



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

Terms of Reference

An African Analysis of the Odious Debt Doctrine

The [African Forum and Network on Debt and Development \(AFRODAD\)](#) is a Pan-African civil society organisation established in 1996 to advocate for debt cancellation and addressing debt related issues in Africa. Over the past 25 years, AFRODAD has built expertise on public debt management issues and its intersectionality with domestic resource mobilisation, and international public and private finance in Sub-Saharan Africa and continues to be concerned that African economies do not become highly indebted and in debt distress as in the 1980s. We work with Government Officials across Africa, Members of Parliament, Media and Journalists, Civil Society Organisations, and representatives from the global financial architecture at continental and global levels. We advocate for accountable and transparent public debt and financial management; strengthening of legal and policy frameworks to curtail leakages through illicit financial flows and profit shifting; prioritising revenue generating opportunities through all forms of finance in Africa. Our work focuses on influencing African governments and institutions to adopt accountable and transparent public debt management policies and practices for sustainable development and eradication of poverty. Since our establishment, we have been contributing to finding sustainable solutions to Africa's challenges in debt and resources mobilisation, including financial development. Our main focus areas are Sovereign Debt Management, Democratisation of the Debt Discourse, Collective Action on Debt and Development and Institutional Development & Sustainability.

A. Introduction

“Asking the Iraqi people to assume Saddam’s debt is rather like telling a man who has been shot in the head that he has to pay for the bullet.”

~James Surowiecki

The conundrum of defining odious debt marks the commencement of a web of confusion around the definition, legal status and applicability of the doctrine. The golden thread running through this web is that of irresponsible lending and/or borrowing, expenditure not in the interests of the citizenry and general unconscionability – arguably even illegality. While the philosophical underpinnings of the doctrine of odious debt can be traced back to Aristotle, Grotius and Plato,¹

¹ Oliver Pahnecke, ‘Sovereign Borrowing Without Odiousness: Legal Instruments to Substitute the Odious Debt Doctrine in the Repudiation of Sovereign Debt’ (LLM thesis, Middlesex University London 2023) <<https://repository.mdx.ac.uk/download/9b3a30c37b26ba7cfe8cf8c09aa6e9a15bbbd93b699918a0798112791d7c155f/1030968/ORPahnecke%20thesis.pdf>> accessed 5 February 2025.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

there exists consensus among scholars that the modern-day conceptualisation of the doctrine can be traced back to the 20th century, in the aftermath of World War I. In 1927, Alexander Nahum Sack in his book “The Effects of State Transformations on their Public Debts and Other Financial Obligations” described the modern-day odious debt doctrine as debts contracted and expended against the interests of the population and in the full awareness of the creditor.² Verbatim, Sack states that “...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 its population that fights against it, etc., this debt is odious for the population of the State.”³

Although this conceptualisation was contextualised in the period after World War I, the modern-day doctrine has evolved even further in terms of taxonomy, scope and certainly even applicability. The taxonomy proposed by Sack included war debts, subjugated or imposed debts and regime debts, whereas O’Connell adds hostile debts to the mix. Khalfan et al point towards “developing world debts not spent in the interests of the population,”⁴ and more recently, Megliani in the context of the Mozambique hidden loans scandal asserts that “...a debt is odious if, in the awareness of the creditors, it is contracted without the consent of and not for the benefit of the population.”⁵

Unsurprisingly, the arguments around applicability of the doctrine are diverse and wide-ranging. For example, many newly independent states agreed to assume the debts of their colonisers in return for independence, with scholars arguing that these inherited debts of the crown are odious.⁶ Others such as Giyose assert that debts related to injustices such as slavery, genocide, colonialism and neo-colonialism, are odious debts and explores debt cancellation as a method of reparation.⁷ Moreover, the odious debt doctrine has often been raised as a justification for successor regimes to argue that a debt was not incurred or used for the benefit of the people.

In addition to the uncertainties around definition, scope and applicability, there is no proper adjudication forum for the settlement of claims of odiousness of debt, which justifies raising these concerns in the context of arbitration or domestic litigation, as well as during bilateral and

² Robert Howse, ‘The Concept of Odious Debt in Public International Law’ (July 2007) (UNCTAD/OSG/DP/2007/4 <<https://cdi.mecon.gob.ar/bases/docelec/unctad/dp185.pdf>> accessed 5 February 2025.
<<https://cdi.mecon.gob.ar/bases/docelec/unctad/dp185.pdf>

³ Ibid.

⁴ Ibid, 5-6.

⁵ Mauro Megliani, ‘Mozambican Illegal Debts: Testing the Odious Debt Doctrine’ (2020) 53 Vand J Transnational <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/vantl53&div=46&id=&page=>> accessed 5 February 2025.

⁶ Pahnecke (n 1).

⁷ MP Giyose, ‘The Debt to the Indebted: Reparations, Odious Debt, and Their Global Implications’ (2012) 53(1-4) Armenian Review 167

<https://openurl.ebsco.com/EPDB%3Aagcd%3A8%3A28242840/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Aagcd%3A86038399&crl=c&link_origin=scholar.google.com> accessed 6 February 2025.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

multilateral negotiations on debt relief. However, invocation of odiousness in different fora with respect to distinct debt contracts creates the risk of inconsistency in interpretation and varying precedents.⁸

Problem Analysis

The globe will soon be marking a century since the 1927 conceptualisation of odious debt. The past century has been marked by numerous significant shifts in global economic and social order including *inter alia* colonialism, independence, establishment of the Bretton Woods institutions and emergence of imperially conceived international markets. This necessitates an inquiry into the re-conceptualisation of the doctrine, especially for the benefit of countries in the Global South which are suffocating under the burdens of unsustainable debt and shrinking fiscal space. For Africa, these have become hindrances to the achievement of development agendas under the African Union Agenda 2063, and the attainment of social and economic rights. The African Legal Support Facility (ALSF) reports a doubling of debt-to-GDP ratios in sub-Saharan Africa over the course of a decade from 2013 to the end of 2022, with the interest-to-revenue ratios more than doubling since the early 2010s, increasing concerns around debt sustainability. As of November 2023, the International Monetary Fund (IMF) and World Bank had identified 13 African countries were at a high risk of debt distress with 7 already in debt distress.⁹ The mounting debt is accompanied by massive debt service, as between 2019 and 2021, 25 African countries – around half the continent – spent more on interest payments than on education or investment. An additional concerning trend is that public debt is growing faster in the developing world.¹⁰ This is alarming because debt is draining Africa of resources which otherwise could have been invested in development and in addressing inequality in public service delivery. Odious debt plays a role in exacerbating this situation as it is a facilitation of Illicit Financial Flows (IFFs) bleeding the continent of its resources.

The odious debt doctrine lacks a normative characterisation which many developing countries could rely on to argue for the repudiation of their debt obligations. This therefore presupposes an inquiry into a clear definition of odious debt in light of recent developments in the debt landscape – including the changing creditor landscape and debt-related IFFs – especially in African countries. Put simply, Africa needs its unequivocal contextualised definition of odious debt – one that flows from the lived realities and experiences of African countries and not from the context of World War I. Pahnecke argues that the definition of odious debt remains a hindrance in

⁸ Ibid.

⁹ Difie Boakye-Mensah et al, *Understanding Sovereign Debt: Options and Opportunities for Africa* (African Legal Support Facility, 2nd edn), 14.

¹⁰ United Nations Global Crisis Response Group, 'A World of Debt: A Growing Burden to Global Prosperity' (United Nations, July 2023) <<https://unctad.org/publication/world-of-debt/regional-stories>> accessed 14 May 2024.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

practical application of the doctrine, which leads to rare application of the same, but does not make impossible its application.¹¹

The next step is to understand the legal status of the doctrine of odious debt. As the doctrine lacks a proper normative foundation, its ideal systematic placement at this time is a matter of policy rather than a matter of law, particularly under the umbrella of transnational public policy, hence it is a universal principle for the interest of mankind.¹² While the doctrine is regarded as an avenue for repudiation of debt claims against a debtor nation, it is seldom used in this manner. The essence of odiousness is the principle of unconscionability which is found in both civil and common law. The doctrine also finds its place under the law of agency, which is an element of contract law. Numerous constitutions assign the role of an agent to an elected government, with the citizenry being the principal. Under the law of agency, an agent is regarded as “...a person that has the power to create, change or terminate the legal relations of another, the principal.”¹³ Where the agent exceeds such authority, the agent is liable to the principal for damage arising from unauthorised actions. The government therefore plays a fiduciary role in the context of sovereign debt, which if exceeded, can give rise to liability which conscionability demands be borne by the agent and not the electorate. In this regard, it is crucial to explore how the doctrine can gain its legal status as a binding law, backed by responsible lending and borrowing principles stipulated in the African Borrowing Charter.¹⁴ We argue that a United Nations normative framework on debt presents one possible avenue for the achievement of this objective.

Furthermore, to provide a holistic solution, the above steps must be taken in the context of IFFs, particularly debt-related IFFs. Latif postulates that part “...of the African debt has been aggravated by historical injustices in the form of colonial and odious debts, emergence of vulture funds, lack of thin capitalisation rules, debt to equity swaps, lack of fiscal transparency and accountability for resource backed loans all which culminates into an environment that fosters opportunities for illicit finance or untaxed gains made out of manipulating the debt and the legal framework within which it operates.”¹⁵ Nazir and Yiega further connect odious lending to IFFs in the context of the Mozambique hidden loans case, arguing that state-owned enterprises are used as vehicles for debt-related IFFs due to lack of publicly available fiscal information. In the Mozambican case, funds were borrowed without adherence to legal requirements for national projects, but benefits therefrom did not

¹¹ Pahnecke (n 1).

¹² Megliani (n 5).

¹³ Pahnecke (n 1) 28.

¹⁴ AFRODAD, ‘The African Borrowing Charter’ (2018) <<https://afrodad.org/sites/default/files/advocacy-documents/AFRODAD-COMBINED-CHARTER.pdf>> accessed 9 February 2025.

¹⁵ Lyla Latif, ‘Is Africa’s Fiscal Space Undermined by Debt related Illicit Financial Flows? A Case Study of Selected SADC Member States’ (2022) Committee on Fiscal Studies WP 01/03 ADHR <<http://uonjournals.uonbi.ac.ke/ojs/index.php/ffd>> accessed 5 7 February 2025.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

materialise.¹⁶ There does exist further analysis on odious debt in the context of IFFs from existing literature, demonstrating that scholars have regarded the debt odious, as well as the Court which decided that all the acts related to the contraction of the loans were void for violation of the Constitution. In particular, the loan contraction process had exceeded the debt ceiling imposed by regulation and constitutional requirements under Article 179(p) which granted the Assembly of the Republic exclusive power to authorise the government to take out loans and establish the upper limit of guaranteeing loans.¹⁷ It is interesting to note that such loan contraction without adherence to legal requirements and due process has become the norm in African countries, presupposing an inquiry into whether the odious debt doctrine can also be extended to other loans for debt cancellation. One example is a resource-backed loan recently contracted by the Government of South Sudan in blatant disregard of the country's debt ceiling and legally stipulated procedure. In a Statement of Reference filed at the East African Court of Justice, the Applicants in the matter have argued that the loan constitutes an odious debt.¹⁸

Against this background, AFRODAD seeks to develop a research paper that explores an appropriate definition of odious debt in the African context in light of recent developments and the current state of affairs. Through this, we aim to establish a certain taxonomy and scope for application of the doctrine. Furthermore, the paper will serve as a platform to explore connections with IFFs and expound on the use of the odious debt doctrine as an inhibitor of debt-related IFFs and a catalyst for debt cancellation.

B. Objectives of the study

- i. Establish an unequivocal and contextualised African definition of odious debt;
- ii. Determine an appropriate taxonomy of odious debt and the scope of application of the odious debt doctrine'
- iii. Examine avenues of making the odious debt doctrine a binding normative construct, including the legal reforms required to facilitate the same;
- iv. Examine the link between odious debt and IFFs;
- v. Determine how the odious debt doctrine can be used to curb debt-related IFFs and achieve debt cancellation in African countries.

C. The scope of the assignment

¹⁶ Afshin Nazir and Vallarie Yiega, 'Debt, Access to Information and Illicit Financial Flows: An Analysis Based on the Mozambique Hidden Loans Case' (2020) *Financing for Development* 1(2) 237.

¹⁷ *Ibid.*

¹⁸ *Kanyibil Noon and 3 others v The Attorney General of the Republic of South Sudan* [2024] EACJ Ref No 26 of 2024.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

- i. Provide a detailed background examining the above issues in light of current affairs on the African continent;
- ii. Examine previous conceptualisations of the odious debt doctrine and define the same in an African context;
- iii. Establish an appropriate taxonomy of odious debt and the scope of application of the odious debt doctrine, based on the re-conceptualisation in ii. above;
- iv. Analyse critically the legal status of the doctrine and explore avenues to make it a binding norm at national and international levels;
- v. Explore the connections between the odious debt and IFFs;
- vi. Examine debt cancellation and repudiation of sovereign debt obligations for African countries through application of the odious debt doctrine.
- vii. Determine the role of different actors including governments, creditors and the international community in this regard.

D. Key Outputs

- Assessment Paper (25 pages excluding references, cover page and annexes). Formatting requirements include Times New Roman, Font 11, Spacing 1.15.

E. Analysis Approach

The assessment paper should have and/or follow the structure proposed below which enables flow of arguments and the tying down of cutting-edge policy propositions

- **Introductory or background section**

- Presents an overview of the subject.
- Expresses a clear research problem with related research questions.
- Includes aim and objectives of the study with a justification of why study is needed.
- Summarises and justifies the methods used in the study.

- **Literature Review**

- Presents clear conceptual clarifications.
- Looks at related literature and identifies gaps.
- Looks at issues related to the problem and questions raised.

- **Findings and Discussions**

- Tackles the questions raised.



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

- Determines whether the main problem is being solved.
 - **Conclusions and Policy Recommendations**
 - Determines whether the research aims and objectives were met.
 - Engages in policy discussions and advances recommendations.

The paper should:

- Be well written with references and acknowledgement of sources of materials that are referred to in the text, end notes and bibliography at the end of the report.
- Have a table of contents and list of tables, glossary and list of acronyms if any.
- Contain an executive summary, and a section on key findings, conclusions and recommendations.
- Contain recommendations for Parliament, Governments, private sector, civil society and the international community.
- Outputs should be tailored to specific events and audiences during the dissemination of findings.

F. Timing

The Research Study should be completed within 30 working days from the time the contract is signed between the selected consultant and AFRODAD.

	Wk1	Wk2	Wk3	Wk4	Wk5	Wk6
Inception meeting with consultant	xxxx					
First draft and review	xxxx	xxxx				



AFRICAN FORUM AND NETWORK
ON DEBT AND DEVELOPMENT

Second Draft and Validation			XXXX	XXXX		
Final Draft and design				XXXX	XXXX	
Approval and Webinar launch						XXXX

G. Reporting

The consultant will report to both the Policy Manager and Legal Analysis and Advocacy on Debt (LAAD) Policy Officer theo@afrodad.org and afshin@afrodad.org

I. Competencies

The Consultant should have skills and experience in the following areas:

- Policy aptitude and experience on sovereign debt, human rights, and international law.
- Postgraduate degree in Law and an Undergraduate degree in Law with experience on public finance issues including debt and IFFs.
- Demonstrated expertise on international law, IFFs and sovereign debt.

Expressions of interest should be sent to recruitment@afrodad.org, copying theo@afrodad.org and afshin@afrodad.org with the subject line “**EOI: Odious Debt Paper**”. Expressions of interest should be submitted by 14th March 2025 at 11.59 p.m. (GMT).