

The Doctrine of Odious Debt. Break the Taboo on Odious Debts and Their Repudiation

By [Eric Toussaint](#) and [Le Vent Se Lève](#)
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Éric Toussaint has a PhD in Political Sciences and is spokesperson for the CADTM (Committee for the Abolition of Illegitimate Debts). He coordinated the work of the [Truth Committee on the Greek public debt](#) which had been created by the President of the Greek Parliament Zoe Konstantopoulou on 4 April 2015 and was shut down by the new president of the Greek Parliament on 12 November 2015. His latest book *The Debt System. A History of Sovereign Debts and their Repudiation* ([Haymarket](#), 2019) discusses the several instances in history when debts were repudiated. This was one of the issues we talked about.

LVSL – Do you consider that debt is not sufficiently covered in mainstream media? And if so, why do you think this is the case?

Éric Toussaint – It is often mentioned, but never in the sense in which the CADTM conceives of it. The discourse in mainstream media and by governments consists of repeating that there is too much public debt, too much public expenditure, that States must pay their debts and reduce their expenditure. With the CADTM, we are raising the questions of where those debts come from, whether the objectives for which debts were contracted were legitimate and whether they were contracted in a legal and legitimate manner. This is our approach, and yes, absolutely, this way of looking at things is not present in the mainstream media. They claim it is not related to their reality.

LVSL – Yes, you classify debts according to whether they are illegitimate and possibly odious. Can you tell us about the characteristics of these types of debts?

Image on the right: Alexandre Nahum Sack (1890 – 1955)



E.T.: First of all, a doctrine of odious debt was developed by Alexander Nahum Sack, a conservative Russian jurist and professor of Law at the University of Saint Petersburg under the Tsarist regime (Petrograd was the capital of the Russian Empire at the time). He developed the doctrine in reaction to the Soviets' repudiation of debt in 1918. He was not in agreement, and went into exile in France and then began compiling a list of all claims involving sovereign debts between the end of the 18th century and the 1920s. He studied the international arbitrations, the jurisprudence, the unilateral acts. Based on all that he created a doctrine of international law [1] that is partly applicable today. It establishes a general principle that holds that even in the case of a change of government, of regime, there is a continuity of international obligations.

Nevertheless, the doctrine includes one fundamental exception: the concept of odious debt, which is based on two criteria. The first criterion is fulfilled if it can be demonstrated that the debts claimed against a State were contracted against the interests of the population of that State. The second criterion is met if the lenders were aware of that fact or cannot demonstrate that it was impossible for them to know that these debts were contracted against the interests of the population. If these two criteria are met, then these debts contracted by a previous government are odious, and the new regime and the population cannot be required to repay them. For the CADTM, this doctrine has to be brought up to date because the concept of what is against the interests of a given population has evolved since the 1920s, simply because [international law has evolved](#). That is true above all after the Second World War, when constraining legal instruments like the ICESCR ([International Covenant on Economic, Social and Cultural Rights](#)) and the ICCPR ([International Covenant on Civil and Political Rights](#)) were put in place and make it possible to determine what is or is not in the interests of a population.

As for illegitimate debt, it can be defined in less constraining terms. Such debt is qualified as illegitimate because it has been accumulated to promote the interests of privileged minorities and does not respect the general [interest](#). For example, that is the case when public debt is contracted to bail out the major shareholders of banks, when in fact it is these same banks that are responsible for the economic stagnation resulting from a banking crisis. In that context, the debts accumulated since the banking crisis of 2007-2008 in countries like

France and the USA are illegitimate debts. Research conducted by the CAC (*Collectif pour un Audit Citoyen de la dette publique* – Collective for a Citizen Audit of Public Debt) in fact determined that 59% of the debt claimed against France is illegitimate (see [in French] [this article](#) and [this document](#)). This debt mass corresponds in part to the banking bailout, but also to a whole series of fiscal gifts given to major corporations which do not conform to the principles of fiscal and social justice. Further, the Eurozone States' refusal to finance state debt through the [central bank](#) and the marketing of that debt forces the States to pay higher [interest rates](#) than they would pay if they were able to get financing from the central bank. Therefore the amount of the accumulated debt resulting from that difference in interest rates should be deducted from the total.

LVSL – Regarding repudiation, how are debts repudiated? In your book you cite many examples of debt repudiation. Is there a continuity in the political contexts that encourage these repudiations?

E.T.: First of all, in general, a change of regime or government leads to the debt accumulated up to the time of the change being called into question. For example, in 1837 in the USA, there was a citizen rebellion in four States (Mississippi, Arkansas, Florida and Michigan) that led to the overthrow of their governors, whom the people accused of corruption, of having made agreements with bankers to finance infrastructures that were never built. The new governors repudiated debts and the bankers affected by the repudiations brought suit in federal court. But they lost their case! It's a very interesting one. The repudiation was the result of a citizen mobilisation and a denunciation of the behaviour of certain authorities by an outraged population who rebelled against repayment of these debts. The creditors were mainly British. Alexander Nahum Sack writes in this regard: *"One of the main reasons justifying these repudiations was the squandering of the sums borrowed: they were usually borrowed to establish banks or build railways; but the banks failed and the railway lines were never built. These questionable operations were often the result of agreements between crooked members of the government and dishonest creditors."* (p. 158). Creditors who attempted to prosecute the States that had repudiated their debts in a US federal court had their suits thrown out. To justify its rejection of the actions, the Federal justice system used the Eleventh Amendment to the Constitution of the USA, which stipulates that *"The judicial power of the United States shall not be construed to extend to any suit in law or [equity](#), commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."* Consequently this unilateral act of repudiation was a success. [2]

As another example, in Mexico, the government of president Benito Juárez – which was liberal in the 19th-century sense, that is, it favoured separation of church and state and free, compulsory secular public education – was overthrown in 1858 by the French in league with the local Conservatives. They borrowed from French, Swiss and Mexican bankers to finance their illegal government. In 1861 when Benito Juárez returned to power with the support of the people, he repudiated the debts contracted by the Conservatives. In January 1862, the French government of Bonaparte declared war on Mexico under the pretext of obtaining repayment of the debt owed to the French bankers. A French expeditionary corps of 35,000 soldiers put the Austrian prince Maximilian I on the throne as Emperor of Mexico. But Benito Juárez returned to power once again, with popular support, and decided to repudiate the debts contracted by Maximilian of Austria's regime between 1862 and 1867. The results were very positive for the country. All the major powers recognized the Benito Juárez regime and signed commercial agreements with it, including France after the fall of Bonaparte in

1870.

Finally, we can mention the Russian Revolution, where the population was opposed to the expenditures of the Tsarist regime and to the wars it waged. And when the Soviets took power in October 1917, one result was the adoption of decrees that first suspended repayment and then repudiated the debt. [3]

These are examples of acts that can be referred to as unilateral.

Image below: William H. Taft, president of United States of America (1909-1913).



Other examples of international intervention could be cited. In 1919, in Costa Rica, an anti-democratic regime was overthrown and there was a return to a democratic regime, associated with a decision by Costa Rica's parliament to repudiate debts contracted by the previous regime. Faced with the threat of British intervention, Costa Rica requested neutral arbitration. The two countries agreed to designate the former President and Chief Justice of the Supreme Court of the USA, William Howard Taft, as arbitrator, and the court ruled in favour of Costa Rica! It's an interesting case in terms of jurisprudence, and it served as a reference for Alexander Sack, since he was an admirer of the USA. In fact Taft ruled that the debt claimed against Costa Rica by a British bank, the Royal Bank of Canada, was a debt accumulated by President Federico Tinoco for his personal benefit and against the interests of the population. **The bank was not able to demonstrate that it did not know that the money was borrowed by Tinoco for purely personal ends.** And above all, at no point in his ruling does Taft refer to the despotic nature of the Tinoco regime, and Sack applied that principle in his doctrine: he affirmed that the nature of the preceding regime is unimportant and that what matters in judging the debt is the use to which the borrowed money was put. And from my point of view this is fundamental, because for years there was an erroneous interpretation of Sack's doctrine which limited the applicability of repudiation of odious debt to dictatorial regimes. Sack's doctrine is based on the notion of a "regular government" of a given territory, a regime exercising real power, and whether it is legitimate or not is not the question. Sack defines a regular government as follows: *"By a regular government is to be understood the supreme power that effectively exists within the limits of a given territory. Whether that government be monarchical (absolute or limited) or republican; whether it function by 'the grace of God' or 'the will of the people'; whether it*

express 'the will of the people' or not, of all the people or only of some; whether it be legally established or not, etc., **none of that is relevant to the problem we are concerned with.**" (p. 6).

According to Sack, what are the two criteria that establish a debt as odious?

There is no doubt about Sack's position: that a regime be despotic is not a sine qua non condition that makes debts odious and susceptible to repudiation. [4] According to Sack, all regular governments, whether despotic or democratic of some kind, may be accused of having agreed to odious debts.

What are the two criteria that establish a debt as odious? *"Consequently, for a debt, regularly incurred by a regular government to be considered incontestably odious with all the consequences that follow, the following conditions must be fulfilled:*

1. — *The new government must prove and an international tribunal recognise that the following is established:*
 - a) *that the purpose which the former government wanted to cover by the debt in question was odious and clearly against the interests of the population of the whole or part of the territory, and*
 - b) *that the creditors, at the moment of the issuance of the loan, were aware of its odious purpose.*
2. — *once these two points are established, the burden of proof that the funds were used for the general or special needs of the State and were not of an odious character, would be upon the creditors."* (p. 170)

Sack clearly mentions the interests of the population, in particular in the context of a very specific case: the Treaty of Versailles of June 1919. The treaty says that the debts contracted by Germany to colonise Poland cannot be claimed against Poland once it was restored to its existence as an independent State, since the debt was contracted precisely for the purpose of colonising Poland and is therefore counter to the interests of the Polish people. In the same treaty it is stated that the people of the former German territories in Africa (Namibia, Tanganyika, Cameroon, Togo, Ruanda-Urundi) cannot be held responsible for debts contracted by Germany to colonise those territories. Sack cites an extract of the reply that the Allies made to Germany, which was not inclined to accept forgiveness of the debt of its ex-colonies, because Germany would have to continue the repayments itself. The Allies replied: *"The colonies should not bear any portion of the German debt, nor remain under any obligation to refund to Germany the expenses incurred by the Imperial administration of the protectorate. In fact, it would be unjust to burden the natives with expenditure which appears to have been incurred in Germany's own interest(...)"* [5]

This is where the notion of the interest of the people, which took on meaning beginning with that period, comes to the fore. The president of the USA at the time, Woodrow Wilson, [published a declaration in January 1918](#) proclaiming the right of peoples to self-determination. According to that principle, a debt accumulated to colonise a given population calls the right of that people to self-determination into question.

This evolution of law justifies my position, which is that we should use the criteria Sack developed on the basis of jurisprudence, but also take into account the evolution of international law.

LVSL – How do you explain the fact that when dealing with economic history, in particular in universities, the issue of debt is rarely if ever mentioned?

ET: Yes, it's never brought up, simply because it's a taboo. That's really quite astounding, when in fact it's not only non-mainstream authors who write about debt. For example there are people like Kenneth Rogoff, who was chief economist at the [IMF](#), and Carmen M. Reinhart, former Senior Policy Advisor and Deputy Director at the IMF and researcher at the NBER (National Bureau of Economic Research), who co-wrote a book called [This Time Is Different: Eight Centuries of Financial Folly](#) (Princeton University Press, 2009), in which they discuss the issue of [sovereign debt](#) in depth. There is extensive literature on debt from classical and neo-classical economists, but as you point out it's rarely taught in the universities – in European universities in any case, despite its being a vital issue from a socio-economic and legal point of view. However it's beginning to be taught in the Law faculties in American universities, for example by major figures like [Mitu Gulati, who is a professor at Duke University](#), and Odette Lienau, an associate professor of Law at Cornell University, who has written a monograph entitled *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance*. [6] But as public debt again becomes a central issue, the dinosaurs and conservatives in the universities will no longer be able to avoid debate on subjects such as odious debt, suspension of payment and debt repudiation.

Often disparaged and widely avoided or ignored in university courses, the doctrine of odious debt has nevertheless been the topic of hundreds of articles and dozens of specialised books by a range of experts. They include:

The United Nations International Law Commission, [7] the IMF, [8] the [World Bank](#), [9] the UN Conference on Trade and Development, [10] the UN independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, [11] Ecuador's Commission for the full audit of public debt set up in 2007 by President Rafael Correa, [12] the Committee for the Abolition of Third World Debt, now known as the Committee for the Abolition of Illegitimate Debt (CADTM) [13] and the Greek Debt Truth Commission set up by the president of the Hellenic Parliament in 2015 [14] have published documents, taken a stand and organised seminars on the topic, as debts whose legitimacy and validity may be questioned are constantly under discussion in the field of international relations.

Recent academic publications on the subject include: Salomon, Margot E. Salomon and Robert Howse, « Odious Debt, Adverse Creditors, and the Democratic Ideal » (November 27, 2018), London School of Economics Legal Studies Working Paper No. 20/2018, [available at SSRN](#) ; Ilias Bantekas and Renaud Vivien, « [The Odiousness of Greek Debt in Light of the Findings of the Debt Truth Committee](#) » Vol. 22 *European Law Journal* (July 2016) 539 at 542 ; Ilias Bantekas, 'The Right to Unilateral Denunciation of Odious, Illegal and Illegitimate Sovereign Debt', in I. Bantekas and C. Lumina (eds.), *Sovereign Debt and Human Rights* (Oxford UP, 2018) 536-554; Pierre Pénet, "[Rethinking Odious Debt](#)" – Books & ideas 19 March 2018. ISSN : 2105-3030. Jeff King, *The Doctrine of Odious Debt in International Law. A Restatement*, University College London, 2016; Stephania Bonilla, *Odious Debt: Law-and-Economics Perspectives*, Gabler publishers, Wiesbaden, 2011; Michael Waibel, *Sovereign Defaults before International Courts and Tribunals*, University of Cambridge, 2013; Michael Waibel, *Sovereign Defaults before International Courts and Tribunals*, University of Cambridge, 2013; Odette Lienau, *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance*, Harvard, 2014; Juan Pablo Bohoslavsky, Sabine Michalowski, "Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A

Response to the World Bank Discussion Paper on Odious Debts” (2009-2010), *Columbia Journal of Transnational Law*, Vol. 48.

In conclusion, the doctrine of odious debt is a robust one that has evolved and continues to evolve over time, and governments need to find the courage to organise, with the active participation of their citizens, an audit of debt in order to set in motion the process of repudiating debts identified as being odious.

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Notes

[1] *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières : traité juridique et financier*, (The Effects of the Transformation of States on their Public Debt and other Financial Obligations: a Legal and Financial Treatise), Paris, Sirey 1927. All translations by the CADTM. The almost complete document (in French) [can be downloaded free](#) from the CADTM Web site. Also see, in English, [“The Doctrine of Odious Debt: from Alexander Sack to the CADTM”](#)

[2] Source: Sarah Ludington, G. Mitu Gulati, Alfred L. Brophy, [“Applied Legal History: Demystifying the Doctrine of Odious Debts”](#), 2009

[3] Eric Toussaint, [“The Soviets and Tsarist Debt”](#). See also : Odette Lienau, *Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance*, Harvard, 2014

[4] Another quote from Sack clearly confirms that he was opposed to the despotic nature of a regime being a condition sine qua non to identify an odious debt: “Applying other conditions than those we have established (p. 6-7) would, through arbitrary, differing and contradictory judgements, bring about the paralysis of the whole international public credit system and so (if such judgements were to have real weight on questions of recognising or of not recognising debts as State debts) would deprive the World of the advantages of public credits.” (p. 11).

[5] Source: *Treaty Series*, no. 4, 1919, p. 26. quoted by Sack, p. 162.

[6] See the conference [Rethinking Sovereign Debt: Politics, Reputation, and Legitimacy in Modern Finance](#) by Odette Lienau

[7] *Yearbook of the International Law Commission 1977 Volume II Part One* – ILC 1977, v2, p1.pdf, http://legal.un.org/ilc/publications/yearbooks/english/ilc_1977_v2_p1.pdf; see also the report for 1979 http://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v2_p2.pdf

[8] IMF, Michael Kremer and Seema Jayachandran, “Odious Debt”, *Finance & Development*, June 2002, Vol. 39 no. 2. <http://www.imf.org/external/pubs/ft/fandd/2002/06/kremer.htm> See also Michael Kremer and Seema Jayachandran, “Odious Debt”, Presented at the Conference on Macroeconomic Policies and Poverty Reduction, April 2002, <https://www.imf.org/external/np/res/seminars/2002/poverty/mksj.pdf> IMF, Raghuram Rajan, “Straight talk: odious or just malodorous?”, *Finance & Development*, December 2004 <https://www.imf.org/external/pubs/ft/fandd/2004/12/pdf/straight.pdf>

[9] Vikram Nehru and Mark Thomas, 2008, “Odious Debt: Some Considerations” at: <http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1184253591417/OdiousDebtPaper.pdf>, World Bank, Odious Debt Roundtable, Washington D.C., 14 April 2008, http://siteresources.worldbank.org/CSO/Resources/Odious_Debt_Roundtable_Report_FINAL_July_17_08.pdf

See the CADTM’s reaction to the round table organised by the World Bank: “CADTM Belgium’s position on the doctrine of odious debt and its legal strategy for debt cancellation”, <http://www.cadtm.org/Topicality-of-the-odious-debt.3515>, published 4 July 2008.

[10] Robert Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD, 2007 http://unctad.org/en/Docs/osgdp20074_en.pdf

[11] UN, Cephias Lumina, *Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, 2009 http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.10_en.pdf

[12] See the final report on the findings of the commission, in which I took part representing the CADTM. The report, in English and Spanish, [can be downloaded here](#)

[13] See “CADTM – [Topicality of the odious debt doctrine](#)”, Position of the CADTM, published 8 August 2008

[14] Greek Debt Truth Commission, [Preliminary Report of the Greek Debt Truth Commission](#), especially chapters 8 and 9, published 18 June 2015.

See also Greek Debt Truth Commission, “[Illegitimacy, Illegality, Odiousness and Unsustainability of the August 2015 MoU and Loan Agreements](#)” published 25 September 2015

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