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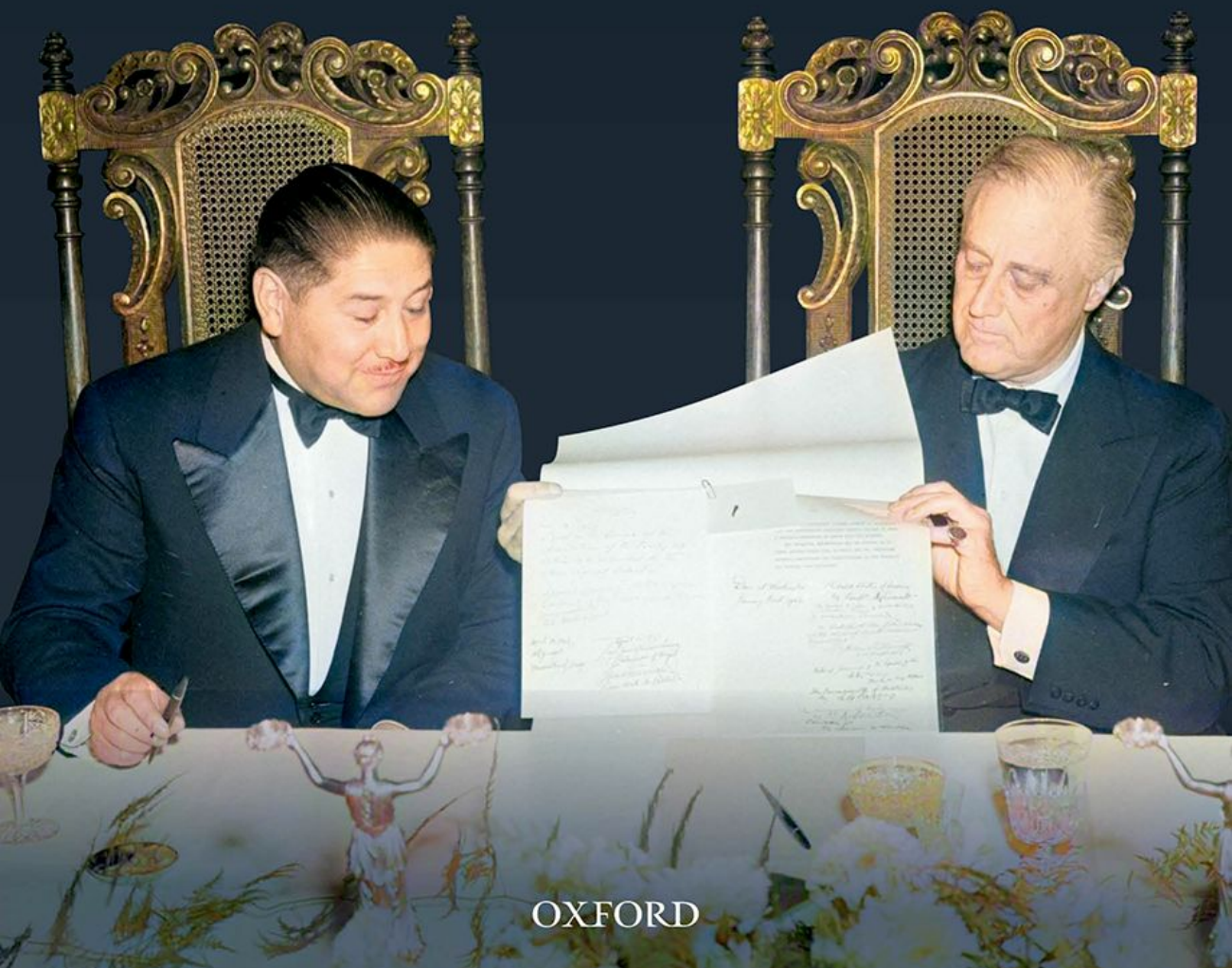
PIERRE PÉNET & JUAN FLORES ZENDEJAS

SOVEREIGN DEBT DIPLOMACIES

rethinking sovereign debt from colonial empires to hegemony



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We Owe You Nothing

Decolonization and Sovereign Debt Obligations in International Public Law

Grégoire Mallard

8.1 Introduction

In the 1960s and 1970s, as many newly independent states freed themselves from colonial political ties, they tried to change the rules of old international economic order and establish a 'new international economic order' (NIEO) based on principles of justice, sustainability, and equality between states. As Nico Schrijver (1997, p. 116) observes, the promotion of the NIEO in international law pitted the Global South—conceived at the time as encompassing Latin America, Africa, and Asia—in its search of new economic rights, against Western states (the United States and former European empires in particular), who defended the sanctity of contracts securing the economic rights acquired by Western private companies like oil concessions. The push for the NIEO emerged from the non-aligned movement (Anghie 2005). Whereas the non-aligned states whose conference in Bandung in the 1950s articulated classical claims in favour of sovereign equality of states, the right to self-determination and the protection of human rights in the Global South, in the 1970s, the NIEO leaders ventured to prolong the decolonization fight deep into the economic realm (Group of 77, 1967). The proclamation in favour of the NIEO emerged out of the conference of heads of state and government of the non-aligned countries which took place in September 1973 in Algiers (Byrne, 2016): this conference was a key landmark during which the leaders of the Global South concluded with a call to the UN General Assembly (UNGA, 1974) to agree upon a Programme of Action for the establishment of the NIEO.

In this global struggle, the issue of sovereign debt figured prominently. In their statement, the heads of states gathered in Algiers recommended 'debt renegotiation on a case-by-case basis with a view to concluding agreements on debt cancellation, moratorium, rescheduling or interest subsidization' (section II, article 2.g), starting with the 'the least developed, land-locked and island developing countries and the countries most seriously affected by economic crises and natural

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calamities' (section II, article 2.i). For the new Global South leaders, newly independent countries were suffocated by the debt they inherited from the colonial past and the low prices of raw materials such as oil, which made their economic models unsustainable. As Mohammed Bedjaoui (1970a, p. 51), the Algerian Ambassador sent to Paris to renegotiate the terms of the oil concessionary contracts between France and Algeria, wrote, 'debt service alone, namely annual amortization and interest payments, would exceed the total amount of new loans by 20 percent in Africa and by 30 percent in Latin America', which meant that the level of state indebtedness inherited by newly independent states from metropolitan states left them crippled at birth.

This new international economic order (NIEO) eventually failed to be established. The common historical explanations account for that failure by pointing to the changing political context in the early 1980s (Abi-Saab, 1991; Rajagopal, 2003; Craven, 2007; Pahuja, 2011; Anghie 2015), and the neoliberal counter-revolution sponsored by the British and American governments of Margaret Thatcher and Ronald Reagan in particular (Blyth, 2013). According to this view, it was not the transformative power of the new legal principles expressed by Third World international law scholars that was responsible for this failure, but the political and ideological context in which their calls for international redistributive justice were received (Colson 1972; Anghie et al., 2003).

Still, other commentators point to inner deficiencies in the NIEO programme (Rist, 1996). For instance, critics notice that nine months after the Algiers Conference, the rights of newly independent states that were defined in the Charter of the Economic and Social Rights of States adopted by the UN General Assembly (UNGA) in December 1974 diluted the radical character of their previous claims expressed in Algiers. The Charter no longer attributed to countries from the Global South an absolute right to nationalize multinational concessionary companies (without obligation to impose an immediate and fair indemnization). NIEO diplomats were either too inexperienced or too quick to compromise when confronted to the pressures of the United States and its European allies. More radically, Gilbert Rist (1996, p. 153) argues that, in fact, the NIEO promoters anticipated and even reinforced the dominant development doctrine of the Global North—and the United States in particular, at least since, the 'Truman Doctrine' of 1947—in which economic growth, expanding international trade, and increased foreign aid to the Global South were seen as the three main pillars of economic growth for the newly independent states. This radical criticism of the NIEO fails to pay attention to the legal dimension of the NIEO programme as it reduces the latter to an economic doctrine, albeit one that remains compatible with, rather than opposed to, the dominant liberal ideology.

This chapter comes back on this criticism—and challenges its validity—by focusing on the legal dimension of the debate on the NIEO in the 1970s. Debates about the legal doctrine of sovereign debt cancellation were opposing

the Global North and South in various UN assemblies, like the UN General Assembly (UNGA) or the International Law Commission (ILC). Practitioners of international law were also deeply divided (see Waibel in this volume). This chapter focuses on the legal debates inside the ILC, which lead to contradictions, and ultimately failure to bring about transformation through progress in international law itself. Indeed, an important aspect of the NIEO was its strong juridical dimension (Pahuja, 2011). The importance of law in this conflict may be attributed to the fact that newly independent countries bargained from a position of economic weakness, and therefore thought to move the terrain of discussion from the political and economic realm to the legal terrain, where ideas of global justice have a stronger echo than in purely commercial disputes. Or it may be the result of the professional trajectories of leading NIEO figures like Mohammed Bedjaoui (Mallard, 2019, p. 165–171). In any case, this juridical dimension is key to notice that the principled claims of NIEO leaders were assessed according to legal evaluative standards and criteria rather than on purely geopolitical or economic grounds. As a result, controversies about the legality of claims made by NIEO leaders need to be accounted for and described if one wants to understand the rise and fall of the NIEO.

This chapter, which draws on a broader socio-historical analysis of the transnational circuits in which legal ideas about North-South solidarity were formulated, criticized, and reinvented (Ozsu, 2015; Mallard, 2019), identifies three types of legal tensions, which damaged the transformative project of the NIEO from within, and can account for its failure, in the legal realm. First, the ILC members who were put in charge of elaborating the contours of the UN convention proclaiming the NIEO immediately noticed a tension between their role as legal experts in charge of the 'codification' of existing law, and the legislative dimension of their work when tasked to write a new convention. The ILC was indeed supposed to both survey and codify the treaties, conventions, and devolution agreements of the decolonization era and to prepare the groundwork for the signature of the Convention on Succession of States in respect to State Property, Archives and Debts, which was eventually opened for signature in 1983. The empirical work of codification contradicted the other goal 'legislation', which consisted in identifying rules that worked to the advantage of newly independent states and that could be written in such Convention.

Second, as time passed, and political pressures grew more intense as a result of the Arab countries' decision to nationalize Western oil conglomerates in the early 1970s and to subsequently raise oil prices, the opposition between ILC members from the Global North who wanted to exclude from their consideration the legal obligations between newly independent states and private interests, and those ILC members from the Global South who wanted to extend their reflections to oil concessions granted by former colonial states to private companies, quickly dominated the debate. The intensity of these debates showed that there was no

agreement within the ILC over the boundary between private and public law, and whether the jurisdiction of the sub-committee extended to both or not.

The third contentious issue related to the framework that ILC members were prepared to accept for the future negotiations of assets and debt recovery. In particular, the ILC, and its Special Rapporteur Mohammed Bedjaoui, blurred the distinction between creditor and debtor state, by arguing that in most cases, if the negotiation took the entirety of the colonial experience as the basis for the future calculation of sovereign debt claims across the Global North and South, newly independent states were not debtor but creditor states, a claim which elicited strong reactions from countries of the Global North.

Throughout all three dimensions of the legal debates at the core of the NIEO, this chapter pays particular attention, and to some extent, homage, to the role of Algeria's chief diplomat in Paris, the ILC Special Rapporteur Mohammed Bedjaoui, whose work on state succession in financial and economic matters has had a strong influence, at least in academia (Mallard, 2019, p. 165). Bedjaoui worked for the ILC while still serving as Algeria's Minister of Justice (from 1964 to 1970), then as Algerian Ambassador to France (from 1970 to 1979), and then to the UN in New York (from 1979 until 1982). The chapter shows how, within the ILC, the Algerian diplomat and statesman scored a few victories on each of these three contentious debates, although unequally so, and why these processes resulting from these tensions can account for the way the work of the ILC unfolded, with the adoption of a convention that was ratified by a handful of countries only. In this narrative, the failure of the NIEO is thus related to the inner dynamics of committee work, and to tensions within the international legal field rather than to purely external factors, like the changing ideologies in Global North countries, or the diplomatic mistakes of Global South leaders.

8.2 A Contradictory Task: Codification in the Age of Decolonization

Following UN General Assembly resolution 1686 of December 1961 recommending that the Commission study the topic of succession of states and governments in view of the phenomenon of decolonization, the ILC formed a sub-committee in 1962, which submitted its first report in 1963. The ILC had initially nominated Manfred Lachs to serve as Special Rapporteur of the sub-committee in charge of reporting on succession of states with respect to matters other than treaties (while Sir Humphrey Waldock was named the Rapporteur on succession in matters of treaties), but after the latter was elected to the ICJ, Mohammed Bedjaoui replaced him (ILC, 1967, p. 368). Bedjaoui's experience as a jurisconsult during the 1962 Evian negotiation between the French government and the provisional Algerian government (Malek, 1995) proved essential for his new role as the Special

Rapporteur (Mallard, 2019, p. 168). Bedjaoui (1968, p. 96) acknowledged that he focused his attention on the legal texts that he had started to compile when he was jurisconsult for the provisional Algerian government, which he had published in a 1961 book on Algeria and international law.

Bedjaoui's (1961) book on Algeria had demonstrated that, according to the principles found in treaties, conventions, and agreements in classical European international law, the Algerian provisional government was clearly entitled to claim the recognition of statehood for the young Algerian nation. His book was written before Algeria's independence, and borrowed from the West its legal justifications, in order to convince the nations that remained neutral in the fight that opposed the French metropolis and the Algerian provisional government—the United States in particular—to side with the party of independence. By the mid-1960s, when Bedjaoui joined the ILC, Algeria had gained its independence, and the next step on Algeria's pathway toward economic independence was to now attack the legitimacy of the old European international law, which unequivocally worked to the detriment of the newly independent states. Bedjaoui was now asked to expand the range of references and to clearly point to new 'progressive developments' found in the emerging law of decolonization as well as in the principles of the UN Charter.

As Bedjaoui (1968, p. 96) noted in his first report to the ILC, the methodology he applied to codify the law was to look at all treaties, conventions, arbitral decisions, bilateral agreements (as an international public law scholar trained in the French tradition would do), in order to capture the topic under investigation: as he wrote, 'by referring to the criterion of sources [treaties], a distinction may be drawn between *conventional* succession and *unconventional* succession, i.e., between succession resulting from treaties and succession resulting from sources other than treaties.' But by adopting strictly that criterion, one would have been led to exclude from the inquiry 'problems relating to private property, debts, public property, acquired rights, etc., when the latter have been regulated by treaty', which would have then artificially left one side of the subject matter to be treated outside the scope of the inquiry.

At the same time, and even if Bedjaoui (1968, pp. 97, 99) acknowledged that it was not the job of the ILC to 'create new law under the guise of progressive development', it was its duty to analyse emerging 'norms known and accepted by most states to a greater extent than traditional law, in whose formulation most existing states [which had come into being through decolonization wars] took no part'. Codifying obsolete rules would be completely useless, so instead of *codification*, Bedjaoui proposed to engage in an effort of harmonization by basing his work 'on legal constructions embodying to the maximum extent possible the present trends of international law, the principles of the Charter, the right to self-determination, sovereign equality, ownership of natural resources, etc.' Bedjaoui (1970a, p. 463) noticed that the term 'succession' was not neutral, but

inherently conservative: intrinsic to the idea of 'succession' was the notion that sovereigns had limited powers to change the order of private property;[1] and that, if they did, they should proceed diligently to compensate private victims of property changes with fair indemnities (Bedjaoui, 1970a, p. 483).

This interpretation of his mission conformed to the 1962 mandate defined by the UNGA 'that the question [of state succession] should be approached with appropriate reference to the views of states which have achieved independence since the Second World War', as well as the line already agreed upon by the ILC under the leadership of Manfred Lachs in its 1963 session, when it set the task to produce a convention rather than a code (in which a judge or arbitrator could have found a list of all relevant cases and rules applicable to each case). The future convention was thus to be signed by independent UN member states, which would therefore agree to confirm or reject past rules and adopt new binding rules. Indeed, the development of international law on the topic of state succession was such that no consensus from which to derive a systematic code had yet been arrived at; and besides, as ILC members remarked, diplomatic arrangements found in decolonization cases 'had to be interpreted with caution, since some of them had been imposed by metropolitan states on new and weak states and might lead the Committee astray if taken as typical examples' (Lachs, 1963, p. 265) to form a customary law. Thus, the ILC members decided to prepare 'terse and brief articles of the type usually included in a convention' (cited in Lachs, 1963, p. 286).

The very empirical work of codification thus contradicted another goal, which consisted in identifying rules that worked to the advantage of newly independent states. Not only did existing public international law tend to protect the economic interests of former metropolises in the postcolonial era, but they had been born obsolete, as their rules were ignored, superseded, or rewritten as soon as newly independent states took command of their economic destiny (Bedjaoui 1970b). This gave enough reason to the ILC members to reject the goal of 'codification' and propose instead to write a convention (e.g. a new politically negotiated document that would supersede existing treaties), thereby stepping outside of its jurisdictional boundary.

In doing so, the ILC distinguished itself from precedent interwar efforts to codify the law of state succession, whose conclusions (and methodology) had been necessarily quite conservative (Ludington, Gulati & Brophy, 2010). Indeed, the main effort of codification in the interwar period had been undertaken by Alexander Sack after the Allied victors had dismantled the Three Empires: the

[1] Bedjaoui (1970a, p. 465) associated such limits with an imperial conception at work in the post–First World War treaties and their understanding of 'limited sovereignty' which was advocated by the Committee on New States at the Paris Peace Conference of 1919. In contrast, the UN General Assembly's Resolution (UNGAR) 1514 of December 1960 solemnly repudiated the imperialist legal theory of state accession that put conditions on the ability of new states to claim a right to statehood (Bedjaoui, 1970a, p. 494), even though the latter is ambiguous on the question of acquired rights.

German Second Reich (with the Versailles Treaty, 1919), the Austro-Hungarian Empire (Treaties of St Germain and Trianon, 1920), and the Ottoman Empire (Treaty of Lausanne, 1923). Alexander Sack, a Russian expatriate who left the Soviet Union to relocate in Paris, tried to codify the rules of state succession found in the post–First World War treaties, with no mandate from any international organization (like the League of Nations) and from a purely academic perspective. The 'folk theory' Sack identified in the texts that could matter to the work of the ILC, to the extent that they elaborated a theory of sovereign debt succession in the colonial context, was found in the provisions that the Allied powers imposed on Germany as far as its colonial possessions were concerned. Sack noted that the Allied powers had agreed that 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, and that it would be no less unjust to make this responsibility rest upon the mandatory powers which, in so far as they may be appointed trustees by the League of Nations, will derive no benefit from such trusteeship (Cited in Sack, 1927, p. 161–2).

In the interwar settlement, this folk theory found its legal concretization in article 254 of the Versailles Treaty, which left to the Reparations Commission the duty to measure the amount of debt that the German and Prussian governments had contracted to help German nationals colonize Polish lands. Likewise, the Versailles Treaty (article 257, 1) did not create any obligations for the German colonies in Africa and elsewhere—or for the mandate powers designated to administer their development—to repay the debts left by the German state and which had been used for their development (Sack, 1927, p. 164), despite the express German demands to the mandate powers (France and the United Kingdom).

Even if Sack explicitly acknowledged that debts left by the predecessor state were 'odious' to the population when they had been contracted for the 'purpose of enslaving indigenous populations or for the purpose of helping its own nationals colonize the lands', (Sack, 1927, p. 158) the difference between Sack and the ILC was great. Sack had criticized the Versailles Treaty for applying a criterion for sovereign debt cancellation that was too loose, as he claimed that it was not clear that these cancelled Polish debts could de jure be called 'odious' according to his own doctrine: the Germans had bought the lands they colonized from Poles at a very high price (according to Sack), and the Germans did not fund these land purchases with loans, but on the Prussian budget, which meant that German taxpayers had already paid for these purchases. For him, the doctrine of 'odious debt' required the existence of three conditions: lack of consent from, and lack of benefit to, the debtor state, and creditor awareness of the two first conditions.

In contrast, Bedjaoui cited the Versailles Treaty and the Reparations Commission as providing a great precedent of his much more radical theory of sovereign debt cancellation applied to decolonized nations (Bedjaoui, 1977, p. 103). Even if Bedjaoui praised Sack's work for his analytical clarity, he was clearly opposed to Sack's attempt to limit the applicability of the concept of 'odious debt'. (Bedjaoui, 1977, p. 57) Indeed, Sack had claimed that debts that had benefited a territory—or the people in the territory—under subjugation should not be regarded 'odious' if they had proved useful investments that were still active at the time of succession. For Bedjaoui (1977, p. 103), 'even in the case of loans granted to the administering power for the development of the dependent territory (criterion of intended use and allocation), the colonial context in which the development of the territory may take place thanks to these loans disqualifies the undertaking.' In these circumstances, it would be 'unjust', Bedjaoui added, 'to make the newly independent state assume the corresponding debt even if that state retained some trace of the investment, in the form, for example, of public works infrastructures'. Thus, for Bedjaoui, the criteria of intended use and allocation (development rather than war or expropriation of natives by colonizers) that Sack had introduced to limit the applicability of the doctrine of 'odious debts' to the most extreme cases (colonial war or expropriation or personal enrichment of the sovereign) were not useful guides to determine which colonial debts contracted by the metropolitan state should pass on to the newly independent states. In principle, all of the state debts should be disregarded, and left for the metropolitan state to reimburse, unless the latter could really prove that the investment, and the associated debt, could be dissociated from the colonial context, and that it had been contracted after the expression of need by the dependent populations. In other terms, 'the general principle of non-transferability of the debts of the administering power, to which exceptions may be allowed, . . . places the burden of proof on the predecessor state rather than on the newly independent state' (Bedjaoui, 1977, p. 103).

As Bedjaoui (1977, p. 99) wrote, during the eight years of war between France and the Algerian pro-independence fighters, the administering power had for political reasons been 'overgenerous in pledging Algeria's backing for numerous loans' which had the effect of 'seriously compromising the Algerian Treasury' after independence, to the point that one may wonder if such generosity did not hide darker intentions: that of leaving a nation almost bankrupt at the time of its birth. This was just one example of the poisonous gifts which Bedjaoui suspected to have caused the 'increasingly insupportable debt problem' among newly independent states (Bedjaoui, 1977, p. 100). Thus, Bedjaoui's 1977 report to the ILC concluded with a general condemnation of the level of state indebtedness inherited by newly independent states from metropolitan states, which left them crippled at birth, and which, as Algeria's Head of State said at the 4th conference of Non-Aligned Countries, meant that 'the cancellation of the debt' was called for 'in a great

number of cases' (cited in Bedjaoui, 1977, p. 101)—a call that the UN General Assembly endorsed in its resolution for a New International Economic Order.

To prove his point, the rapporteur to the ILC Sub-Committee repeatedly cited Algeria as an example to be followed by other newly independent states, as after gaining its independence in 1962, Algeria 'refused to assume debts representing loans contracted by France for the purpose of carrying out economic projects in Algeria during the war of independence' (Bedjaoui, 1977, p. 99). Thus, Algeria's denunciation of French debts contracted for costs related to the Algerian territory was not limited to the 'war debts that France had [initially] charged to Algeria' (e.g. those debts that even Sack would have considered 'odious'), but they also extended to debts which had been contracted to pay for useful developmental projects. As Bedjaoui wrote, the Algerian delegation to the Evian negotiation (of which he was a member)

> argued that the projects had been undertaken in a particular political and military context, in order to advance the interests of the French settlers and of the French presence in general, and that they were part of France's overall economic strategy, since virtually the whole of France's investment in Algeria had been complementary in nature. (Bedjaoui, 1977, p. 99)

In so doing, Bedjaoui acknowledged that the principle of non-transmissibility of state debts to newly independent states that he wanted to enshrine in the future Convention represented less a 'codification' of established practice—as 'the practice of the newly independent states of Asia and Africa is far from uniform'—than a new principle of international public law which conformed with the new international economic order. Even in the case of the financial deal that was reached in December 1966 (after three years of negotiations) between France and Algeria, Bedjaoui implicitly remarked that the principle of non-transmissibility had not been recognized by both sides, even if, to him, 'Algeria does not seem to have succeeded to the state debts of the predecessor state by making the payment of 40 billion old francs (400 million new francs)' (Bedjaoui, 1977, p. 99).

Considering the wide disparity of cases regarding newly independent states and the issue of state succession in respect to state debt, it was thus not a surprise if Bedjaoui's draft article was received with a dose of scepticism when he presented the complete draft convention to the other ILC members (Bedjaoui, 1981, p. 27). Representatives of the Western states in the ILC criticized this principle of non-transmissibility in the context of newly independent states. Even another ILC member who developed the Third World Approach to International Law (TWAIL) remarked that Bedjaoui's analysis appeared to 'deal extensively with French colonial practice', but much less with Dutch or British colonial practice, which to a much larger extent than the French had left the ability to raise taxes or

loans to dependent but still 'separate administrative units that were largely fiscally autonomous' (Bedjaoui, 1981, p. 28). Thus, it seemed that for those newly independent states it was difficult to ground the principle of non-transmissibility of debts on established practice, except in extreme circumstances.

After Bedjaoui released the last report on the Law of State Succession to the ILC, the UN General Assembly decided in December 1981 to convene an international conference of plenipotentiaries to consider the draft articles on succession of states in respect to state property, archives, and debts, and to embody the results of its work in an international convention. The Conference assigned to the Committee of the Whole the consideration of the draft articles adopted by the ILC. Mohammed Bedjaoui participated in the debates as the expert consultant in his quality as the Special Rapporteur to the ILC on state succession (UN Conference, 1983a). In the convention, after six introductory articles, seven articles concerned the issue of 'transfers' of *state property*—or rather, the 'substitution of sovereignty' to which 'property' was attached, as the articles talked about the 'extinction' and 'arising' of rights (article 9) in order to stress discontinuity rather than continuity in the process (UN Conference, 1983b, p. 48)—five articles (14 to 18) concerned the issue of territorial swaps, thirteen articles (19 to 31) concerned the issue of the transfer of state archives, ten articles (32 to 41) codified the issue of *state debt* in cases of state succession. The Conference, on 7 April 1983, adopted the 'Vienna Convention on Succession of States in respect of State Property, Archives and Debts' consisting of a preamble, fifty-one articles, and an annex.

The Convention was opened for signature from 7 April until 31 December 1983, but it has not yet entered into force as it is missing the signature of key UN member states. In particular, the articles that concerned the succession of rights on property and debts in the case of 'newly independent states' for which exceptional rules applied (articles 15 and 38, respectively) were the most controversial, as can be seen from a brief survey of the objections of Western states to the Convention. Already during the plenary conference the main lines of division appeared between the Western states, which refused to sign, and the Communist block and Group of seventy-seven states, which were in favour (Mallard, 2019, p. 194).[2] The Algerian delegate, Mr Moncef Benouniche could only regret that Western states' 'negative attitudes to an instrument which was fully in conformity with trends in the international community paralleled the uncooperative approach which had led to difficulties in the negotiations of the new international economic order' (UN Conference 1983a, p. 27).

[2] The delegates in the plenary conference who voted against represented Belgium, Canada, France, Germany, Israel, Italy, Luxembourg, Netherlands, Switzerland, the UK. and the USA (UN Conference, 1983a, p. 3).

The US representative, for instance, justified his opposition due to 'the extent and scale of the special treatment given to newly independent states and the unnecessary vagueness of the formulation of a number of provisions' (UN Conference 1983a, p. 31). The West German representative objected that a 'conference like the present one, which attempted to formulate existing rules of customary international law and to reach agreements about rules of contractual international law [two different tasks] could not be fulfilled if it did not take into consideration the views of a substantial minority of states' (UN Conference 1983a, p. 27). For him, the articles that related to the treatment of debts for newly independent states (article 38)—which affirmed that no 'state debt of the predecessor state shall pass to the newly independent state, unless an agreement between them provides otherwise' (article 38.1), and that the 'agreement referred to in paragraph 1 shall not infringe the principle of permanent sovereignty of every people over its wealth and natural resources, nor shall its implementation endanger the fundamental equilibria of the newly independent state' (article 38.2)—were particularly controversial, a position shared by the representatives of all Western states. For the Canadian delegate, the 'value of a treaty that did not codify customary law but purported to create new rules, as was unquestionably the case with that convention, depended upon the degree of support it could command among states with different interests on the matter', and as the French delegate regretted, the method of work, which had consisted in voting on articles rather than seeking consensus had imperilled the whole work of the Conference (UN Conference 1983a, p. 28).

8.3 Boundary Crossing Between Private and Public International Law

The extent to which ILC members had been asked to strictly codify existing principles of international law as far as the question of transmissibility of debts in the postcolonial context, or whether they were allowed to propose new principles on the matter—and if so, how consensus could be built—was not the only divisive issue within the ILC. A second issue concerned the extent to which its jurisdiction extended far beyond the strict confines of public international law. In 1963, it appeared that the ILC would extend its study to cover how state succession affected the rights of private individuals, especially of 'nationals of foreign states' (Rosenne cited in Lachs, 1963, p. 287), as these issues were at the centre of negotiations in the case of newly independent states—as illustrated by the Franco-Algerian negotiation. Indeed, as Bedjaoui (1970a, p. 528) wrote, until the age of decolonization, the theory of state succession was mostly concerned with the protection of the acquired rights (*droits acquis*) of the foreign nationals

who owned possessions in the territory of the new state, and it was never concerned with protection of the 'vital economic interests' of the new state.

But at the same time, the decolonization process had irremediably showed that the *raison d'être* of newly independent states was the protection of the 'vital interests' of the nation, which sometimes necessitated ignoring the sanctity of property rights, especially when there was a manifest 'public utility' (Bedjaoui, 1970a, p. 533) in their violation. In 1969, Mohammed Bedjaoui thus delivered a (second) report to the ILC that extended beyond the strict confines of international *public* law, as it was concerned with the 'economic and financial acquired rights' of both public and private individuals. In parallel, in 1970, in an important *Recueil de Cours* that Bedjaoui delivered at The Hague Academy of International Law, he synthesized many reflections from his work at the ILC commission on the law of state succession and how it affected 'acquired rights'. In both publications, Bedjaoui claimed that newly independent states' ability to violate acquired rights should never be limited by their ability to compensate victims of expropriation. In fact, it was precisely when the newly independent states were incapable of paying 'just' reparations that the state needed to expropriate large private interests. Although a few individuals could receive reparations for the loss of their properties, newly independent states could not accept the principle that all rights of foreign nationals should be compensated for, as the 'lands, the buildings, the transport, the industry, the trade companies, etc., belonged to private interests' during colonial administration, and thus, 'compensating them for the loss of their property in case of nationalization would mean that the new state would have to buy its whole country back' which would be economically impossible. In this case 'the state would indebt itself in perpetuity, and even [if] the debt was distributed over a very long period, no budget could service such a debt'. (Bedjaoui, 1970a, p. 545) The situation would also look very much like the situation of slaves 'buying back their freedom'.

In the 1970s, Bedjaoui (1970a, p. 535) extended these reflections to oil concession contracts, which, he claimed, should be read as contractual obligations with *private* persons—as the ICJ had established in its 1952 ruling on Anglo-Iranian Oil vs Iran—and not as *public* law documents benefiting from the sanctity attributed to treaties. In so doing, Bedjaoui (1970a, p. 469) clearly opposed the Gaullist idea of 'cooperation' in technical cooperation (especially in the oil sector) in which he saw the *public* law version of the private law doctrine of 'acquired rights'. For Bedjaoui, the real goal of postcolonial cooperation between the former Western oil conglomerates and the newly independent states was the prolongation of colonial relations of interstate subordination. Cooperation agreements in the oil sector were just a public law tool invented to maintain the 'trust' that private investors had in the sustained protection of their private interests and concessionary rights in postcolonial eras. Citing the Evian Agreements between France and Algeria (chapter II), 'cooperation' was indeed a guarantee (*contrepartie*) that

Algeria would protect 'the interests of the French state and the acquired rights of the legal persons on Algerian territory', especially those of the French concessionary companies (Bedjaoui, 1970a, p. 500). Technical cooperation offered 'guarantees' similar to the continued presence of metropolitan military forces in the territory of newly independent states: their overall goal was to insure foreign creditors against the threat that private properties might be redistributed (Bedjaoui, 1970a, pp. 498–9; also 1970b).

Bedjaoui's reflections on the superiority of newly independent states' sovereign 'vital interests' over the private rights of foreign investors divided the ILC's Sub-Committee. Realizing in 1970 that 'the topic of acquired rights was extremely controversial and that its study, at a premature stage, could only delay the Commission's work on the topic as a whole, most members were of the opinion that the codification of the rules should not begin with the preparation of draft articles on acquired rights' (ILC, 1970, p. 300). In order to avoid divisive disputes with the ILC Sub-Committee, Bedjaoui then moved to restrict the original mandate to study only issues of transmission of state property—or rather 'public property appertaining to sovereignty' (Bedjaoui, 1971, p. 177)—and exclude the thorny issue of the private acquired rights of foreign nationals and (multi-) national oil companies. Still, the question of state property needed some clarification: in particular, whether the law of the metropolitan state or that of the successor state would serve as the source for the definition of 'state property'. On this issue, Bedjaoui found in the precedents—mostly decisions made by the Reparations Commissions—that no international body had been 'in a position to carry out the task [of defining which properties belonged to the sovereignty of the state] without reference to the municipal law of the predecessor state' (Bedjaoui, 1971, p. 176).

This general rule, which from his intellectual trajectory and past involvements Bedjaoui seemed ready to accept (as he had defended Algeria's position during the Evian negotiations based on references to French administrative law and European international law), suffered only one exception: when the law of the predecessor state differentiated between the 'public' and 'private' property of the state. Indeed, Bedjaoui (1971, p. 179) proposed that the transmission of state property from the metropolis to the newly independent state should be without compensation for all state property according to the predecessor state's legal definition of the 'public' property, except when the predecessor state had had the possibility of manipulating the distinction between the public and private domains of the state—as in that case, the former metropolis could have kept most its past 'property' intact in the postcolonial age just by calling it 'private' (and thus non-transmissible) a few months before independence, or by granting a legal concession to a 'private' (or semi-private) company on public goods or services right before independence (Bedjaoui, 1970b, p. 146).

As Bedjaoui continued to work in 1971 and 1972 on these conflicts of law between predecessor and successor states, he began to endorse a more radical position on the issue of transmissibility of 'private' property to the newly independent state. The article of the future convention he proposed to the ILC in 1972 no longer relied on the internal law of the predecessor state to dictate which debts and which properties were 'necessary for the exercise of sovereignty' and hence 'devolved automatically and without compensation from the predecessor to the successor state'. Bedjaoui (1972, p. 67) remarked that after reviewing the vast body of precedents, he had found 'no precise answers in international contemporary law to the two following key questions: 1) what property is required for the exercise of sovereignty? 2) what authority has the power to determine such property?' In addition, he further weakened the general rule according to which 'public property should be made by reference to the municipal law which governed the territory concerned' by adding the following exception: 'save in the event of a serious conflict with the public policy of the successor state'. This was an important and broad exception, as it was not completely clear who would decide the 'seriousness' of the conflict of law and thus, the ability of the successor state to impose its legal definition.

Bedjaoui (1972, p. 67) tried to limit the scope and ambiguity of such an exception, by adding that while the newly independent states

> were to have a broader concept of the exercise of sovereignty, which required that property formerly regarded as unnecessary for this purpose should pass within its patrimony [like an oil concession], logic would at least appear to require that the predecessor state should not be made to pay the price for the establishment of a different political and ideological regime or a different institutional model [like a socialist economy].

This general exception found its most manifest illustration in the conflict of law regarding the right to grant (oil) concessions. As Bedjaoui (1973, p. 26) noted in his 1973 report to the ILC, 'it is quite inappropriate to consider the successor state as "subrogated" to the rights of the predecessor state, or as "succeeding" the latter regarding the right in respect to the authority to grant concessions.'

As Algeria took the decision to nationalize oil concessions in 1971 and 1972, Bedjaoui analysed this key issue at great length despite the fact that the ILC Sub-Committee had originally decided to leave all matters related to the recognition of the private rights of private individuals and companies outside of its mandate (Bedjaoui, 1973, p. 25). Citing the French jurist Lyon-Caen, for whom a concession is the 'juxtaposition of a contract and an act of sovereignty', Bedjaoui reintroduced the issue by leaving aside the '*contractual* aspect of the concession', in order to 'deal exclusively with *the act of sovereignty*' (Bedjaoui, 1973, p. 25). Thus, as far as the problem of concession could be split into an international

private law issue and an international public law issue, Bedjaoui claimed that the ILC could discuss the latter aspect. As far as this public law aspect was concerned he 'considered that the successor state exercises its own rights as a new conceding authority, which replaces the former conceding authority', meaning that it could freely decide to grant or withdraw 'by virtue of its sovereignty, the title of owner of the soil and subsoil of the transferred territory' (Bedjaoui, 1973, pp. 26–7). In other words, he made it clear that 'the fact that the successor state "receives" the internal juridical order of its predecessor state should not automatically imply that the concessionary regime is thereby renewed' (Bedjaoui, 1973, p. 27).

The evolution in Bedjaoui's thinking on this issue was deeply affected by the Arab states' oil policy in general, and Algeria's oil policy in particular (Mallard, 2019, p. 187), as his opinion gave a legal justification for the decision by the Algerian government to nationalize oil production in February 1971—the first of the Arab states to make such a drastic move, quickly followed by Qaddafi's Libya, which nationalized BP's assets in 1971, and then by Saddam Hussein's Iraq and Saudi Arabia, in retaliation against Western support to Israel in the 1973 war. In 1971, the Algerian government's decision to claim 51 per cent of the property rights of French oil companies operating in Algeria (and 100 per cent on the gas sector and the pipelines) was a unilateral cancellation of the 1965 bilateral agreement by which the Algerian government had agreed to respect France's acquired rights regarding the exploration and exploitation of Algerian oil in the Sahara, provided that the French would reinvest half of its oil revenues in Algeria (Grimaud, 1972). When he learnt of Algeria's decision, French Prime Minister Jacques Chaban-Delmas sent a memorandum to the Algerian Ambassador in Paris, who was no one other than Bedjaoui, in which he listed all the French claims against the unilateral nationalization of the oil sector (Grimaud, 1972, p. 1300). In this memo, the Prime Minister recognized 'Algeria's right to nationalize', but not without a preliminary and fair compensation for the nationalized assets, and he threatened to ask French companies to immediately stop production in the Sahara if a committee charged with determining such compensation was not set up—a demand that the Algerian government rejected, first through the voice of Bedjaoui, and then through the voice of Prime Minister Boumedienne, when the latter abolished all the concessions in April 1971.

Through his reports to the ILC, Bedjaoui thus sought a legal justification grounded in international public law for Algeria's 1971 decision that would rebuke the French arguments against Algeria's right to nationalize oil companies without prior compensation. His report to the ILC added a legal argument to the economic claims that Algerian economists had already made in their denunciation of the French application of the 1965 agreement.[3] Thus, we see that Bedjaoui's

[3] The Algerian side claimed that from 1965 to 1970, the French oil companies made 7 billion francs profit from Algerian oil exploitation while the French claimed only 1.4 billion francs, leading to

changing position on the question of the conflict of law between predecessor and successor state, and its radicalization, paralleled the evolving Algerian position on the question of concessions. Already in this first report, Bedjaoui (1969) made it clear that decolonizing states could and should ignore 'devolution agreements' (for instance, those decreed by France for Algeria) and acquired rights: when concessions had been obtained during colonial times, they were inherently tainted by the colonists' lack of respect for the acquired rights of the colonial subjects (as the colonists often used the *terra nullius* doctrine to appropriate natural resources).

But Bedjaoui did not obtain the success he hoped for in the ILC. The discussion among ILC members revealed equally (or even more) divisive issues in the case of the article on transferability of state assets as in the case of the non-transferability of state debts from metropolitan states to newly independent states (article 38). As Bedjaoui remarked before the Committee of the Whole, article 38 was not that extreme, as the articles on state debt only concerned debts that 'were governed by international *public* law and therefore excluded debts owed by the predecessor state to private creditors' (UN Conference, 1983b, p. 193), thus protecting the latter even in the case of newly independent states. As Bedjaoui said, the ILC had long pondered on the 'advisability to cover any other financial obligation chargeable to a state' but had decided to produce a Convention that only concerned financial obligations from state to state (even though the latter represented a small portion of the debts contracted by states, which increasingly turned to private capital markets to fund their operations). This limitation was welcomed by the Western delegates, like the Austrian delegate, which thus agreed that the Convention protected private creditors from being prejudiced by all state successions (UN Conference, 1983b, p. 194). Bedjaoui added that the ILC was of the opinion that 'transnational corporations were not subjects of international law' and were thus not concerned by article 38 on the non-transmission of debts from metropolitan states to newly independent states (UN Conference, 1983b, p. 196). Furthermore, the Convention explicitly recognized that 'a succession of States does not as such affect the rights and obligations of creditors' (article 36). Still, the Convention maintained that any agreement between state parties was limited by the recognition of the 'principle of permanent sovereignty of every people over its wealth and natural resources' (article 38.2).[4]

disputes about the amount that the French should have reinvested in Algeria per the 1965 bilateral deal (Grimaud, 1972, p. 1285).

[4] The Convention also defined how disputes regarding the passing of state debts were to be solved: 'by a process of consultation and negotiation' (article 42) or by the special conciliation procedure specified in the Annex (with conditions for the nationality and qualification of the conciliators) if the dispute was not settled within six months of the date of state succession (article 43); and if both of these procedures had failed, by 'submitting [the case] for a decision to the International Court of Justice' (article 44); or finally, if there was common consent, by a procedure of arbitration (article 45).

Here again, the issue divided the Western Bloc on one side and the Communist Bloc and Group of 77 on the other side, as witnessed by the Algerian and Bulgarian delegates' defence of Bedjaoui's wisdom (UN Conference, 1983b, p. 202). Bedjaoui's arguments did not reassure Western delegates: the US delegate for instance doubted the validity of the argument that the Convention protected private creditors, as by restricting itself to the succession of state-to-state financial obligations, it left private creditors with no other choice than to 'resort to the general rules of customary international law, and those rules were highly intricate, complicated, often ambiguous and unclear' (UN Conference, 1983b, p. 199). Thus, the German, Swiss, and US delegates concluded, by accepting a strict boundary between *public* and *private* international law in a field in which cases often involved the protection of both public and private interests, the Convention artificially limited its scope to purely state-to-state relations and excluded private creditors from its protection. Western delegates thus felt that by recognizing at the same time the principle of transmissibility of all state properties and non-transmissibility of all state debts in the case of newly independent states, as well as the principle of permanent sovereignty over natural resources (Bedjaoui, 1981), the Convention was deeply unbalanced to the detriment of Western interests in general, and oil concessions in particular (UN Conference, 1983b, p. 227). Among the articles of the Convention, it was the reference to the inalienability of natural resources in newly independent states (article 15) and the 'principle of the permanent sovereignty of every people over its wealth and natural resources' (article 15.4) that divided the West and the Group of 77: as the US delegate remarked, he did not believe that article 15 was 'an accurate statement of existing law and that its provisions should be accepted as progressive development of international law'—a position echoed by the Dutch delegate, according to whom the term 'permanent sovereignty' was not a legal but a 'moral' notion (UN Conference, 1983b, pp. 93, 109).

8.4 Reversible Identities between Creditor and Debtor States

Related to the divisive question of how much newly independent states should compensate private and concessionary companies in the extractive business, in case the former should decide to nationalize the latter, a third line of conflict opened between members of the ILC, which focused on the more general question of how one should choose the adequate framework for assessing in the postcolonial age the debit and credit of nations that were formerly intertwined by complex webs of trade and financial circuits.

Already in 1961, the Declaration by the non-aligned states in Belgrade stated quite clearly that the decolonized states were in fact 'creditor states' rather than 'debtor states' toward the old metropolises (Bedjaoui, 1970a, p. 550). As Bedjaoui

(1970a, p. 556) later asserted, building upon this Declaration, colonial economies were largely extractive and exploitative, as the industrial development of the metropolises had depended upon the ability of colonial private interests to funnel profits toward the metropolis and to cut the local colonial populations off from the benefits of growth. For him, the metropolis had 'contracted a debt' with its colonies, such that the nationalization of private interests could be seen as a reparation paid by the metropolis to its colony. If the debtor state was the metropolis, private individuals who sought compensation should turn to their own state rather than to the new independent state. This had been Raymond Aron's (1957) proposal in favour of giving Algeria its independence, which had infuriated and shocked pro-French Algeria advocates—that the French state, rather than the newly independent Algeria, should compensate the Europeans who returned to France as a result of Algeria's independence.

More generally, Bedjaoui (1970a, pp. 552, 559) supported the idea of a global settlement that would not only be based on the assessment of the value of nationalized properties by the decolonizing nation but also on the comprehensive calculus of past benefits realized by private interests and chartered companies in the colonies, especially if the latter was not reemployed for the good of the colonial subjects from whom profit was extracted. Thus, only if reparations were to be calculated based on a long-term view of the historical relations between metropolis and colonial territories was Bedjaoui in favour of talking about reparations—and then, his thinking converged with solidarists' defence of the 'duty to repair' (Colonomos & Mallard, 2016). In many ways, these global settlements were exactly what Bedjaoui (1978b, p. 31) wanted the ILC to promote, as he inscribed within the article on state succession in respect to property for newly independent states a clause which mirrored the kind of settlement that the former colony had to find with the metropolis: the clause introduced 'the concept of the contribution of the dependent territory to the creation of certain movable property of the predecessor state . . . so that such property should pass to the successor state in proportion to the contribution made by the dependent territory' (Bedjaoui, 1978b, p. 31).

For instance, if Algeria was to settle claims by companies like French oil companies, French companies should also be accountable to claims by Algerian interests. In effect, Bedjaoui's (1976, p. 82) call for reciprocal settlements continued to be based upon the criticism of the philosophy and practice of 'cooperation' between former metropolis and former colony, whose permanence was most manifest in the case of French ties with former colonies from Western Africa—whether such cooperation extended to the right to issue currency, to own military bases, etc. Citing Gunnar Myrdal's criticism of the 'forced bilateralism' that such neo-colonial logics created, he opposed the logic of continued cooperation in the exploitation of oil and the recognition of an inalienable right of all nations over their 'wealth, natural resources and economic activities' (Bedjaoui, 1976, p. 89)—an inalienable right which was established in various

UN General Assembly Resolutions, like that establishing a New International Economic Order in May 1974, and which was referred to in the final version of the article on state succession in respect to property for newly independent states accepted by the ILC.

Still, the former imperial states, led by the British and the French, objected to clauses in article 15 of the UN Convention of 1983 that could open up reparation debates. The British delegate objected to the statement that newly independent states should inherit property outside their territory (in the territory of the metropolis) 'in proportion to the contribution of the dependent territory' as the determination of such property would 'require mathematical calculations that were practically impossible to carry out' (UN Conference, 1983b, p. 94), thus leading to intractable controversies about reparations—a position which the Indian delegate criticized, but which the French delegate endorsed, as the latter also claimed that 'the term "contribution" lacked precision' (UN Conference, 1983b, p. 98). The Algerian delegate tried to counterattack by arguing that the 'principle of permanent sovereignty was already embodied in the 1978 Vienna Convention on Succession of States in Respect to Treaties' and that the principles of 'equitable compensation' were well-recognized principles of international law (UN Conference, 1983b, p. 96); but from the discussion, no consensus emerged. The Swiss delegate reinforced the Western position by remarking that only in article 15, which concerned newly independent states, could we find a violation of the general principle that a transition should proceed from the agreement of all parties (UN Conference, 1983b, p. 100). As he added, 'the reference to the "fundamental economic equilibria" of the newly independent state was also open to criticism' (UN Conference, 1983b, p. 227).

8.5 Conclusion

Although the ILC Sub-Committee on state succession in financial and economic matters worked for almost twenty years to produce new wisdom on important legal principles governing the core legal questions of the NIEO, it failed to achieve consensus among its members. In many ways, by creating rigid boundaries between different types of succession (transfer, union, separation, and dissolution on one side, and newly independent states on the other side), and creating two opposite sets of rules for each group (as far as the issue of state debt was concerned), the Rapporteur to the ILC Sub-Committee restricted the principles of the NIEO to the newly independent states of Asia and Africa—most of which had already been through the process of independence at the time, which somehow doomed the resulting Convention as it prevented it from being applied to new cases. These historical and geographical restrictions thus excluded the possibility of applying the principles for 'newly independent states' to the new states

that would secede, for instance, from the Soviet 'Empire', first in Eastern Europe and then in the Balkans (Craven, 2007). In addition, to the extent that Bedjaoui accepted the exclusion of the transmission of private debts from the mandate of the ILC Sub-Committee, his report lost some of its relevance for the new crises that would agitate South Asia and Latin America in the 1990s.

With these limitations in mind, it is not surprising if direct references to the work of the ILC on state succession in matters of state debts have largely been absent from debates about the sovereign debts of 'developing' nations. In many ways, the present-day revival of the doctrine of 'odious debt' by religious or left-wing activists represents a Pyrrhic victory for both Sack and Bedjaoui. First, even if the Jubilee network of legal activists—who are at the avant-garde of the fight for sovereign debt cancellation in the Third World—use Sack's name to ground their odious debt doctrine in a glorious past, they use his name inappropriately: indeed, Sack forged a doctrine whose very goal was to limit the cases in which sovereign debt cancellation would be acceptable (Gulati & Ludington, 2008), at a time when practical examples of sovereign debt cancellation seemed to abound dangerously—as with the Polish debt cancellation, recognized by the Versailles Treaty, or with the Bolsheviks' unilateral cancellation of Tsarist debts.

Second, while the present-day calls for the cancellation of the sovereign debt of Third World nations seem to converge with Bedjaoui's new international economic order, they are now expressed on moral rather than political grounds: as they are linked with denunciations of human rights abuses before, during, and after decolonization they thus fall outside the scope of the law of state succession. Besides, Bedjaoui's geographical restriction of his extended doctrine of 'odious debt' (which was much more radical than Sack's) to Asia and Africa was part of a political struggle to unite non-aligned nations of the two continents against the two Blocs who were busy fighting their Cold War in Latin America and parts of South Asia. The political aspect of his work took precedence over his willingness to form a new doctrine of 'odious debt': as some ILC members regretted, 'although the question of odious debts had been discussed by the Commission, . . . and the Special Rapporteur's earlier proposals [were] quite interesting, no provisions relating to it had been included in the draft articles' (Bedjaoui, 1981, p. 19). Bedjaoui had assumed implicitly that those state debts that could be deemed 'odious' were those that newly independent states could reject (since those were the non-transmissible debts) and vice versa, so there was no need to add a separate discussion of the doctrine of odious debt as related to the other categories of state succession (transfer, union, separation, or dissolution). That may well have been a tragic mistake, even though the legal work of the ILC still produced an impressive amount of documentation on the law concerning the transmission of debts from the colonial to the postcolonial context, which future studies could explore in greater detail.

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