt transmitted to Zimbabwe on independence comports well with this classic formulation.

2.2.1 THE ODIIOUS DEBT DOCTRINE

The concept of odious debt is frequently examined through the prism of the ODD, as articulated by the Russian born jurist Alexander Nahum Sack in 1927, who abstracted the main elements of the doctrine from previous state practice—notably the war and subjugation debt exceptions discussed below.

Sack asserted that an incoming administration is entitled under international law to treat as unenforceable, and therefore refuse to repay, any debts incurred by the previous regime if the proceeds of such loans have not in fact been used to benefit the population of the relevant state. More specifically, Sack claimed that a new regime was entitled to repudiate any debt

Argentina from paying the latest interest payments due on the restructured bonds unless it also pays the holdouts in full. See Brian Daigle, "Argentina Pushes for Global Debt Restructuring Mechanism" (2 October 2014) *Global Risk Insights*, online: <globalriskinsights.com/2014/10/argentina-pushes-for-global-debt-restructuring-mechanism/>.

⁷¹ Michael Kremer & Seema Jayachandran, "Odious Debt", online: (2002) 39:2 *Finance & Development* <www.imf.org/external/pubs/ft/fandd/>. See also Seema Jayachandran & Michael Kremer, "Odious Debt" (2006) 96:1 *American Economic Rev* 82. For criticism of the ex ante approach, see e.g. Adams, "Iraq's Odious Debts", *supra* note 63; Lee C Buchheit, G Mitu Gulati & Robert B Thompson, "The Dilemma of Odious Debts" (2007) *Duke LJ* 1201; see also Ndikumana & Boyce, *supra* note 2 at 94–95; Daniel K Tarullo, "Odious Debt in Retrospect" (2007) 70 *Law & Contemp Probs* 263. A tentative application of the ex ante approach can possibly be seen in the IMF's decision to withhold loans from the Tudjman administration in Croatia in 1997 (see Kremer & Jayachandran, *supra* note 71); David E Sanger, "IMF Loans to Rights Violators are Attacked in Congress", *The New York Times* (22 April 1998), online: <www.nytimes.com/1998/04/22/world/imf-loans-to-rights-violators-are-attacked-in-congress.html>. Boyce views the withholding of loans from Croatia as an example of 'peace conditionality', aimed in particular at compelling the Tudjman government to hand over ten individuals indicted for war crimes for trial at The Hague. James K Boyce, *Investing in Peace: Aid and Conditionality after Civil Wars*, Adolphi Paper 351 (Oxford: Oxford University Press, 2002) at 10. However, as far as conditions are imposed on a recipient state before it is judged fit to receive financial assistance, the implication must be that a state not fulfilling these criteria is not viewed as an acceptable debtor.

obligations entered into by its predecessor provided that each of the following three conditions were satisfied: (1) the debt was contracted without the consent of the population;⁷² (2) it was acquired for a purpose that would not benefit that population;⁷³ and (3) the creditor was aware of the foregoing points when advancing the loan monies.⁷⁴ Any debts fulfilling these criteria were, according to Sack, *dettes odieuses*, and responsibility for repaying them attached not to the state itself but rather to the regime that had contracted them.⁷⁵ Provided an incoming government could demonstrate that it had inherited such odious debts,⁷⁶ the burden of proof would switch to the relevant lenders to adduce evidence that their loans had in fact benefited the population of the state in some way and therefore merited repayment.⁷⁷ If the creditors were unable to do so, then the new sovereign would be justified in not repaying them.⁷⁸

The ODD is now more commonly invoked in relation to governmental succession—especially in relation to severely indebted nations of the South afflicted with debt inherited from previous periods of despotic rule.⁷⁹ Traditionally, however, the doctrine operates only

⁷² Sack in fact spoke of the debt being incurred by a despotic power, but his point was seemingly that the actions of despots will necessarily lack the people's consent (see Buchheit, Mitu Gulati & Thompson, *supra* note 71 at 1218).

⁷³ See Alexander N Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières* (Paris: Recueil Sirey, 1927), translated in Patricia Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy* (London, UK: Earthscan, 1991) [Adams, *Loose Lending*]: "If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State. ... One could also include in this category of debts the loans incurred by members of the government or by persons or groups associated with the government to serve interests manifestly personal – interests that are unrelated to the interests of the State" at 165–166.

⁷⁴ *Ibid* at 165.

⁷⁵ *Ibid*.

⁷⁶ Alexander N Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières* (Paris: Recueil Sirey, 1927) translated in Larry Catá Backer, "Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems, and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes" (2007) 70 *Law & Contemp Probs* 1: "[i]t is the new government which bears the burden to prove that particular debts contracted by the prior government were not in the interests of and to the advantage of the state and – this is uniquely important in these circumstances – that the creditors knew that these sums would be intended for odious ends." at 10, n 39.

⁷⁷ "[I]t is to the creditors, in their turn, to prove that, in spite of its 'odious' purpose of the loan and their knowledge thereof, all or part of its proceeds was in fact employed in a way that benefited the state." (*Ibid* at 10, n 40).

⁷⁸ Adams, *Loose Lending*, *supra* note 73 at 167.

⁷⁹ In reference to Rwanda, the British House of Commons International Development Committee declared in 1998: "Some argue that loans were used by the genocidal regime to purchase weapons and that the current administration and, ultimately, the people of Rwanda, should not have to repay these 'odious' debts ... We further recommend that the [UK] government urge all bilateral creditors, in particular France, to cancel the debt incurred by the previous regime" (Christoph G. Paulus, "The Evolution of the 'Concept of Odious Debts'" (2008) 68 *Heidleberg J Intl L* 391 at 420). Indeed, a decision often portrayed as a landmark judgment in the formation of the ODD – the Great Britain–

where a change in sovereignty has occurred. In other words, the demarcation that persists between governmental and state succession in connection with the passing of public debt in general is replicated in respect of the ODD. Consequently, Sack was adamant that the doctrine did *not* apply to changes in the internal governance of a state, however far-reaching. Hence, he rejected the arguments of Russia's Bolshevik government that it was justified in repudiating the debt and other financial obligations of its Tsarist predecessor⁸⁰—a position famously echoed by the US Court of Appeals for the Second Circuit in the *Lehigh Valley Railroad* case:

Changes in the government or the internal polity of a state do not as a rule affect the position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.⁸¹

The modern reorientation of the ODD—permitting the rejection of nonbeneficial debt in any case in which there has been a transformation in the governing regime, particularly a change from nondemocratic to democratic rule—was obviously applicable to the situation the Zanu-PF government found itself in on assuming power in 1980, as the country's first democratically elected government. Even if it is the case, however, that the disclaiming of odious debt is confined to cases of state succession proper, Zimbabwe met this stipulation as

Costa Rica arbitration of 1923 (the Tinoco case) – involved governmental succession, absolving the Costa Rican government from, inter alia, the obligation to repay a US\$200,000 loan advanced to the previous administration that was found to have been used not in the legitimate interests of the state but (with the full knowledge of the creditor concerned) to help fund the flight of the former president, Frederico Tinoco, and his brother from Costa Rica when the downfall of the regime was imminent. Even so, the presiding judge—former US president William Taft—in rejecting an initial argument that the loan was invalid because it had been made to a non-democratic administration, affirmed the rule that a mere change in government was not sufficient to affect the contractual obligations of a state. See *Great Britain v Costa Rica* (1924) 18 AJIL 147.

⁸⁰ Alexander N Sack, “Diplomatic Claims Against the Soviets (1918–1938)” (1937–1938) 15 NYUQL Rev 507 at 516. Russia did eventually agree to pay back a proportion of the debt that had been repudiated, but not until the twentieth century was drawing to a close. It paid £82 million to British investors in 1986 (around 63 percent of the sum owed), and 3 billion francs (£272 million) to French bondholders over a three-year period from 1997 to 2000 (about 42 percent of the original claim). See Lyndon Moore & Jakub Kaluzny, “Regime change and debt default: the case of Russia, Austro-Hungary, and the Ottoman Empire following World War One” (2005) 42 Explorations in Economic History 237 at 250–251.

⁸¹ John Moore, *Digest of International Law*, (Washington: Government Printing Office, 1906) vol 1 at 249 cited in *Lehigh Valley Railroad Company v State of Russia*, 21 F (2d) 396 at 401 (2d Cir 1927). These comments were in turn cited approvingly in *Jackson*, a case concerning the non-payment by the PRC of certain bonds issued in the United States in 1911 by the imperial Chinese government to finance the building of the Hukuang Railway (and which the nationalist government of Chiang Kai-shek had subsequently promised to honour). See *Jackson v The People's Republic of China* 550 F Supp 869 (ND Ala 1982) at 872. *CF United States v Iran*, Award 574-B36-2, Award (3 December 1996) at para 54 (Iran–US Claims Tribunal) (WL 1171809): one of the chambers of the Iran–United States Claims Tribunal also adopted this position, holding that the Islamic revolution of 1979 had not affected Iran's international legal personality or its rights and obligations under international law.

well. In fact, many of the liabilities the country inherited on independence were of the exact nature that gave rise to the odious debt concept in the first place: war and subjugation debts.⁸²

2.2.2 THE ODD'S ANTECEDENTS: WAR AND SUBJUGATION DEBTS⁸³

Loosely speaking, *war debts* refer to loans that have been incurred in order to fund a war against the successor state; the rationale being that states and their populations can hardly be expected to help finance wars against themselves that creditors must be aware that if they advance monies to one of the warring parties and that party is subsequently defeated it is wholly unrealistic to expect satisfaction from the victor.⁸⁴ Hence, following its victory in the Boer War of 1900, Britain refused to accept responsibility for those loan notes issued by the Boer Republics (the Orange Free State and the South African Republic) in order to finance

⁸² Whether the ODD, as encapsulated by Sack, has crystallized into a rule of customary international law is controversial. Many contemporary authors are ambivalent as to its status or deny that it has any legal standing at present—especially when applied to cases of governmental succession—citing a dearth of state practice in particular. See Choi & Posner, *supra* note 27 at 34-35; Buchheit, Mitu Gulati & Thompson, *supra* note 71 at 1228-30; Bolton & Skeel, *supra* note 4 at 83; Jai Damle, “The Odious Debt Doctrine After Iraq” (2007) 70 *Law & Contemp Probs* 139 at 139; James V Feinerman, “Odious Debt, Old and New: The Legal Intellectual History of an Idea” (2007) 70 *Law & Contemp Probs* 193 at 218-219; Anna Gelpern, “What Iraq and Argentina Might Learn from Each Other” (2005) 6:1 *Chicago J Intl L* 391 at 406; Michalowski, *supra* note 27 at 45; Christoph G Paulus, “‘Odious Debts’ vs. Debt Trap: A Realistic Help” (2005-2006) 31:1 *Brook J Intl L* 83 at 86; Andrew Yianni & David Tinkler, “Is there a Recognized Legal Doctrine of Odious Debts?” (2006-2007) XXXII *NCJ Intl L & Com* 749 at 768; Emily F Mancina, “Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law” (2004) 36 *Geo Wash Intl L Rev* 1239 at 1252. For a more positive view of the legal status of the ODD, see generally Adams, *Loose Lending*, *supra* note 73 and King, *supra* note 61 at 71-72. According to King, those who point to the ODD’s failure to establish itself as a principle of customary international law have misunderstood the nature of the burden of proof. As odious debt is intended to operate as an exception to the rule that debts must be repaid, what must be proved, he argues, is: “Absence of general, uniform practice and consistency, or absence of *opinio juris* of that alleged rule of repayment ... [the] difference is significant. A fluctuation in practice, or absence of *opinio juris*, in respect of repayment of odious debts, rather than the assertion of the doctrine, is the threshold that must be crossed.” Jeff A King, “The Doctrine of Odious Debt in International Law: A Restatement” (2007) Faculty of Laws, University College London Working Paper 4 at 6, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1027682>. See also *INA Corp v Iran*, Award 184-161-1 (26 November 1986), Iran-U.S. Claims Tribunal Reports, vol 8 (1985- I) 403 at 446-447. Judge Ameli in the course of a dissenting opinion to one of the Iran-US Claims Tribunal awards, declared the “principle of odious debts” to be one option among others to invalidate a debt, as cited in Paulus, “The Evolution of the ‘Concept of Odious Debts’” *supra* note 79 at 417, n 127.

⁸³ In describing such debts, Bedjaoui borrows from biological terminology: “The term ‘odious debts’ designates the genus, whereas ‘war debts’ and ‘subjugation debts’ constitute different species within that genus” (Bedjaoui, *supra* note 49 at 67 para 117). O’Connell employs the term “hostile debts” in reference to subjugation debts (O’Connell, *supra* note 44 at 459-461).

⁸⁴ Although Feilchenfeld emphatically denies that this is the case (Feilchenfeld, *supra* note 46 at 721). See Hans Cahn, “The Responsibility of the Successor State for War Debts” (1950) 44:3 *AJIL* 477 at 487 (for Cahn, the rationale for not paying war debts was, as much as anything, preventive—the means by which a state would signal to other creditors that they should refrain from funding its antagonists).

their respective war efforts against the British, apparently on the ground that the war debts exception applied⁸⁵—just as the United States had earlier declined to honour those debts incurred by the Confederate states in prosecuting the American Civil War.⁸⁶ Similarly, the war debts exception was applied in the peace treaties that concluded the First World War, with the negotiators generally exempting the victorious powers and the liberated territories from liability for any debts contracted by the defeated states after the date on which war commenced.⁸⁷ Going beyond its general declaration of 1918, the new Soviet government, in 1920, explicitly repudiated Russian debts owed to Britain by invoking the ‘war debts’ exception.⁸⁸ The treaties which terminated the Second World War also tended to exempt successor states from any liability to pay war debts, so that, for example, newly liberated Abyssinia (now Ethiopia) was not obliged to repay any of the debts assumed by Italy in respect of its forcible annexation of the country.⁸⁹ Consequently, state practice as evidence of customary international law appears to indicate that war debts (at least in so far as their proceeds have been devoted to actively fighting the successor state) are not transmissible—a position accepted by the majority of publicists.⁹⁰

⁸⁵ According to legal advice obtained from the Colonial Office: “obligations incurred during the war, or in contemplation of the war, stand upon a different footing, and we do not know of any principle of international law which would oblige Her Majesty’s Government to recognize such obligations” (UK, Foreign Office, *Opinion of 30 November 1900* (Foreign Office Confidential Paper (7516) no 22A) cited in O’Connell, *supra* note 44 at 462). Britain did eventually provide some compensation to the holders of South African war loans, albeit limiting the amount paid to 10 percent of the sum owed. See Arthur Berriedale Keith, *The Theory of State Succession with Special Reference to English and Colonial Law* (London: Waterlow and Sons Ltd, 1907) at 65. The British government’s position was also reflected in judicial opinion as expressed in *West Rand Central*, a case in which the plaintiff sought recovery of gold (or the value thereof) confiscated by the South African Republic shortly before the outbreak of hostilities with Great Britain. The contention that an annexing state was in any way bound to honour the liabilities of the annexed territory was rejected by the court. *West Rand Central Gold Mining Company Limited v The King* (1905) 2 KB 391 at 402: “When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them”. In 1924 the same reasoning led the highest German court in civil matters, the Reichsgericht, to dismiss the German government’s argument that the claimant was obliged to sue the United Kingdom instead of Germany in a case involving the former German colony of Deutsch-Ostafrika, which had been mandated to the United Kingdom in the aftermath of the First World War (RGZ 108, 298, Judgment of 3 June 1924- III 383/23). See also Paulus, *supra* note 79 at 397–398.

⁸⁶ As enshrined in US Const amend XIV, § 4: “...neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, ... but all such debts, obligations, and claims shall be held illegal and void.”

⁸⁷ Bedjaoui, *supra* note 49 at 70–71 paras 145–147; Cahn, *supra* note 84 at 483–484. However, this principle did have to be tempered by economic reality, particularly in relation to Austria-Hungary, which lost large parts of its territory and resources.

⁸⁸ See Paulus, *supra* note 79 at 397: a declaration of the Peoples’ Commissar for foreign affairs of the newly formed Soviet Union, 9 July 1920, stated “[a]ll Russian contracts and obligations regarding British citizens have been annulled from the date on which the British Government has entered into war and intervention against Soviet Russia.”

⁸⁹ Bedjaoui, *supra* note 49 at 71 paras 151–152.

⁹⁰ Although Feilchenfeld stands as a notable exception (see Feilchenfeld, *supra* note 46).

With regard to *subjugation* or *hostile debts*, these have been defined by the Algerian jurist Mohammed Bedjaoui—the ILC’s Special Rapporteur on the Succession of States in respect of Matters other than Treaties—as those which have been “contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.”⁹¹

This particular type of odious debt is traditionally regarded as having originated in the discussions that terminated the Spanish-American War of 1898. The American delegation, in negotiating the Treaty of Paris that formally concluded the conflict, disclaimed any obligation for Spanish debts secured against Cuban revenue streams (Cuba, among other territories, having been ceded to the United States by Spain at the end of the conflict).⁹² In what is traditionally portrayed as the first incarnation of the modern ODD, the delegation argued that since the loans had been incurred without the Cuban people’s consent and their proceeds were largely employed in purposes injurious to them⁹³—quelling uprisings aimed at achieving independence⁹⁴—it was unconscionable that the Cubans should then be charged with their repayment.⁹⁵ Moreover, asserted the American representatives, those creditors who had been prepared to fund Spain were in effect gambling on Spain’s ability to crush the Cuban revolution. If, as had in fact transpired, Spain was unsuccessful in its attempt and Cuba’s sovereignty transferred to a new power, they could hardly expect to collect on their loans.⁹⁶

Mexico provides an even earlier example of the subjugation debt exception, with the government of Benito Juárez refusing to honour the debts contracted during the three-year reign of the Austro-Hungarian Archduke Maximilian, whose overthrow was finally achieved by Republican forces in 1867.⁹⁷ Similarly, in another often cited example of the subjugation or hostile debts exception, the drafters of the Treaty of Versailles chose, at the end of the First World War, to exempt Poland from repaying those debts acquired in its name for the purposes of aiding Germany’s colonization of the country.⁹⁸ Germany, too, following the *Anschluss* in 1938, claimed that it was entitled to repudiate Austria’s pre-annexation debts, adopting

⁹¹ Bedjaoui, *supra* note 49 at 72 para 157.

⁹² The treaty was finally signed by both parties on 10 December 1898.

⁹³ “[C]reated by the Government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice” (Feilchenfeld, *supra* note 46 at 340).

⁹⁴ As well as being used to finance other Spanish imperialist projects, including an expedition to Mexico (see *ibid* at 339).

⁹⁵ See *ibid* at 340–341.

⁹⁶ “The creditors, from the beginning, took the chances of the investment. The very pledge of the national credit, while it demonstrates on the one hand the national character of the debt, on the other hand proclaims the notorious risk that attended the debt in its origin and has attended it ever since” (Adams, *Loose Lending*, *supra* note 73 at 164). It has been asserted, however, that the creditors of 1898 were not the original investors, Spain having refinanced its debt in 1890 through a new bond issue sold on the international market. The new creditors may therefore have been unaware of the purposes to which the original loan proceeds were put; see Yianni & Tinkler (*supra* note 82 at 758).

⁹⁷ See King, *supra* note 82 at 30.

⁹⁸ Feilchenfeld, *supra* note 46 at 451, n 78; O’Connell, *supra* note 44 at 460–461; Bedjaoui, *supra* note 49 at 73 para 168.

arguments already deployed by Britain and the United States in disclaiming responsibility for the liabilities of the Boer Republics and Cuba.⁹⁹ A later use of the exception was made by Indonesia, when, having initially agreed to assume part of the public debt of the Netherlands in 1949, it denounced that decision seven years later—repudiating the debt on the grounds that Indonesia had neither properly consented to it being incurred, nor obtained any benefit from it, the proceeds having been used in attempting to suppress the Indonesian liberation movement.¹⁰⁰ A much more recent example is that of South Africa's decision to cancel, in 1994 and 1999 respectively, apartheid-era debt owed to it by Namibia¹⁰¹ and Mozambique.¹⁰² In a presidential statement issued during consultations with Namibia's President Nujoma, President Mandela "indicated that the South African cabinet in principle regarded it as unacceptable that a developing country should be required to repay a debt incurred by the colonial power."¹⁰³ Although there have undoubtedly also been many instances where states have assumed responsibility for what can be characterized as subjugation debts, there is little indication that this was in compliance with any perceived legal obligation.¹⁰⁴

The underlying principle that emerges from the war and subjugation debt exceptions—that the population of a state should not be burdened with paying back debts whose proceeds were used to suppress and control it or even to actively wage war against it—is strikingly applicable to the debts contracted under the Smith regime. These debts had been incurred without the consent of the vast majority of Zimbabwe's inhabitants (disenfranchised under

⁹⁹ According to King, a large part of the loan proceeds had in fact been used by Austria to buy food, undermining Germany's claim that all Austria's pre-Anschluss debt was contrary to the country's interests (King, *supra* note 61 at 28).

¹⁰⁰ *Commission's Report*, *supra* note 46 at 95 paras 16–17; Bedjaoui, *supra* note 49 at 73 para 169; Paulus, *supra* note 79 at 400.

¹⁰¹ Namibia was estimated to owe 700–800 million South African Rand (about US\$190–200 million). See "S Africa intends to scrap Namibia's debt", *Xinhua News Agency* (10 August 1994); Patrick Comerford, "Spotlight: Namibia: Africa's 'last colony'", *Irish Times* (7 December 1994) 12; "Mandela writes off Namibian debts, agrees to hand over property", *BBC Summary of World Broadcasts* (8 December 1994).

¹⁰² Mozambique owed about US\$6.5 million; see Gumisai Mutume, "Whither the debt? Despite HIPC, African countries still struggle with heavy debt payments" (2001) 15:3 *Africa Recovery* 26, online: <www.un.org/en/africarenewal/vol15no3/153debt.htm>. According to Rob Davies, Chairperson of the Trade and Industry Portfolio Committee in the South African Parliament, Mozambique's debt was cancelled "in recognition of the odious nature of that debt, relating to the apartheid regime's war in Southern Africa". See Congress of South African Trade Unions, Press Release, "Calls for debt cancellation increase" (14 April 2000), online: <www.cosatu.org.za/show.php?ID=931>.

¹⁰³ "South Africa set to write off Namibian debt", *Agence France Presse* (6 December 1994).

¹⁰⁴ As Howse explains: "It would be mistaken to invoke cases where the debt was arguably odious but the outcome was adjustment not elimination of obligations to show that state practice does not support the existence of an odious debt concept as customary international law," pointing out that "parties often hold back from the exercise of their full legal rights and obligations for pragmatic reasons. This does not mean that the rights and obligations are lesser or that their existence does not have an important bearing on the negotiated outcome." See Robert Howse, *The Concept of Odious Debt in Public International Law*, (United Nations: 2007) 1 at 8, online: <www.unctad.org/en/Docs/osgdp20074_en.pdf>.

white-minority rule) and had mostly served the interests of an oppressive (and often violently repressive) regime—not least by paying for the vast security apparatus that kept it in power for so long and by funding its counterinsurgency wars against the indigenous liberation forces. Nor is there any difficulty, as is sometimes the case in attempting to apply the ODD, in demonstrating creditor awareness as to what loan monies had been used for. Given the obloquy directed against Rhodesia, the target of UN Security Council sanctions—including a complete prohibition on funding—lenders to the Smith government could hardly have pleaded ignorance as to the nature of the regime they were financing, no more than could those who chose to invest in apartheid South Africa.¹⁰⁵

Post-independence Zimbabwe, then, should have been a prime candidate for refusing to repay the debts inherited from the Rhodesian regime, blazing a trail for its neighbour to the south, which was to undergo its own transition from white-minority rule to multiracial democracy nearly a decade and a half later. And, as with South Africa, it was likely that any decision to repudiate the debts of the previous regime would have elicited a broadly sympathetic response from large sections of the international community. Moreover, Zimbabwe, again like South Africa, exhibited, in comparison with other sub-Saharan African states, relatively advanced, if highly uneven, economic development at the time of the transition to democracy, which might be thought to have made it reasonably attractive to future lenders and investors and hence less susceptible to any large-scale withholding of credit consequent upon a refusal to meet past debt obligations.

In addition, the Zanu-PF government arguably had stronger grounds for refusing to repay the loans it inherited from its segregationist era than did its South African counterpart, since its acquisition of power took place in the context of Zimbabwe's achievement of independence from its old colonial ruler, Britain. Consequently, it could have repudiated the Rhodesian debt either on the ground that there is no principle of international law by which state debt is automatically transmitted to a successor state and/or because the loans in question fell squarely within the classic war and subjugation debt exceptions. That is, their proceeds were used to maintain control over the country—cowering the indigenous population and preventing it from freely determining its own political, social, and economic destiny—as well as quelling armed resistance to the status quo. Furthermore, in the latter case, there could have been no objection on technical grounds to the disclaiming of this classically odious debt, since the sovereign transformation element that has traditionally been regarded as a prerequisite of the ODD had been fully satisfied.

3. ZIMBABWE'S ASSUMPTION OF ODIUS OBLIGATIONS

3.1 THE DECISION TO REPAY THE RHODESIAN-ERA DEBT

In spite of the above, and in contrast to the behaviour of the Smith regime and its rejection of the Kariba Dam loan from the World Bank after UDI in 1965, there was to be no rejection of Zimbabwe's foreign debt when the Zanu-PF government assumed power in 1980, following the country's first truly independent and democratic elections. Foreshadowing what was to occur in South Africa some fourteen years later, the government opted to affirm and repay

¹⁰⁵ Indeed, the high-interest and short-term nature of much of the private credit provided suggests that the relevant lenders were aware that they might not be repaid in the event of the regime's downfall.

the loans contracted under Rhodesian rule. This was notwithstanding the fact that Mugabe's Zanu-PF government—unlike the Mandela government, which was to abandon much of its commitment to redistribution in favour of a market-oriented and neoliberal economic programme by the time it came to power¹⁰⁶—initially opted to pursue what has been described as a “social-welfarist” agenda. Its objective was to reduce the vast income disparity between the white and the black populations and, more generally, to improve the living conditions of the poor—particularly in the rural areas.¹⁰⁷ Consequently, it might have been thought that, on independence at least, the government would have been favourably disposed to repudiating the odious debt acquired during the Rhodesian years, redirecting the money saved into projects aimed at enhancing the welfare of ordinary Zimbabwean citizens.¹⁰⁸

Instead, in choosing to pay back the odious debt it inherited, Zimbabwe was to act as something of a role model for South Africa and other countries emerging from repressive rule—albeit, as Patrick Bond and Masimba Manyanya lament, the wrong one:

Had Mugabe embarked upon a high profile repudiation of Rhodesian-era debt, that might have deterred international bankers ... from lending to South Africa during its 1980s crisis, which kept apartheid in place for longer and with more durability than should have been the case. Progressive demands for financial sanctions against

¹⁰⁶ On the ANC's gradual relinquishing of its initial redistributionist approach, culminating in the adoption of the free-market Growth, Employment and Redistribution Strategy, see generally William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (London: Zed Books, 2007); Ian Taylor, *Stuck in Middle GEAR: South Africa's Post-Apartheid Foreign Relations* (Westport, CT: Praeger Publishers, 2001); Hein Marais, *South Africa: Limits to Change, the Political Economy of Transition* (London: Zed Books, 2001); Mueni Wa Muiu, *The Pitfalls of Liberal Democracy and Late Nationalism in South Africa* (New York: Palgrave Macmillan, 2008); Michael H. Allen, *Globalization, Negotiation, and the Failure of Transformation in South Africa: Revolution at a Bargain?* (New York: Palgrave MacMillan, 2006).

¹⁰⁷ Dashwood, *supra* note 16 at 28–29.

¹⁰⁸ That a post-independence government might reject the debts contracted by its racist predecessors was certainly mooted in some quarters, with one writer speculating, during the course of the Lancaster House negotiations:

What will a new government decide to do and in fact be capable of doing? Will it willingly inherit all the debt from an illegal regime? Will it negotiate with the Bank of England about meeting commitments to UK bondholders? Will the UK government and the IBRD require quick and early payment or will a debt repudiation and/or rescheduling exercise ensue as part of a package of sanctions-removal policies? If there is repudiation, even only in part, what ramifications might this have on private and official creditors?

DG Clarke, “Zimbabwe's International Economic Position and Aspects of Sanctions Removal” in WH Morris-Jones, ed, *From Rhodesia to Zimbabwe: Behind and Beyond Lancaster House* (London: Frank Cass, 1980) 28 at 47. In fact, shortly after winning the election, the Mugabe government agreed to repay debt owed to the UK government and to British bondholders incurred before 1965. Of the £55 million owed to the UK government, it was agreed that £22 million would be cancelled and the remaining £33 million rescheduled over ten years. See *The Zimbabwe (Independence and Membership of the Commonwealth) (Consequential Provisions) Order 1980*, SI 1980/701 arts 5–6, Explanatory Note. See also, UK, HC, *House of Commons Debates*, vol 984, 461 at 462 (7 May 1980) (Richard Luce, then Under-Secretary of State for Foreign and Commonwealth Affairs); UK, HC, *House of Commons Debates*, vol 987, 619 at 619–620 (2 July 1980).

dictatorial regimes like that of Burma would be taken much more seriously by bankers if Mugabe and subsequently Nelson Mandela had enforced those sanctions with debt repudiation, once they assumed power.¹⁰⁹

Furthermore, suggest Bond and Manyanya, refusing to repay the debt would have had other advantages: demonstrating consistency with the UN sanctions imposed on Rhodesia before independence; punishing the lenders who kept an unlawful and racist regime in power; allowing the Mugabe government to direct funds otherwise spent on debt servicing into meeting Zimbabwe's developmental needs; and enabling government officials to better resist the imposition of the Washington Consensus policies advocated by the International Monetary Fund (IMF) and others.¹¹⁰

That the post-independent government chose nonetheless to honour the Smith-era debt can be attributed to a number of factors, some of which were later to prove relevant to South Africa. In particular, it would seem that the Mugabe government, although keen to promote local involvement in the economy (evidenced by its acquisition of state interests in certain key sectors and general commitment to majority Zimbabwean participation in foreign-owned enterprises)¹¹¹ nonetheless remained committed to encouraging foreign investment. Thus, according to Bond and Manyanya, apprehension as to the effect that repudiation would have on Zimbabwe's ability to attract credit and investment appears to have been a crucial determinant: "It seems the government was too anxious to establish its credentials with the financial world."¹¹² Moreover, according to the authors, although the government did in fact consider disclaiming the debt that it inherited from its white-minority predecessor, Mugabe was eventually dissuaded from this course of action by senior members of the banking community.¹¹³

As would later feature so prominently in South Africa, then, reputational concerns—the fear that refusing to repay foreign debt, no matter how justified, would translate into the withholding of further credit and investment—appears to have persuaded the government not to repudiate.¹¹⁴ Furthermore, the Mugabe government was a completely new regime in a newly

¹⁰⁹ Bond & Manyanya, *supra* note 14 at 24.

¹¹⁰ *Ibid.* But see Dashwood, *supra* note 16 at 65–84. Dashwood contends that the Zimbabwean government was quite capable of defying the wishes of the IMF and the World Bank when it did not agree with their policy prescriptions, and in fact decided on its own initiative, in the mid to late 1980s, to implement market-based reforms independent of any pressure exerted by the Bretton Woods Institutions.

¹¹¹ See Dashwood, *ibid* at 35–36, 148, 155–156.

¹¹² Bond & Manyanya, *supra* note 14 at 24, citing Thandike Mkandawire, who later became head of the UN Research Institute for Social Development.

¹¹³ The authors refer to an interview with Norman Reynolds, chief economist in the finance ministry under the Mugabe government in the early years following independence, who explains how Mugabe was cajoled into honouring the debt: 'The heavies – local and international bankers – came in and worked on Mugabe for a year and a half. That included lunches and dinners, and he finally relented and agreed not to default.' Bond & Manyanya, *ibid* at 24.

¹¹⁴ For a detailed application of reputation theory to the repayment of state debt, involving the analysis of over three hundred years' worth of bond-market data, see Michael Tomz, *Reputation*

independent country, and it is possible that a decision to repudiate would have had a greater impact on potential investment than a similar decision taken by a longer established regime.¹¹⁵

In this respect, it is instructive to contrast the behaviour of the Mugabe administration with that of the Smith regime in defaulting on the country's external debt following UDI. In terms of a cost-benefit analysis, and the likely damage that Rhodesia would sustain to its reputation for economic reliability, defaulting on the nation's foreign debt can be said to have represented a logical step for the Smith government. Since the country's ability to attract foreign investment had already been greatly impaired by the imposition of financial sanctions in response to UDI, the decision to default was unlikely to have inflicted significant reputational damage on the country beyond that which it had already suffered.¹¹⁶

It may well have been the case, of course, that Zimbabwe would not have suffered any damage to its reputation had it chosen to repudiate the colonial era debt: either because of widespread support for the rejection of loans accumulated during the Rhodesian era and/or because investors would not necessarily interpret a decision not to repay odious debts as indicative of a more pervasive willingness to default. The government could even have tried to insulate itself further from such damage by conducting an audit of the loans inherited beforehand to check for odiousness or by offering to refer suspect loans to arbitration.¹¹⁷ Indeed, there is some evidence that the markets are quick to forgive and forget in any event, with withdrawal of credit and higher borrowing costs being relatively short-term reactions to default.¹¹⁸ However, it is the incoming government's own perception that is determinative of the matter, and the Mugabe government may well have decided that, on balance, it would do more harm than good to disclaim the debt.

Wider geopolitical considerations also played a role in the matter, particularly in relation to apartheid South Africa, which was keen to ensure that Zimbabwe provided the right prototype for the demise of white-minority rule elsewhere in southern Africa.¹¹⁹ There was

and International Cooperation: Sovereign Debt Across Three Centuries (Princeton, NJ: Princeton University Press, 2007).

¹¹⁵ See Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008) at 90-91. As he notes: "New states, or states with new regimes ... have reputations that are less well established, so more is at stake when they make compliance decisions. Because observing states have only weak priors [i.e. prior beliefs] about the new state's willingness to comply with international legal obligations, each individual compliance decision has a larger impact on the new state's reputation. It follows that, all else equal, the incentive to comply is increased."

¹¹⁶ The position of the Smith government can be compared to that of Russia's Bolshevik government in 1917. As Guzman suggests, since the other European powers were unlikely to be prepared to lend to the new communist regime, the Soviets had little to lose reputation-wise in repudiating the Tsarist debt (*ibid* at 89).

¹¹⁷ See Conclusion below.

¹¹⁸ See Eduardo Borensztein & Ugo Panizza, "The Costs of Sovereign Default" (2008) International Monetary Fund Working Paper WP/08/238 at 22, online: <www.imf.org/external/pubs/ft/wp/2008/wp08238.pdf>.

¹¹⁹ On the considerable influence exerted by the government of PW Botha on the process leading up to Zimbabwe's independence, including on British policy-making, see generally Onslow, *supra* note 25. The Botha government was especially supportive of Bishop Muzorewa's candidacy, taking

also the very real threat that South Africa, anxious to preserve its own considerable commercial interests in Zimbabwe, would take retaliatory action (both economic and military) if the post-independence government decided to deviate too far from the agenda pursued by its colonialist predecessor.¹²⁰ Hence, anything likely to unsettle the interests of foreign capital and the white community was almost certain to be discarded. And, since most of the country's earnings were generated by the large commercial farms and industrial concerns—practically all of which were in white ownership—the government was wary of doing anything that would jeopardize the newly independent nation's economic wellbeing.¹²¹

Also inclining the government towards repayment may have been the fact that Zimbabwe's external debts—at least initially—may not have appeared too burdensome. As Hevina Dashwood observes, the debt service ratio for Zimbabwe's foreign debt for the year 1980 (i.e. the cost of servicing external debt expressed as a proportion of the value of goods and services exported) was actually quite low, standing at just 3.8 percent.¹²² Consequently, it is possible that the government simply determined that “the costs [attendant on repudiation] outweighed the benefits. Costs would certainly have included some of the future loans and possibly substantial aid flows, and even potential restrictions on trade finance.”¹²³ In addition, Zimbabwe is endowed with a variety of mineral resources and, at the time of independence, enjoyed a relatively diverse export profile. This meant the country was not solely dependent on the performance of one or two primary commodity exports and therefore, in theory, should have been more capable of withstanding the adverse effects of any external economic

advantage of Rhodesia's dependence on South Africa “to manipulate the democratic process to secure an ‘acceptable’ (that is, non-communist) black nationalist government, and to set a vital precedent for doing the same in South West Africa/Namibia – although it was recognised that the [United Nations] limited Pretoria's room for manoeuvre on the Namibia question” (*ibid* at 492).

¹²⁰ See Lionel Cliffe, “Zimbabwe's Political Inheritance” in Stoneman, *supra* note 9, 8 at 34.

¹²¹ See Dashwood, *supra* note 16 at 23–24 and 28. As Dashwood explains, the Mugabe government was keen to avoid the fate of its eastern neighbour, Mozambique, which had suffered a mass departure of its white population on the transition to democratic rule. See also Colin Stoneman & Rob Davies, “The Economy: An Overview” in Stoneman, *supra* note 9, 95 at 123.

¹²² See Dashwood, *supra* note 16 at 64. A comparatively low level of external debt may also have persuaded South Africa's ANC administration not to repudiate. According to the Apartheid Debt Co-ordinating Committee, only about 5 percent of South African debt in 1997 (three years after Mandela's election) was owed to foreign creditors. See *Truth and Reconciliation Commission of South Africa Report* (Cape Town: The Commission, 1998) vol 4 at 54–55 para 150, online: <www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.

¹²³ Bond & Manyanya, *supra* note 14 at 24. See also Rob Davies, “Foreign Trade and External Economic Relations” in Stoneman, *supra* note 9, 195 at 216:

[t]he present government has not repudiated any of these debts, although there must be a strong moral temptation to do so given that it was used by the regime to finance the war, and those who lent money did so in direct contravention of mandatory sanctions, and that presumably most of the loans must have been raised in South Africa. There is however a pragmatic reason for not repudiating the debts in that to do so might create problems for future attempts to borrow abroad. The amount of servicing that the debt requires is unknown, but it must be less than 5 per cent of export earnings.

shock (such as declining terms of trade or rising interest rates).¹²⁴ Furthermore, what was in comparison with many other African nations a relatively healthy, if highly uneven and racially divided, economy was widely expected to improve after independence,¹²⁵ as the long years of war were finally brought to an end and investment flows returned on the cancellation of international economic sanctions.

However, even if it were the case that the government thought the debt would not prove too onerous, it seems that such an assessment was flawed. According to Tim Jones, the loans were short term and subject to high interest rates,¹²⁶ which presumably reflected the risk inherent in lending to an unlawful regime (short term and high interest loans were also to become the preferred vehicles for lending to apartheid South Africa after official lending from the IMF and World Bank and other states was withdrawn from the 1980s onwards).¹²⁷ They were to become particularly burdensome when Zimbabwe was affected by drought in the early 1980s (severe shortages of rainfall being a recurring feature of the country's climate). As Dashwood notes, Zimbabwe's external debts increased dramatically in the years following independence, precipitated by a prolonged drought in 1982¹²⁸ that necessitated recourse to an IMF standby arrangement between 1983 and 1984.¹²⁹ Although the government made some progress towards reducing the country's indebtedness by the end of its first decade in power—placing some emphasis on debt repayment so as to limit the influence of the IMF and World Bank—Zimbabwe's debts increased dramatically from 1993 onwards, as it experienced a further devastating drought.¹³⁰

The Economic Structural Adjustment Programme (ESAP) introduced in 1991 in conjunction with the IMF and World Bank—along with the blessing of pro-market actors in the ruling elite—failed to deliver the economic growth expected.¹³¹ As the 1990s progressed, the government became increasingly corrupt, antidemocratic, and uninterested in pursuing the antipoverty strategies that had characterized the early years of its incumbency.¹³² Adding

¹²⁴ Dashwood, *supra* note 16 at 61–63.

¹²⁵ Lloyd M Sachikonye, “Whither Zimbabwe? Crisis and Democratisation” (2002) 29:91 *Rev African Political Economy* 13 at 13; Stoneman & Davies, *supra* note 121 at 95. See also Stefan Andreasson, *Africa's Development Impasse: Rethinking the Political Economy of Transformation* (London, UK: Zed Books, 2010) at 122, 125.

¹²⁶ Tim Jones, *Uncovering Zimbabwe's debt: The case for a democratic solution to the unjust debt burden* (Witham, UK: The Tawny Press, 2011) at 6, online: <jubileedebt.org.uk/reports-briefings/report/uncovering-zimbabwes-debt-the-case-for-a-democratic-solution-to-the-unjust-debt-burden>.

¹²⁷ Jeff Rubin, “Challenging Apartheid's Foreign Debt” (1997) 1 at 15, online: <www.africanafrican.com/folder12/african%20african%20american4/Mau%20Mau%20uprising/RUBIN.pdf>.

¹²⁸ Thus, by 1983, Zimbabwe's debt-service ratio had increased nearly ten-fold on the 1980 figure, equating to nearly a third of the country's total foreign earnings: see Dashwood, *supra* note 16 at 64.

¹²⁹ *Ibid* at 65.

¹³⁰ *Ibid* at 72 and 142.

¹³¹ On ESAP: see generally *ibid* at 55–84; Patrick Bond, *Uneven Zimbabwe: A Study of Finance, Development, and Underdevelopment* (Trenton, NJ: Africa World Press, 1998) at 379–381; Sachikonye, *supra* note 125 at 14.

¹³² In fact, the government actually had to be persuaded by the World Bank to ameliorate some of the harshness of its economic strategy by providing more funding for health in particular; see

greatly to the country's indebtedness were the millions spent in the Congo helping to defend Laurent Kabila's regime against rebel forces,¹³³ which meant that by the time the war veterans (those who had fought in the war of liberation against white rule) began agitating for some form of recompense there was almost no money left to meet their demands.¹³⁴

Moreover, if apparent affordability did indeed steer Zimbabwe towards repayment rather than repudiation, this touches on another complication affecting modern-day invocations of the ODD: the extent to which capacity to pay (from the perspective of both debtors and creditors) should trump evidence of odiousness. It is not normally the case, for example, that individuals or businesses agree to repay what is discovered to be an unlawfully imposed debt solely because they have the resources to do so. Certainly, if one returns to the colonialist origins of the ODD, a state's refusal to countenance repayment of a loan believed to constitute a war debt (as was the case with Great Britain in respect of many loans incurred by South Africa during the course of the Boer War) or a 'hostile debt' (as the United States regarded the Spanish loans to Cuba) was in no way dependent on the debt-servicing ability of the state in question. And, of course, the repayment of any debt always carries with it an opportunity cost, which will be that much greater the poorer the country. Hence, in the case of Zimbabwe, however manageable a US\$700m debt may have appeared from a macroeconomic perspective, the sums used to repay it could instead have been used on projects aimed at enhancing the lives of ordinary Zimbabwean citizens. At the very least, nonpayment of the Rhodesian-era debt would have meant that the country was in a better position to weather the hardship inflicted by the drought in the early years of independence, reducing its overall indebtedness.

Finally, perhaps, a more general point can be made about why it is difficult for southern states to disclaim odious debt. Those states that would now benefit most from applying the ODD are poor, tend to be politically weak, and can suffer a great deal of harm if disgruntled creditors (whether private actors, other states, or the Bretton Woods Institutions) choose to withhold funding or other forms of assistance and patronage. This naturally militates against their willingness to invoke the doctrine, even where, as with post-independence Zimbabwe and post-apartheid South Africa, disclaiming the debt of the predecessor regimes would doubtless have been applauded in many quarters and credit providers may well have been reluctant to sue for the return of their money for fear of the negative publicity this would generate.¹³⁵ Thus, the position occupied by debtor states of the South in the international economic and political hierarchy is in no way comparable to that enjoyed by Britain and the US, whose actions pioneered the odious debt concept more than a century ago.

Nor is it likely that southern borrowing states will be helped in their efforts to develop the concept in a more inclusive and enlightened direction. Attempts to incorporate a definition of odious debt in the *1983 Convention*, and to clearly state that such debt is nontransmissible, ran

Dashwood, *supra* note 16 at 7 and 76–77.

¹³³ See Meredith, *supra* note 10 at 148–149; Sachikonye, *supra* note 125 at 14 (at the height of the intervention, the cost to Zimbabwe was estimated to be US\$1 million per day).

¹³⁴ Meredith, *supra* note 10 at 133–134. According to Meredith, a compensation fund for war victims had in fact been established, but had been virtually depleted as a result of corrupt payouts to senior government officials and their relatives.

¹³⁵ A point made by Adams in relation to many of the creditors who lent to the Iraqi regime of Saddam Hussein (Adams, "Iraq's Odious Debts", *supra* note 63 at 13).

aground. Consequently, although the Convention apparently precludes the passing of odious debt, exactly how that debt is defined for the purposes of the instrument remains unclear. The ILC “recognized the importance of the issues raised in connection with the question of ‘odious’ debts” but opted not to include a separate article on the matter drafted by the Special Rapporteur,¹³⁶ being “of the opinion ... 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.”¹³⁷ In addition, although an amendment was adopted to prevent the transfer of odious debt (at the UN Conference of State Representatives convened to discuss the ILC’s draft articles), it failed to attract the support of the major creditor states, with the international community again dividing along North-South lines.¹³⁸ And, of course, the failure of the Convention to garner sufficient ratifications to enter into force means that it has no legal effect.

In fact, the governments of creditor states are now generally wary of acknowledging the existence of the concept of odious debt at all, as was most recently illustrated in relation to Iraq.

¹³⁶ Bedjaoui had drawn up the following, more expansive definition of odious debt for inclusion in the Convention:

- (a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;
- (b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

(Bedjaoui, *supra* note 49 at 74 para 173). For an explanation of Bedjaoui’s definition of odious debt, which drew on post-WWII developments, see King, *supra* note 82, at 18–19.

¹³⁷ *Commission’s Report*, *supra* note 46 at 79 para 43. Hence, it would seem that the Convention’s provisions dealing with the transmission of state debt were intended to exclude the transference of odious debt, except in cases of union or merger, where it was envisaged that all state debt would pass to the successor (see King, *supra* note 82 at 64–65). That the articles in question preclude the transmission of odious debt is not self-evident, requiring recourse to the *travaux préparatoires*; although King, suggests that the rules’ “focus on equitable apportionment and agreement” makes “the capacity for odious debts to be excluded ... rather obvious” (*ibid* at 65).

¹³⁸ The Syrian delegation had proposed that the definition of state debt be amended to specify that only debt incurred ‘in good faith’ and ‘in conformity with international law’ could pass to a successor state – wording it believed would prevent the transmission of odious debt. See “United Nations Conference on Succession of States in Respect of State Property, Archives and Debts” Vienna, 1 March–8 April 1983, Official Records vol 1, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 1983, 30th Mtg, A/CONF.117/16 at 192–193 para 82. The amendment (absent the phrase “in good faith,” which a number of delegates found either unnecessary or too vague) was adopted by 43 votes to none, with 20 abstentions, and hence article 33 defines state debt as “any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law” (*ibid*, 32nd Mtg at 206 para 75). Representatives of major creditor nations objected not so much to the terminology employed – the phrase “in conformity with international law” having no obvious connection with the non-transmission of odious debt – as to the Syrian delegation’s interpretation of it. See e.g. *ibid*, 33rd Mtg, at 208 para 17 (for the comments of the West German representatives); *ibid*, 32nd Mtg, at 203 para 34 (for the comments of the French representatives); *ibid*, 33rd Mtg, at 209 para 25 (for comments by UK representatives).

Although the Bush administration was keen to ensure that Iraq's debt was reduced as much as possible (reflecting its own political and economic objectives in the wake of the 2003 invasion), it quickly resiled from any suggestion that it was supportive of the ODD.¹³⁹ Embracing the use of the concept in one instance risked encouraging its use elsewhere, confirming its relevance to cases of governmental as well as state succession and to situations where its invocation might well prove harmful to United States interests.¹⁴⁰ Instead, it constructed a narrative in which Iraq was depicted as morally deserving of debt forgiveness in relation to the loans accumulated under Saddam Hussein (via a Paris Club engineered write-down) as opposed to legally entitled to repudiate such debt on the basis of any ODD.¹⁴¹ That the United States (and Britain) had, in helping to pioneer the concept of odious debt, set a precedent they might later prefer to disown, was noted by Michael Hoeflich some 20 years before the Iraqi invasion, "In many respects, the self-interest of the nineteenth century has become an enemy of the self-interest of the twentieth, and the rhetoric, theories, and practices of the United States and Great Britain in the nineteenth century linger on as very unwelcome ghosts."¹⁴²

Ultimately, whatever the reasons for Zanu-PF opting to pay back the debt incurred by its racist predecessor, Zimbabwe inherited a problem that was to be far more detrimental to its long-term welfare: that of land reform, the funding of which can conceivably be characterized as an additional odious obligation that burdened the new state.

¹³⁹ An impression initially created by comments made by, among others, the then US Deputy Secretary of Defence Paul Wolfowitz and US Treasury Secretary John Snow. See US, *Military Implications of Nato Enlargement and Post-Conflict Iraq: Hearing of the Senate Armed Services Committee*, 108th Cong (2003) at 37; Neil Cavuto, "John Snow, U.S. Treasury Secretary" *Fox News (Your World with Neil Cavuto)* (11 April 2003), online: <www.foxnews.com/on-air/your-world-cavuto/2003/04/11/john-snow-us-treasury-secretary>.

¹⁴⁰ See Kunibert Raffer, "Odious, Illegitimate, Illegal, or Legal Debts—What Difference Does It Make for International Chapter 9 Debt Arbitration?" (2007) 70:4 *Law & Contemp Probs* 221 at 223; Stephen Mandel, "Odious lending: Debt relief as if morals mattered" *New Economics Foundation* (2006), online: <www.i-r-e.org/fiche-analyse-31_en.html>.

¹⁴¹ Nowhere is this re-conceptualization of odious debt as a moral rather than legal construct better captured, perhaps, than in a bill introduced in the House of Representatives shortly after the invasion. The *Iraqi Freedom from Debt Act* defined the notion of odious debt along Sackian lines, noted the proud part played by the United States in its creation (in relation to Cuba) and then carefully proceeded to water it down, avoiding any suggestion that a debtor nation is entitled to repudiate its odious debt as of right:

[D]ebts incurred by dictatorships for the purposes of oppressing their people or for personal purposes *may be considered 'odious'*. In cases where borrowed money is used in ways contrary to the people's interest, with the knowledge of the creditors, the creditors *may be said* to have committed a hostile act against the people. Under such reasoning, such debts *may be questioned*.

US, HR Res 2482, *To call for the cancellation of loans made to Iraq by multilateral financial institution*, 108th Cong, 2003 at 2 [emphases added]. The bill in fact never passed the house.

¹⁴² MH Hoeflich, "Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession" (1982) 1982:1 *U III L Rev* 39 at 48.

3.2 FROM DEBT TO UNEQUAL LAND DISTRIBUTION: ODIOSNESS IN ANOTHER GUISE

Although a significant problem in other postcolonial African societies, it is in Zimbabwe that the issue of land reform has reached crisis proportions, generating violence and bloodshed, and precipitating the complete breakdown of relations between Zimbabwe and its former colonial ruler, Britain. Against this background, it is worth briefly considering not merely the monetary debt that Zimbabwe inherited from its long period of white-supremacist rule, but also the severe problems associated with unequal land distribution—itsself the legacy of a century's worth of colonial exploitation.

As the post-independence government has never been adequately compensated for the cost of carrying out land reform, arguably such expense should itself be considered a species of odious obligation—one that the Zimbabwean people are paying for not only in conventional monetary terms, to the extent that state funds have been diverted into buying agricultural land for redistribution to the indigenous population, but also in the bloody and unpredictable consequences of the farm occupations that occurred from 2000 onwards. Largely attributable to frustration at the government's failure to deal adequately with the land problem, these have resulted in several deaths and in many Zimbabweans being deprived of their livelihood.¹⁴³

In this respect, Zimbabwe's land reform problem calls to mind Christiana Ochoa's contention that it is ill-advised to confine the concept of odiousness to debt obligations, as this may simply encourage despotic regimes to enter into other financial arrangements in order to fund their activities. Thus, in advocating an "odious finance doctrine", Ochoa suggests that the principles of the ODD should be applied to all financial obligations entered into by despots, including "concession, production sharing, or project finance contracts for the extraction of natural resources, and contracts establishing [Foreign Direct Investment],"¹⁴⁴ extending even to the outright sale of land.¹⁴⁵ There seems no reason in principle why this approach should not be extended to cover Zimbabwe's situation. The alienation of prime farmland was not consented to by the indigenous population and has been of no benefit to the majority of them. Those responsible for the alienation must have been aware of these facts as well as that, without adequate financial compensation, Zimbabwe would be unable to effect meaningful redistribution.¹⁴⁶

¹⁴³ See generally Roger Riddell, "Zimbabwe's Land Problem: The Central Issue" in WH Morris-Jones, ed, *From Rhodesia to Zimbabwe: Behind and Beyond Lancaster House* (London: Frank Cass, 1980) 1 at 6–9. Riddell emphasized when the Lancaster House conference was still progressing, "land is not just one important factor in the Rhodesian conflict but ... the central issue, for it holds the key to understanding Rhodesia's economic structure and growth strategy." He proceeds to point out how wide-scale land redistribution and the reorientation of the economy to focus on inward investment rather than the export of primary commodities was vital in order to combat high levels of unemployment and the vast income disparity between the white and black populations.

¹⁴⁴ Christiana Ochoa, "From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine" (2008) 49:1 Harv Intl LJ 109 at 131.

¹⁴⁵ *Ibid* at 131, n 115.

¹⁴⁶ See also Theo Kneifel, "'Odious Debts'—Ein Sonderfall von illegitimen Schulden am Beispiel der Apartheidschulden Südafrikas" (2002) 9 *Kirchliche Arbeitsstelle Südliches Afrika-Info* (February 2002) 6 (discussing these points in relation to South Africa).

Land expropriation has been a defining—arguably *the* defining—feature of Zimbabwe in both the colonial and postcolonial periods.¹⁴⁷ It has frequently been accompanied by brutality, forced removal, and the perversion of legal and moral principles in an attempt to justify taking land away from people of one skin colour, with little or no recompense, in order to give it to those of another. Overwhelmingly, the transfer has been from black to white, but the years from 2000 onwards have witnessed an intensifying form of reverse discrimination. Many white-owned farms have now been the object of violent attack, with their owners and employees forcibly evicted, and the land subsequently transferred to the new occupiers, with the approval of the Mugabe government and the post hoc sanction of the law.¹⁴⁸

The first alienation of the land from the indigenous peoples occurred in the 1890s, soon after the British South Africa Company (BSAC) expanded its search for minerals north of the Limpopo River, eventually colonizing the land between the Limpopo and Zambezi River.¹⁴⁹ Both the Ndebele and the Shona peoples resisted the loss of their lands and the imposition of white-settler rule, but the process of expropriation was to accelerate after their defeat in the 1896–97 war against the Europeans.¹⁵⁰

The advent of increasing numbers of white settlers in the early decades of the twentieth century led to further forcible displacement, culminating in the *Land Apportionment Act of 1930*,¹⁵¹ which designated land as either “European” or “Native”, with African inhabitants of

¹⁴⁷ As emphasized by Shridath Ramphal, Secretary-General of the Commonwealth from 1975 to 1990: “It was about land in the beginning; it was about land during the struggle; it has remained about land today. The land issue in Zimbabwe (Rhodesia) is not ancient history” (Alex T. Magaisa, “The Land Question and Transitional Justice in Zimbabwe: Law, Force and History’s Multiple Victims” (2010) Oxford Transitional Justice Research Working Paper No 2012/5 at 2, online: <www.otjr.crim.ox.ac.uk/materials/papers/42/MagaisaLandinZimbabweRevised290610.pdf>). Joseph Hanlon, Jeanette Manjengwa & Teresa Smart, *Zimbabwe Takes Back Its Land* (Sterling, Virginia: Kumarian Press, 2013) at 31 (“land allocation has been a central issue in the country for more than a century”).

¹⁴⁸ On the role of the law in Zimbabwe in facilitating the expropriation of land, both pre and post-independence. See generally Magaisa, *supra* note 147.

¹⁴⁹ Of particular significance was the controversial Rudd Concession, entered into in 1888 between representatives of the BSAC and Lobengula, king of the Ndebele people, granting the company exclusive mining rights in land under his control, although the concession also purported to extend to land belonging to the Shona. Worse was to come when the agreement was later used as a pretext for colonizing the lands of both peoples; see Sabelo J Ndlovu-Gatsheni, “Mapping Cultural and Colonial Encounters, 1880s–1930s” in Raftopoulos & Mlambo, *supra* note 7 at 39–47; Robin Palmer, *Land and Racial Domination in Rhodesia* (London: Heinemann Educational, 1977) at 26; Magaisa, *supra* note 147 at 3. The BSAC was granted a Royal Charter by the British Crown in 1889, and, as Magaisa notes (*ibid*), was authorized, among other matters, to “discharge and bear all the responsibility of government”.

¹⁵⁰ What has come to be known as the First *Chimurenga* (‘uprising’ in Shona); the Second *Chimurenga* referring to the national liberation war of the 1960s and 1970s.

¹⁵¹ As Hanlon, Manjengwa & Smart note, the racism of Rhodesia’s rulers extended to the immigrant population, with the government initially anxious to ensure that four-fifths of new arrivals were British subjects, preferably “with some capital” (*supra* note 147 at 35). Consequently, “Jews fleeing Hitler in the 1930s were rejected, as were Poles and southern Europeans after World War II, even if they had capital to invest” (*ibid*). Only hardship in Europe at the end of the Second World War,

the European areas gradually excluded from them.¹⁵² The white settlers were allocated a much greater proportion of the land, and the most fertile, while Africans were displaced into the so-called Native Reserves,¹⁵³ which were located on inferior land in the drier regions: “The 1930 law gave 51% of the land—naturally the best—to 50,000 Europeans (of whom only 11,000 actually lived on the land) and 30%—the poorer land—to 1 million Zimbabweans.”¹⁵⁴ Over time, these Native Reserves were to become increasingly overcrowded and subject to ecological damage, while, at the same time, large swaths of land allocated to the white population remained under utilized.¹⁵⁵ African farmers were permitted to buy land under the Act, but only in designated Native Purchase Areas, which were also situated in the drier regions and supplied with far fewer wells and dams than were the European areas.¹⁵⁶ African farmers also faced additional financial burdens, since they were often charged more for the land than their white counterparts and found it much more difficult to obtain mortgages or loans.¹⁵⁷

This pattern of discrimination and segregation was to continue until independence, underpinned by numerous land-related legal measures.¹⁵⁸ Around 100,000 Africans, for example, were cleared from their land following the end of the Second World War in order to make way for further immigrants from Britain, together with returning white veterans whose

coupled with agricultural growth in Rhodesia and the government’s wish to ensure that white-designated lands were actually populated, resulted in the adoption of a more flexible policy (*ibid*).

¹⁵² *Ibid* at 33 (subsequent legislation (enacted in 1941) prohibited the sale, leasing or transfer of land in the European areas to Africans, and classified Africans remaining on European land as “squatters”. As the now British Conservative MP Sir Malcolm Rifkind remarked in 1968, in his MSc thesis on the politics of land in Rhodesia: “The Africans concerned were only ‘squatters’ in a legalistic sense as for the most part they had been on the land for generations before the Europeans had even come to the country”).

¹⁵³ This placed an earlier practice of segregation on a more formal footing; the first ‘native reserves’ having been introduced in the 1890s. See Palmer, *supra* note 149 at 57–60. The Native Reserves were renamed Tribal Trust Lands under the *Tribal Trust Land Act 1965*, and then re-titled Communal Areas following independence. See Achim Blume, *Land Tenure in Rural Zimbabwe: An Outline of Problems* (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), 1996) at 4–5, online: GTZ <www2.gtz.de/dokumente/bib/00-0571.pdf>.

¹⁵⁴ Hanlon, Manjengwa & Smart, *supra* note 147 at 32.

¹⁵⁵ *Ibid* at 39–41.

¹⁵⁶ *Ibid* at 32. See also Brand, “The Anatomy of an Unequal Society” in Stoneman, *supra* note 9 at 47 (“In 1970, 40 per cent of the African areas were more than fifty miles, and only just more than 5 per cent less than ten miles, away from the nearest railway. About 60 per cent were more than fifty miles from any of the seventeen major regional urban centres where the most important markets are located, and 10 per cent more than [a] hundred miles away.”)

¹⁵⁷ See Hanlon, Manjengwa & Smart, *supra* note 147 at 32 (much of this land was never in fact made available to black farmers, and was instead given to civil servants and government supporters). Mtisi, Nyakudya & Barnes also draw attention to the marked disparity in credit allocation between black and white farmers: “In 1977 ... 6,000 white farmers had access to 100 times more credit than an estimated 600,000 African Purchase Area farmers; the difference was even greater for those in the Tribal Trust Lands (TTLs)” (Mtisi, Nyakudya & Barnes, *supra* note 23 at 130).

¹⁵⁸ According to Hanlon, Manjengwa & Smart, *supra* note 147 at 33, “there were regular changes to the land law and the racial labels of land – 44 pieces of legislation on land in 35 years, 1931–65 – which resulted in endless debates in parliament.”

war service was rewarded with the allocation of farms and generous resettlement packages. In contrast, black soldiers, including those who had fought for Britain on the front line, were given nothing.¹⁵⁹ Then, in 1951, the deeply unpopular *Land Husbandry Act* sought to divide up the land in the Native Reserves into individual smallholdings in an attempt both to increase production and to compel those who could no longer be accommodated on the land to seek work in urban factories, thereby providing a cheap source of labour for the manufacturing sector.¹⁶⁰

The eviction of indigenous peoples from their land continued under the tenure of the Rhodesian Front government, which assumed power in 1962. Notorious examples included the removal of the Tangwena people—in the face of determined resistance—from their ancestral homeland in Manicaland and the relocation of 5,000 Africans to the Tsetse-fly-infested Gokwe area.¹⁶¹ By independence, land allocation had become so distorted that approximately 40 percent of Zimbabwean land was owned by just 6,000 large-scale commercial farmers.¹⁶²

Unsurprisingly, therefore, the issue of land redistribution was to become the subject of heated debate at the Lancaster House Conference, during the course of negotiations on Zimbabwean independence. However, the logistics of how this was to be achieved were left unresolved as pressure mounted on the leaders of the Patriotic Front (PF), Mugabe and Nkomo, to reach a settlement that would secure the political future of the country and end the war of liberation that was not only destabilizing Rhodesia but was also bringing chaos to neighbouring African states.¹⁶³ Consequently, the PF was not only urged by the British to agree to a deal,¹⁶⁴ but also by its regional patron, the so-called group of Front-Line Presidents (FLP),¹⁶⁵ desperate to see an end to the escalating conflict that was spilling over into their own countries.

¹⁵⁹ *Ibid* at 35–36; Mlambo in Raftopoulos & Mlambo, *supra* note 7 at 79–80. Mlambo attributes African anger at the differential treatment meted out to black and white veterans as a contributing factor in the rise of nationalism.

¹⁶⁰ AS Mlambo, *ibid* at 86. See also Cliffe, *supra* note 120 (who cites Garfield Todd, Prime Minister of Rhodesia from 1953 to 1958, on the thinking behind this Act and other legislative changes introduced in the 1950s: “We do not want native peasants. We want the bulk of them working in the mines and farms and in the European areas and we could absorb them and their families” at 18).

¹⁶¹ Magaisa, *supra* note 147 at 5–6.

¹⁶² Meredith, *supra* note 10 at 120. See also Riddell, *supra* note 143 at 4.

¹⁶³ See M Tamarkin, *The Making of Zimbabwe: Decolonization in Regional and International Politics* (London: Frank Cass, 1990) at 256–258 (noting the severe disruption that the war was causing in Zambia to the north and Mozambique to the east). As Joshua Nkomo explained, “the pressure on us to reach a settlement was intense. The front-line states were being ruined by the war, to South Africa’s advantage. Everyone was sick of the killing” (Joshua Nkomo, *The Story of My Life* (London: Meuthen, 1984) at 193).

¹⁶⁴ Who, as Nkomo points out, might well have abandoned Zimbabwe altogether if the conference failed, opting to recognize the white-controlled Muzorewa administration instead (*ibid* at 194).

¹⁶⁵ As Tamarkin, *supra* note 163 at 5, explains, “At the end of 1974 ... the Front-Line Presidents (FLP) forum was established as a collective regional patron for the Rhodesian nationalists. This forum was originally composed of the presidents of Tanzania [Julius Nyerere], Zambia [Kenneth Kaunda] and Botswana [Seretse Khama] and Samora Machel, the president of FRELIMO [Frente de Libertação de Moçambique (the Mozambique resistance movement, fighting for liberation from Portuguese

Reluctantly, therefore, Mugabe and Nkomo not only accepted a constitutional provision that reserved 20 percent of the seats in the lower house of the Zimbabwean parliament for representatives of the white population,¹⁶⁶ but also a provision that precluded much in the way of land reform for the next ten years, owing to the inclusion of guarantees intended to provide a generous breathing space for white farmers. Under the so-called “willing seller, willing buyer” principle enshrined in article 16 of the constitution, for the first ten years of Zimbabwe’s independence, land could be bought only if its owner was prepared to sell, and if “prompt and adequate” compensation was paid in a currency of the seller’s choosing,¹⁶⁷ preventing for some time the compulsory purchase of white-owned farms for reallocation to black Zimbabwean citizens.¹⁶⁸

rule]] who, in June 1975, became the president of independent Mozambique. In 1976, the FLP were joined by Agostinho Neto, the president of Angola.”

¹⁶⁶ Tamarkin, *ibid* at 263 (explaining how the FLP exerted strong pressure on the PF to accept this provision).

¹⁶⁷ For the terms of article 16, see Sam Moyo, *The Land Question in Zimbabwe* (Harare: SAPES Books, 1995) at 107. That Zimbabwe was financially incapable of carrying out large-scale land redistribution under the article 16 criteria without external grants or loans is emphasized by Riddell, *supra* note 143 at 11. Ultimately, as Magaisa observes, article 16 was a ticking time-bomb:

Given the primacy and political sensitivity of the land question, it is hardly a surprise that section 16 of the Constitution became one of the most bitterly contested clauses in the Bill of Rights—not only in the courts but in parliament, the media and later in the field, when farms were forcibly occupied post-2000. ... The Lancaster House Constitution paid little, if any, attention to the plight of the victims of the colonial system, leaving the wounds to fester and very unpleasantly burst twenty years later.

(*supra* note 147 at 8).

¹⁶⁸ The country’s dependence on the agricultural sector, both as a source of foreign revenue and to meet its own food needs, also dampened enthusiasm for wide-scale land reform following independence. Dashwood, *supra* note 16 at 53. As Riddell points out, the commercial farming sector was also the country’s largest employer on independence, benefiting greatly from both direct government subsidies and the ability to exploit cheap labour, so that “in 1977, over 80 percent of the 240,000 African employees received cash wages of less than £16 a month ... about half the minimum required for an average family.” Riddell, *supra* note 143 at 2, 5–6. In addition, it seems other African states may have applied pressure on Zimbabwe to act cautiously in respect of the land issue. According to Father Fedelis Mukonori, head of the Jesuit Church in Zimbabwe, and an apparent confidant of President Mugabe, the Organisation for African Unity (now the African Union) urged Mugabe not to implement drastic land reform measures. The fear was that this might impede the end of white rule in neighbouring South Africa (see interview conducted with him by the late Zimbabwean author Heidi Holland, in Heidi Holland, *Dinner with Mugabe* (Johannesburg: Penguin, 2009) at 94, n 3). Although some progress was made in buying and distributing land directly after independence, this faltered following the severe drought of 1982: “Land acquisition reached its peak in 1982/3, when over one million hectares were purchased at a cost of \$21,029,579. In 1983/4, the amount spent on land acquisition plummeted to \$6,867,978, and rose only very slowly thereafter” (Dashwood, *supra* note 16 at 53).

In making such concessions, it seems Mugabe and Nkomo were influenced not only by a threatened withdrawal of support from the FLP,¹⁶⁹ but also by oral assurances from both British and American representatives at the negotiations that their respective governments would later make available funds for land reform.¹⁷⁰ Crucially, however, no agreement was reached on exactly what would be contributed,¹⁷¹ and it would appear from a formal statement made by Lord Carrington in the course of the negotiations that Britain was not prepared to offer a specific sum, but rather wanted to emphasize its inability to bear the costs of land reform alone, indicating instead that it wished to form part of a wider funding effort by the international community.¹⁷² Nevertheless, the agreement that some funds would be provided appears to be

¹⁶⁹ Tamarkin cites Robert Jaster on the matter: “[T]he PF got the following message from the FLP [Front-Line Presidents]: ‘Since you have already publicly accepted the really major provisions of the constitution, you cannot threaten to break up the conference over a minor issue like compensation. The Front-Line will not back you.’” (*supra* note 163 at 265).

¹⁷⁰ In the course of Holland’s interview with Father Mukonori (Holland, *supra* note 168 at 129) the offer of British and American funds for land reform is referred to: “President Jimmy Carter pledged assistance over and above America’s development aid to Zimbabwe in order to help Britain fund the purchase of commercial farms for eventual land redistribution. It was this offer as much as the threats from African leaders that broke the Lancaster House deadlock in 1979.” Clare Short, International Development Secretary under Tony Blair, also alluded to the offer of funds during an interview with Holland: “The deal, I think, was that we offered some money provided there was no compulsory purchase” (Holland, *supra* note 168 at 94). In Tamarkin’s view, it was the American intervention that proved decisive: “It was essentially a question of a financial burden the British were not keen to shoulder on their own. By that time, rich Uncle Sam had already come to the rescue, offering to share the cost” (*supra* note 163 at 265). See also Riddell, *supra* note 143 at 11. According to Nkomo, the Carter administration did not actually go quite as far as pledging funds for land purchase, but did offer money for development: “They said they could not use their taxpayers’ money to compensate inefficient landowners for not using land [i.e. land owned by white farmers not under production]. But, if the British would help to buy the land, American funds could be used to develop it” (*supra* note 163 at 196).

¹⁷¹ According to Holland’s interview with Father Mukonari, it was not until thirteen years after the Lancaster House conference that the absence of any documentation confirming British and American assurances on compensation first came to light, when the issue of land reform was becoming a matter of increasing urgency within the country:

“When the land question started getting out of hand in 1992,” explains Father Mukonori ... “I asked Edson Zvobgo, the official lawyer to the Patriotic Front at Lancaster House: ‘Where is the land document you signed with the British and the Americans? Does it say who the land must be given to? Does it stipulate peasant farmers as the only beneficiaries? Does it prevent land being redistributed to government ministers?’” ... It was on requesting the vital land document from the lawyer that Mukonori and Mugabe realised that America’s offer had never been committed to paper by their own team. When they hurriedly asked the State Department for a copy of the relevant document, convinced that American diplomats and negotiators at Lancaster House would have kept minutes, they were told that Washington had never seen it in writing either.

(Holland, *supra* note 168, at 129–130).

¹⁷² Thus, in an address to a plenary session of the Lancaster House Conference on 11 October 1979, Lord Carrington explained: “The costs [of funding a land resettlement programme] would be very substantial indeed, well beyond the capacity, in our judgement, of any individual donor country,

uncontested.¹⁷³ As events transpired, however, Britain was to contribute far less than had been expected, ceasing to provide any sums altogether from the mid-1990s onwards.¹⁷⁴

Although the UK did contribute some funds (£44 million in total) to Zimbabwe in the 1980s and 1990s, under the Conservative administrations of Margaret Thatcher and John Major, further payments to help with the cost of land redistribution were suspended in 1994 amidst concerns about corruption.¹⁷⁵ Talks were underway about the possibility of restoring funding when the Major government lost power to the New Labour administration of Tony Blair in Britain's 1997 election.¹⁷⁶ This event was to herald a radical shift in the UK's approach to funding for land reform in Zimbabwe—one that was to lead to a precipitous decline in relations between the two states. On assuming office, the Labour government denied that it was under any obligation to comply with promises made by its Conservative predecessor and declined to release any funds to Zimbabwe for the purposes of land redistribution unless these were explicitly linked to poverty reduction—the central plank of the new administration's international development strategy.

In fact—somewhat ingeniously, although no doubt unwittingly—the Labour government deployed a form of odious debt argument of its own in disclaiming responsibility for paying any funds to the Mugabe government for the purpose of land reallocation. The argument made, embodied in the infamous Clare Short letter,¹⁷⁷ was premised on the notion that there had been a “regime change” of sorts in Britain—the election of a Labour government after eighteen years

and the British Government cannot commit itself at this stage to a specific share in them. We should however be ready to support the efforts of the government of independent Zimbabwe to obtain international assistance for these purposes” (UK, Select Committee on Foreign Affairs Minutes of Evidence, *Annex A, Zimbabwe: UK Approach to Land Reform* (HC 2002-03, 339), online: British Parliament <www.publications.parliament.uk/pa/cm200203/cmselect/cmffaff/339/3032509.htm>).

¹⁷³ Based on Lord Carrington's statement, the Foreign Affairs Select Committee summarized the British position as follows: “The UK agreed to contribute to the costs and to rally the support of the international donor community” (*ibid.*). See also Nkomo, *supra* note 163 at 196: “neither the British nor the Americans would tell us how much they would put up, but the principle [i.e. that funds would be provided to buy and develop land] was a useful one.”

¹⁷⁴ According to Mugabe himself, in the course of an interview with Holland (*supra* 168 at 224–225), the Americans did initially provide generous sums for land reform—much more so than the British—but ceased to do so when Ronald Reagan replaced Carter as US president.

¹⁷⁵ Holland, *ibid* at 96. The acquisition of large-scale commercial farms by members of the ruling elite from 1990 onwards (i.e. after the article 16 restriction had expired) created an additional obstacle to meaningful land reform, since this new class of black farmers had, in common with their white counterparts, an interest in opposing the redistribution of land to the peasantry, together with the imposition of a land tax that the government had been planning to introduce (according to Dashwood, *supra* note 16 at 183–185). See also Meredith, *supra* note 10 at 123–128, who points out that land compulsorily acquired under the *Land Acquisition Act of 1992* (much of which was distributed to government ministers and officials) included land owned by political opponents of Zanu-PF, casting further doubt on the *bona fides* of the Mugabe government.

¹⁷⁶ Holland, *supra* note 168 at 96.

¹⁷⁷ Letter from Clare Short, UK Secretary of State for International Development, to Kumbirai Kangai, Zimbabwe Minister of Agriculture (5 November 1997), to clarify the position on funding for land redistribution, online: <www.theguardian.com/politics/foi/images/0,9069,1015120,00.html>.

of successive Conservative administrations, beginning in 1979, the year in which the Lancaster House conference took place. The incoming government, it was suggested, could not be held responsible for any commitments made by a previous Conservative administration or, more fundamentally, be asked to atone for the wrongs of Britain's colonial past. Thus, explained Short: "I should make it clear that we do not accept that Britain has a special responsibility to meet the costs of land purchase in Zimbabwe. We are a new Government from diverse backgrounds without links to colonial interests."¹⁷⁸ The letter then proceeded to describe how any funding provided by the Blair administration to Zimbabwe would be conditional on its complying with the terms of the new government's programme for international development, which in turn was dependent upon recipient countries using any funds received for the object of alleviating poverty.¹⁷⁹ This did not mean that the money could not be used for land redistribution purposes, the letter explained, but only if the aim was to relieve hardship.¹⁸⁰

Although the Blair government's strategy of tying any funding to donee countries to poverty reduction initiatives can be viewed as fairly unremarkable, its application in the case of Zimbabwe undoubtedly represented a fundamental change of position as regards what had been agreed (however imprecisely) at Lancaster House. Rather than the Zanu-PF government receiving funds it believed it was due as of right to correct the past injustice of wholesale land theft under colonial rule—and in return for which the PF had made significant concessions at Lancaster House—it instead discovered that it was, at most, to be the recipient of its ex-colonizer's largesse, and then only if it complied with the conditions attached. Thus, in attempting to subsume Zimbabwe within its general overseas aid policy, the Blair government neatly absolved Britain of any responsibility to help correct the problem of grossly unequal land distribution to which its past colonialist practices had given rise.¹⁸¹ The hypocrisy of the

¹⁷⁸ For good measure, Short sought to bolster her own anti-colonialist credentials by emphasizing her Irish ancestry, pausing to observe that: "we [i.e. the Irish] were colonised, not colonisers." This attempt at postcolonial solidarity signally failed to impress Mugabe, however, who, by all reports was, and remains, enraged by both the content and the tone of the communication, which heralded a breakdown in Zimbabwean–British relations from which the two nations have yet to recover (see Holland, *supra* note 168 at 92–103). Short's rejection of any collective responsibility on behalf of the British for its past exploits in Zimbabwe is confirmed during the course of her interview with Holland, conducted in June 2006: "I was trying to move on from the colonial baggage and get us off to a fresh start. I wanted us to act as a development agency, not as the former colonial power" (*ibid* at 95). On the mutual demonization discourse that New Labour and the Mugabe government descended into, and the destructive effect this had on diplomatic efforts to heal relations between their two nations, see Blessing-Miles Tendi, "The Origins and Functions of Demonisation Discourses in Britain-Zimbabwe Relations (2000--)" (2014) 40:6 J Southern African Studies 1251–1269.

¹⁷⁹ Short, *supra* note 177.

¹⁸⁰ *Ibid* ("[w]e would be prepared to support a programme of land reform that was part of a poverty eradication strategy but not on any other basis").

¹⁸¹ A more sinister interpretation of Labour's withholding of land-reform payments has also been offered—a desire to fatally weaken Mugabe by increasing his unpopularity among rural Zimbabweans—historically, Zanu's main source of support. See Holland, *supra* note 168 at 102–103 (reporting the views of an international development consultant who worked with both the Labour government and its Conservative predecessor on the land-redistribution issue). Indeed, Tony Blair seriously contemplated using force in Zimbabwe to effect regime change. His former Chief of the Defence Staff, Charles Guthrie, claims he had to 'dissuade' Blair from invading the

Blair government's blithe disavowal of its predecessor's promises was not lost on the Mugabe government, which, in contrast, had agreed to abide by the loan commitments inherited from the Smith regime. Hence, complained Kumbirai Kangai (the addressee of Short's letter): "We are still paying for debts incurred by Ian Smith. Some were to borrow money to buy guns to kill us while we were fighting for liberation. If we recognise we have an obligation under international law to pay the previous government's debts, the British government is obliged to meet obligations made by Mrs Thatcher."¹⁸²

In spite of subsequent attempts to heal the diplomatic rift with Zimbabwe, including offers to make available some monies for land purchase,¹⁸³ the Labour government remained unwilling to acknowledge Britain's historic role in creating the land distribution problem in Zimbabwe, or accept that this placed it under a particular duty to help resolve the matter.

The response of the Mugabe government to the post-2000 farm occupations was to introduce the Fast Track Land Reform Programme (FTLRP), which has essentially legitimised them.¹⁸⁴ Under Zimbabwe's new constitution, the occupiers have been granted the full rights of a legal owner, being able to continue to use and occupy the land and to "transfer, hypothecate, lease or dispose" of their rights in it.¹⁸⁵ Furthermore, responsibility for compensating white farm owners whose land is compulsorily acquired for resettlement has been placed on the former colonial power, Britain.¹⁸⁶ Thus, the forcible alienation of land from one group to

country; see Tendi, *supra* note 178 at 1265–1266. See also "The Genial Throat-Slitter Sticking His Knife in Brown", [*London*] *Sunday Times* (25 November 2007) and "Should Britain Invade Zimbabwe?", *The Daily Mail* (10 August 2009), online: <www.dailymail.co.uk>.

¹⁸² Holland, *supra* note 168 at 95.

¹⁸³ See *ibid* at 96-97 (describing attempts made to address the land issue at both a UN Development Programme conference in 1998 and via a British mission to Zimbabwe in 1999). A number of countries in addition to Britain pledged assistance, including the United States, the Netherlands, Norway, and Sweden, but the negotiations failed amidst concern about governance issues in Zimbabwe and the resentment of the Zanu-PF government at what it viewed as unwarranted interference in the country's affairs. The British finally offered a further £5 million in January 2000, with the proviso that this be spent on NGO-run projects. Both the smallness of the sum offered and the clear implication that the Zimbabwean government could not be trusted with the funds incensed Mugabe, and the offer was not accepted (*ibid* at 97–98).

¹⁸⁴ The extent to which the Mugabe government orchestrated the initial farm invasions, as opposed to acquiescing in them after the event, is a matter of much debate. See e.g. Lionel Cliffe et al, "An Overview of Fast Track Land Reform in Zimbabwe: Editorial Introduction" (2011) 38:5 *J Peasant Studies* 907 at 913. As Cliffe et al make clear, the threat posed to Zanu-PF's dominance by the rising MDC caused it to "shift to a policy of encouraging invasions"; while the 'no' vote in the 2000 referendum on its proposed constitution "may have been an important early trigger for the decision to embark on the FTLRP" (*ibid* at 913).

¹⁸⁵ *Constitution of Zimbabwe Amendment Act* (Zimbabwe), No 20 of 2013, ss 291, 294.

¹⁸⁶ *Ibid* s 72(7)(c)(i)–(ii). Compensation from the Zimbabwean state is limited to improvements carried out to the land before acquisition (*ibid* s 295(3)). Such acquisitions cannot be challenged on the ground of discrimination (*ibid* s 72(3)(c)).

another, under the authority of the law, represents another unfortunate example of the way in which the Mugabe regime has come to emulate certain aspects of its predecessor.¹⁸⁷

However, although the Mugabe administration's endorsement of the farm invasions has rightly merited condemnation from both a legal and moral standpoint, it remains important not to lose sight of the colonialist origins of Zimbabwe's land problem: the highly uneven and racially divisive pattern of land ownership that the state inherited on independence.¹⁸⁸ In neglecting to deal with this matter at Lancaster House—essentially confirming the status quo for a decade and then failing to provide any meaningful compensation thereafter—Britain, in conjunction with Zimbabwe's former white rulers, can arguably be said to have imposed a set of property and financial arrangements on the new country far more odious than the external monetary debt the nation inherited.

4. CONCLUSION

Zimbabwe's external debts are currently hovering at around US\$7 billion.¹⁸⁹ Suffering a severe shortage of foreign currency earnings,¹⁹⁰ the country has now been in default for more than a decade, with arrears comprising US\$5.5 billion of the sum outstanding.¹⁹¹ This inability to service existing debt means that the country is unable to access further credit or attract foreign direct investment for much needed infrastructure projects.¹⁹² Even China, which has been Zimbabwe's main credit provider in recent years, has finally lost patience, prompting the Zanu-PF government to make an unbudgeted loan repayment of US\$180m in order to placate Beijing and secure further funding.¹⁹³

¹⁸⁷ Other resemblances being intolerance of any challenge to its power, the use of violence against its opponents, and the highly negative perception of the regime within the international community, reflected in the imposition of sanctions post-2000.

¹⁸⁸ On the importance of adopting a historical perspective in relation to the land issue in Zimbabwe, which takes account not only of recent injustices, but also the brutally-executed expropriations and exclusions that deprived native Zimbabweans of their land during the long colonialist era (see generally Magaisa, *supra* note 147).

¹⁸⁹ See Chinamasa, *supra* note 2. According to the Ministry of Finance's 2014 budget statement, in December 2012 debt owed to bilateral creditors (both Paris Club and non-Paris Club members) amounted to US\$3.59 billion, with US\$2.49 billion owed to multilateral creditors—principally the World Bank (US\$1.4 billion), the African Development Bank (US\$632 million), the European Development Bank (US\$302 million), and the IMF (US\$125 million). See *2014 National Budget Statement*, Zimbabwean Parliament (19 December 2013) at paras 88–89, 318, 321 [*Budget*].

¹⁹⁰ Zimbabwe's trade deficit for the first six months of 2014 stood at US\$1.8 billion: see Chinamasa, *supra* note 2 at 22 para 83.

¹⁹¹ *Ibid* at 23 para 87.

¹⁹² At the end of 2012, the cost of financing the country's infrastructure requirements was said to stand at more than US\$14 billion: see Zimbabwe, Zimbabwean Parliament, *The 2013 National Budget Statement*, (15 November 2012) at para 763.

¹⁹³ The actual sum repaid amounting to US\$180.4 million: Chinamasa, *supra* note 2 at 35–36 paras 126 and 130. See also “Zimbabwe ‘Coughs Up’ Loan Repayments to Keep China Onside”, *Reuters* (10 September 2014) (reporting a figure of US\$1 billion lent by China to Zimbabwe over the past five years), online: <www.uk.reuters.com>. In order to keep credit lines flowing from China, the Zanu-PF government has also been considering pledging future revenues from its mineral resources

In a bid to resolve the deadlock, the government launched the Zimbabwe Accelerated Arrears Clearance, Debt and Development Strategy (ZAADDs) in March 2012, as part of its Zimbabwe Accelerated Re-engagement Economic Programme.¹⁹⁴ Agreed to by the IMF, and in return for which the country has entered into a staff-monitored programme (SMP),¹⁹⁵ ZAADDs aims to secure large-scale debt relief from Zimbabwe's creditors, thereby clearing the way for further borrowing.¹⁹⁶ The strategy entails paying off arrears owed to multilateral creditors as a prelude to entering into negotiations with bilateral creditors,¹⁹⁷ primarily through the Paris Club, in order to obtain a write-down and rescheduling of outstanding sums.¹⁹⁸ It also seeks to inject some transparency into, as well as control over, past and future lending practices, by introducing stricter debt management procedures—under the auspices of the Zimbabwe Aid and Debt Management Office, established within the Ministry of Finance in 2010—and by validating and reconciling Zimbabwe's external debt database.

In contrast to the official approach to debt reduction, organisations such as the Zimbabwe Coalition on Debt and Development (ZIMCODD) and the African Forum and Network on Debt and Development have long advocated that Zimbabwe undertake a thorough audit of its public debt in order to check whether any loans merit nonpayment on account of their odiousness or illegitimacy—and now could be the time to embark on just such an exercise, before the country's debts are again affirmed through a Paris Club restructuring. Thus, Zimbabwe could join the growing band of states opting to conduct audits of their external debt

(particularly its diamond mines) as security against further loans from Beijing. See “Govt Moves to Securitise Minerals” *Zimbabwe Herald* (26 May 2014), online: <www.herald.co.zw>. See also “World Bank Warns Zimbabwe Against Using Minerals as Security”, *African Ventures* (13 June 2014), online: <www.ventures-africa.com>.

¹⁹⁴ On ZAADDs, see *Commentary on the Zimbabwe Accelerated Arrears Clearance, Debt and Development Strategy*, Reserve Bank of Zimbabwe (May 2012), online: <www.rbz.co.zw/pdfs/speeches/Governors%20Paper%20on%20ZAADDs%20May%202012.pdf> [ZAADDs].

¹⁹⁵ In June 2013, then Finance Minister Tendai Biti and Reserve Bank Governor Gideon Gono signed a letter of intent and memorandum of understanding with the IMF in preparation for the implementation of the SMP. See Zimbabwe, Ministry of Finance, “Zimbabwe Takes Bold Step on IMF Debt” (June 2013), online: <www.zimtreasury.gov.zw/163-zimbabwe-takes-bold-step-on-imf-debt>.

¹⁹⁶ The lifting of sanctions, to which the country has been subject for over a decade, is also sought.

¹⁹⁷ Since entering into the SMP, Zimbabwe has been making monthly payments of US\$150,000 to the IMF, together with quarterly payments of, respectively, US\$900,000 to the World Bank and US\$500,000 to the African Development Bank. See “Zimbabwe Pays Back IMF Debts”, *Zimbabwe Standard* (8 July 2013), online: <www.thestandard.co.zw>. See also Chinamasa, *supra* note 2 at 71 paras 284–85. In addition, “as a way of normalising relations,” the government plans to “start making token payments to the European Investment Bank” (*ibid* at 72 para 287).

¹⁹⁸ Under the Club's “Naple terms”, available to countries whose income per capita is less than US\$500; this would allow the forgiveness of up 67 percent of debts owed, with the balance to be rescheduled over several years; see ZAADDs, *supra* note 194 at paras 28–29. As with all such restructurings, the process would require Zimbabwe to elicit comparable reductions from non-Paris Club bilateral creditors (as required by Paris Club rules), and will likely involve a similar level of debt cancellation being sought from commercial creditors (probably via the London Club).

obligations to check for odious and illegitimate loans.¹⁹⁹ Debts could then be disclaimed or affirmed on the basis of whether they meet the criteria of odiousness or not.²⁰⁰ Perhaps the most prominent example of this approach to date is provided by Ecuador, where the government of Rafael Correa not only set up an audit commission to examine a range of sovereign loan obligations incurred from 1976 to 2006 but also chose, in 2008, to suspend interest payments on, and then engineer a buyback of, two global bond issues that the commission had criticized in its report as tainted with illegitimacy and illegality.²⁰¹ Alternatively, a future Zimbabwean administration could choose to submit debts it deemed odious to independent arbitration,²⁰² as Patricia Adams counselled Iraq to do in relation to the debts accumulated under Saddam Hussein,²⁰³ and has more recently suggested Ukraine do in respect of a US\$3 billion Eurobond issue that Russia purchased from the previous government of Viktor Yanukovich.²⁰⁴

It may be the case, however, that Zimbabwe will now find it extremely difficult to reject its Rhodesian-era debt in view of the fact that a democratic government chose to affirm these loans rather than reject them many years ago. Moreover, tracking down the odious provenance of current loan monies will likely prove difficult in many cases,²⁰⁵ particularly if loans have

¹⁹⁹ See James K Boyce & Léonce Ndikumana, “Debt Audits and the Repudiation of Odious Debts”, (2012) 87 Association of Concerned African Scholars Bulletin 36, online: <concernedafricascholars.org/bulletin/issue87/boyce/>. See also Razmig Keuchenyanyan, “The French Are Right: Tear Up Public Debt—Most of It Is Illegitimate Anyway”, *The Guardian* (9 June 2014), online: <www.theguardian.com/uk> (audits of public debt have been, or are being, conducted in more than 18 countries, including France, whose audit concluded that 60 percent of such debt is ‘illegitimate’).

²⁰⁰ Some debts could even be subject to partial affirmation, if it could be shown that at least some of the relevant loan monies had been used to fund legitimate state purposes. See Omri Ben-Shahar & Mitu Gulati, “Partially Odious Debts?” (2007) 70:4 Law & Contemp Probs 47.

²⁰¹ The Correa administration’s actions, and its appeals to the concepts of odiousness and illegitimacy to justify them, have been the subject of much criticism. See especially Lee C. Buchheit & G. Mitu Gulati, “The Coroner’s Inquest: Ecuador’s Default and Sovereign Bond Documentation” (2009) 28:8 Intl Fin L Rev 22. See also Adam Feibelman, “Ecuador’s Sovereign Default: a Pyrrhic Victory for Odious Debt?” (2010) 25: J Intl Banking L & Reg 357; Arturo C Porzecanski, “When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador” (2010) Munich Personal RePEc Archive Working Paper No 20857, online: <mpra.ub.uni-muenchen.de/20857/1/MPRA_paper_20857.pdf>. For a more sympathetic view, see Wade Mansell & Karen Openshaw, “Suturing the Open Veins of Ecuador: Debt, Default and Democracy” (2009) 2:1 L & Development Rev 151.

²⁰² On this point, see especially Rehbein, *supra* note 28. For a detailed consideration of the pros and cons (from an indebted country’s point of view) of various existing forums which might be able to perform this function, see Ashfaq Khalfan, “Sites and Strategic Legal Options for Addressing Illegitimate Debt” (2003) in *Advancing the Odious Debt Doctrine*, Centre for International Sustainable Development Law Working Paper COM/RES/ESJ, 53 at 58-67, online: <www.cisdll.org/public/docs/pdf/Odious_Debt_Study.pdf>.

²⁰³ Adams, “Iraq’s Odious Debts”, *supra* note 63 at 12. Iraq instead opted to restructure much of its (overwhelmingly bilateral) debt through the Paris Club.

²⁰⁴ Interview of Patricia Adams, Ukraine’s national news agency (30 July 2014) on *Probe International*, online: <journal.probeinternational.org/2014/07/30/ukraines-odious-debts-2>.

²⁰⁵ Although ZIMCDD has claimed that approximately half of Zimbabwe’s current debt originates from loans incurred by the Smith government in the 1970s: see Darlington Musarurwa, “Every Zimbabwean owes US\$500”, [*Zimbabwe*] *Sunday Mail* (5 December 2010).

been restructured a number of times and the current loan provider is not the original creditor, and hence may be unaware of the purposes for which the original debt was contracted.

Consequently, as Zimbabwe tries to obtain a debt write-down from its creditors, it may find it useful to highlight its odious inheritance as part of a negotiating strategy aimed at debt relief. Both Iraq and Ecuador have recently demonstrated how the concepts of odiousness and illegitimacy can usefully be deployed on the political rather than the legal plane in order to secure debt cancellation and debt reduction.²⁰⁶ In the case of Iraq, references to the odiousness of the Saddam-era loans by a wide range of actors helped determine the framework in which the state's external debts were discussed, provided a means of differentiating the country from other middle-income nations that had been adjudged capable of discharging their debts by Western creditors, and may even have had a direct influence on the generous discount Iraq ultimately received from the Paris Club.²⁰⁷ Ecuador, meanwhile, in denouncing certain bonds issued by a previous administration as illegitimate and odious, provided justification for the buyback of those bonds at a significant discount while simultaneously guarding against reputational damage by signalling to other creditors that properly contracted debts would be honoured.²⁰⁸

Nor should it be forgotten that the decision by the Mandela and Mbeki governments to repay South Africa's apartheid-era debts has not resulted in the issue of the odiousness of these loans disappearing from the public consciousness in South Africa or the discourse of anti-debt campaigners. Instead, it has prompted demands that those who benefited from financing white-minority rule should pay reparations to the South African people and even account for the "odious profits" made from their activities. This reorientation from repudiation to reparations has brought odious debt campaigners into alignment with the South African apartheid litigants, resulting in a synergy between the debt and reparations issues, in which each supports and reinforces the other in the quest to obtain a remedy for past wrongs.²⁰⁹ There

²⁰⁶ Although, of course, there are also significant differences between these cases and that of Zimbabwe. Among other factors, Ecuador had a comparatively modest external debt burden at the time of its default (and so had sufficient funds to buy back the defaulted-on bonds in an aggressively-imposed restructuring deal), and also possessed a fairly diverse debt profile, enabling it to target one (relatively weak) group of creditors without alienating other lenders, including the multilateral institutions. Iraq, meanwhile, is of geostrategic importance, at the heart of the resource-rich but politically volatile Middle East, and benefited, most significantly, from American support in obtaining debt relief.

²⁰⁷ Patricia Adams, "REVIEW Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief" *Probe International* (December 28, 2007), online: <journal.probeinternational.org/2007/12/28/review-iraqs-debt-relief-procedure-and-potential-implications-international-debt-relief/>; Mandel, *supra* note 140.

²⁰⁸ In fact, having hesitated over whether to disclaim a Global 2015 bond series that the audit commission had also condemned as illegitimate, the Correa administration ultimately opted to honour this bond in full, thereby helping to create the impression that this was a government prepared to act responsibly wherever possible. See "Ecuador Leader Says May Honour Global 2015", *The Sandiogo Union-Tribune* (3 January 2009), online: <www.utsandiego.com>.

²⁰⁹ See Brian Ashley, "Apartheid South Africa as a Case Study for Cancellation of Illegitimate Debt" (Paper delivered at the Cycle des conférences sur les relations entre la Suisse et l'Afrique du Sud, 11 mars 2003), online: <www.cetim.ch/fr/documents/03cycleashley.pdf>. Cyus Rustomjee, *Jubilee*

is no reason why Zimbabwe should not follow suit and make similar demands for restitution, encompassing not only recompense for the debt incurred under Rhodesian rule but also compensation for the huge cost of rectifying the country's highly unequal land ownership pattern, which arguably represents the most odious legacy from its apartheid past.

South Africa: A case study for the UKZN project entitled: Globalisation, Marginalisation and New Social Movements in post-Apartheid South Africa (Durban: Centre for Civil Society, 2004), online: <ccs.ukzn.ac.za/files/Rustomjee%20JSA%20ResearchReport.pdf>; Bond & Manyanya, *supra* note 14 at 10. Most strikingly, perhaps, former Haitian President Jean-Baptiste Aristide demanded reparations in respect of the loans that Haiti was forced to incur, and pay off, in order to compensate France for the loss of Haiti and its Haitian slaves following the island's successful war of liberation against its French rulers in 1804. The Aristide government claimed that Haiti was owed (as at April 2003) a total of US\$21 billion from France: see Randall Robinson, *An Unbroken Agony* (New York: Basic Civitas Books, 2007) at 20-22, 57-59. As to recent Caribbean and Kenyan efforts to gain compensation for colonial-era abuse, including slavery, genocide and torture, see "Slavery Compensation: Caribbean Nations Propose Mau Mau Model", *The Guardian* (26 July 2013), online: <www.guardian.co.uk>. See also "UK to Compensate Kenya's Mau Mau Torture Victims", *The Guardian* (6 June 2013), online: <www.guardian.co.uk>