A PROPOSED THEORY OF REPUDIATION OF DEBTS IN INTERNATIONAL LAW

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I. INTRODUCTION

The rise of world trade and the development of international finance have ushered in a new facet to modern-day neocolonialism. Developing countries, in their attempt to duplicate the development pattern of the more affluent nations, but amidst a different historical, social and economic milieu, have accumulated large foreign debts and in the process, have become enmeshed in a debt cycle. The collective experiences of these large borrowers have spawned the present debt crisis; the pressure which the latter phenomenon exerts upon the very foundations of world trade and finance, and more importantly, upon the sovereignty of affected states, has already reached staggering heights.

Radical circumstances require radical solutions. This paper attempts to detail, in legal terms, the matter of debt repudiation as a possible partial solution to the impending financial crash. It seeks to analyze repudiation as a legal concept, to elaborate on the possible grounds upon which repudiation might be justified, and to explore the various consequences or implications of repudiation as a mode of action. Thus, the main bulk of this paper is focused on the theoretical underpinings of repudiation with specific reference to the various legal grounds in international law that justify this approach to the debt crisis. The Philippine experience shall be utilized as a basis of analysis, the basic parameter for suggestions and discussion. The author does not propose an in-depth analysis of the Philippine debt situation, its whys and wherefores. To reiterate, this paper is meant merely to provide an insight into the legality of repudiation in international law, and the Philippine situation shall be the experiential tool to drive home the main thesis and purpose of this paper.

II. PRELIMINARY MATTERS

A. *The Nature of Foreign Debt*

Foreign debt refers to all claims against a particular country arising from loans entered into by the government itself or by the private sector with the guarantee of the government.[1] The first classification of foreign

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1 D. AVRAMOVIC & R. GULHATI, DEBT SERVICING PROBLEMS OF LOW-INCOME COUNTRIES 12 (1960); W. GUTH, CAPITAL EXPORTS TO LESS DEVELOPED COUNTRIES 7-8 (1963).

debt consists, therefore of direct obligations of the government while the second consists of indirect obligations of the government.

The guarantee of the government means that the government assures the foreign lender that the domestic borrower will service and repay the loan and that in default thereof, the loan shall be paid by the government itself. At present, there are four governmental entities which are empowered by law to offer guarantee coverage to foreign obligations incurred by the private sector: the Development Bank of the Philippines,[2] the Philippine National Bank,[3] the National Investment and Development Corporation,[4] and the Philippine Loan Guarantee Corporation.[5] The idea behind this process is to ensure the continuous entry of financial resources into the economy such that the existing domestic financial resources be supplemented in order to meet the country's economic development requirements. According to Presidential Decree No. 550 creating the Philippine Loan Guarantee Corporation, one of the two primary purposes of the corporation is "to guarantee approved foreign loans, in whole or in part, granted to any domestic entity, enterprise or corporation, majority of the capital of which is owned by citizens of the Philippines," and in a later provision, it states that "the payment of obligations incurred by the corporation under the provisions of this Decree is *fully guaranteed by the Government of the Republic of the Philippines*" (emphasis added).[6] Thus, it is clear that irrespective of the end-use of these foreign loans, or the lack of any public benefit derived from these privately-incurred debts, by virtue of this decree, the Philippine government is bound by the prestations of the Philippine party to said loan agreements. For once the guarantee is granted, the Philippine government becomes bound by the terms of the loan agreement. It is true that the principle of excussion, i.e., that the properties and assets of the principal debtor would have to be exhausted before recourse be had against the guarantor, will apply and that the Philippine government is merely a secondary party, but the fact remains that the Philippine government may ultimately become directly liable inspite of the purely private character of the principal parties to the loan and of the end-use of the loan proceeds, and of the profit orientation of the entire loan process.

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2 Rep. Act No. 85 (1946), sec. 2 (1 & m).
3 Pres. Decree No. 694 (1975), sec. 3 (f).
4 Pres. Decree No. 550 (1974), preamble.
5 Pres. Decree No. 550 (1974), sec. 2 (a).
6 In international finance, the guarantee of the central government operates as a security for the foreign loans entered into by the government directly or by the private sector. Unlike in local loans which may be secured by real estate mortgage or chattel mortgage as the case may be, or at least by pledge, foreign creditors are not interested nor satisfied by these kinds of securities. In other words, the guarantee by the government is the only acceptable security in international financing; see also, Pres. Decree No. 550 (1974), sec. 2 in relation to sec. 9.

The sources of foreign loans are international financial institutions, foreign governments, or foreign firms or nationals.[7] The popular international financial institutions at present are the International Bank for Reconstruction and Development commonly known as the World Bank, and to a certain extent, the Asian Development Bank. Notice must also be made of the International Monetary Fund (IMF) whose main purpose, among others, is "to promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems"[8] since it has become an indispensable feature in international loan processes and other facets of international financing. As to foreign governments, they have specialized banks or entities whose primary function is to facilitate foreign loans to foreign governments, entities or institutions. For example, the United States has its Export-Import Bank (EXIM Bank) and Japan has a similar entity. As to the banking institutions, the more prominent ones which have major exposure in the Philippines include the Bank of America, Citicorp, Chase Manhattan, Hanover Trust, Morgan Trust, and the like.

As to form, foreign loans may either be transacted through foreign currency acquired directly, e.g., bank loans or sale of bonds and securities, or through the acquisition of real goods, e.g., capital goods or consumption goods. As to maturity, the loans may either be short term loans, e.g., maturity of one year or less, medium term loans, e.g., maturity of more than one year but not more than five years, or long term loans, e.g., maturity of more than five years.[9] In order to understand the debt issue and to have a more complete view of the intricacies of the foreign debt, one may look into the composition of one country's foreign debt. For example, as of the end of December, 1985, the Philippines had a total foreign debt of $26.252 billion.[10] In the same period, the public sector component of the Philippine foreign debt was $18.231 billion or about 69.6% of the total, while debts owed to commercial banks amounted to $14.474 billion or about 55.1% of the total debt.[11] As to maturity, about 67.3% of the total foreign loans were medium and long term liabilities while short-term borrowings amounted to 32.7% of the total.[12] It must be noted that the public sector had incurred a great part of such debt, and in some cases, had assumed private loans through a system of state guarantee.

B. *Default and Repudiation*

Default exists when the debtor refuses to honor its obligations, whether in whole or in part, absolute or qualified. The essence of this concept

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7 DEBT AND LESS DEVELOPED COUNTRIES (J. Aronson, ed., 1979); INTERNATIONAL DEBTS AND DEVELOPING COUNTRIES (G. Smith & J. Cuddington, ed., 1985); DEVELOPMENT AND DEBT SERVICE (1986).

8 U.N. YRBK. 773 (1946-47).

9 See G. OHLIN, AID AND INDEBTEDNESS (1966).

10 Ibon Facts and Figures, No. 188, June 15, 1986, p. 2.

11 *Ibid.*

12 *Ibid.*

is the non-performance of the prestation required from the debtor either in debt service or in debt payment. This mode of action is uniquely unilateral in character and the determination of whether or not to resort to default, falls within the sole discretion and prerogative of the debtor. Broadly, default may be equivalent to repudiation. However, repudiation in the technical sense is but a degree of default.

One author[13] details the different kinds or degrees of default in the following manner:

1. *Total Repudiation of Debts.* This is outright and absolute default where the debtor country denies ultimate responsibility for its debts and avoids payment of all debts whether state debts or state-guaranteed debts.
2. *Debtor's Cartel.* This is similar to outright repudiation but is committed simultaneously by several debtor countries who agree formally or informally to follow such course of action.
3. *Tacit Default.* This involves the failure of the debtor country to fulfill its obligations without actually announcing it as a state policy. Hence, there is default in fact but no policy of default.
4. *Conciliatory Default.* This involves a unilateral decision of the debtor country to limit the interest or principal payments to a certain level. This is a so-called "middle ground" between cooperation with creditors and outright repudiation.
5. *Agreed Default.* This is a post-default situation where a solution is reached but without the disruption of the default, and this solution is agreed upon by the borrower, the banker and the creditor government. Here however, inasmuch as a default is currently made, the framework of negotiations would likely be set by the demands of the debtor country rather than by those of the bank.

Of the five degrees of default, the predominant mode at present is that of concilliatory default. For instance, the Peruvian plan involves the imposition of only 10% of its export earnings to be allocated to service of its foreign debts.[14] However, no debt repudiation is contemplated in the plan, but only an allocation of a smaller percentage of foreign exchange earnings for debt service and payment. Mexico, for example, tied its interest payments and/or principal payments to the oil price trends since oil is almost its sole source of foreign exchange.[15] The Philippines is at present entertaining "selective debt repudiations" or "case-to-case loan disengagement."[16] In brief, this plan calls for a cap on the interest rate paid

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13 KALETSKY, THE COST OF DEFAULT 61 *et seq.* (1985).

14 Willie Mercado, *Peruvian Plan to Settle Debts Won't Work for RP,* Manila Times, July 11, 1986, p. 8, col. 1; Philippine Daily Inquirer, May 8, 1986, p. -, 3, col. 1.

15 Philippine Daily Inquirer, July 15, 1986, p. 7, col. 1.

16 Daniel Yu, *Debt Repudiation: Pros and Cons,* Business Day, March 3, 1986, p. 3, col. 1; Philippine Daily Inquirer, May 8, 1986, p. 1, col. 1; See also, Ibon Facts, *supra,* note 10 at 4.

on foreign debt, a moratorium on debt service and payment of commercial debts especially those guaranteed by the government, and repudiation of certain loans which are questionable at best or immoral at worst. However, unlike Mexico which pegged the interests payments to oil prices, the Philippine plan mandates pegging the interest payments with the country's earning capacity.

Nevertheless, it is a misapprehension to think that there are no other modes of action which may result in the perceived benefits that could be reaped in case any of the degrees of default be undertaken as a policy. For one, there is that proposal to capitalize interest payment and spreading these out over a longer period. This scheme is equivalent to the "equity repayment scheme" whereby the present interests and principal debt due may be exchanged for the debt corporation's capital stocks. For another, there may be convened, perhaps under the auspices of the United Nations, a world debt conference participated in by various debtor and creditor countries and/or banks in order to stave off unilateral actions that may be undertaken by the debtor countries. Here, the debtor countries may form an aggrupation to press their demands with a greater degree of force and persuasion than in a negotiation undertaken singly by any of them relative to the creditor entities. In the very least, the bargaining position of the debtor-countries would be considerably strengthened and creditors may be persuaded to agree to more favorable arrangements.

C. *Some Short Historical Notes*

Outright repudiation is not at all new to the international financial world and to world relations. One author even contends that sovereign-lending debacles followed a devious fifty-year cycle wherein the present defaulting countries in the 1930s and 1970s[17] are at present the same problem borrowers. For instance, Latin American sovereign borrowers seemed to follow a borrow-default cycle in almost perfect regularity.[18] The historical note behind the Drago Doctrine is likewise enlightening. In 1902, when Venezuela was blockaded by the combined fleets of Great Britain, Germany and Italy in order to enforce contractual and other claims against Venezuela, Dr. Drago, foreign minister of Argentina, formulated the doctrine known as the Drago Doctrine which posits that "a public debt cannot give rise to the right of intervention, and much less to the occupation of the soil of any American nation by any European power."[19] At present, most Latin American problem borowers are on top of the list: Argentina, Brazil, Chile, Venezuela, Peru and Mexico.

The Communist triumphs in various countries have also resulted in outright repudiation of the debts incurred by the former regime.

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17 KALETSKY, *supra*, note 13 at 1.
18 *Ibid.*, citing W. WINKLES, FOREIGN BONDS: AN AUTOPSY (1933).
19 J. SALONGA & P. YAP, PUBLIC INTERNATIONAL LAW 227 (4th ed., 1974).

In 1917, Soviet Russia repudiated all debts connected with or entered into by the tsarist and provisional governments of Russia. The reason for this was that the bulk of the sums received as loans were utilized by the overthrown governments in the struggle against their own people. When Mao Tse Tung led the communist victory in China, the same policy was adopted basically following the same reasoning. In 1960, when Cuba became a communist state after the Castro forces overthrew then President Batista, it repudiated all debts for the same reason.

Neither are the present major creditors clean insofar as debt repudiation and/or default of debts is concerned. In 1839, in the midst of an economic crisis, two US Banks, the Union Bank of Mississippi and the Bank of United States went bankrupt and ceased their operations. By 1842, two of the most prosperous states, Maryland and Pennsylvania, defaulted on their repayments of debts, followed by a succession of defaults which included Mississippi and Louisiana. As a result, the United States could not float a loan abroad and the international banking firm then, the Rothchilds of Paris, avoided granting loans to the United States. In fact, up to now, some bonds of these states remain unpaid.[20]

England also resorted to default: In the 14th century, King Edward III defaulted on their Italian loans, and up to the present, Britain has not paid all the debts incurred to finance the Napoleonic Wars and those incurred to finance the First World War. France likewise defaulted on most of its World War I debts. Germany also defaulted on the Dawes Loan of 1924 and in 1933, refused to pay the reparations mandated by the Treaty of Versailles which ended World War I. In fact, when these governments found the debt burdens intolerable, they resorted to repudiation and currency devaluation such that all German-debts and two-thirds of French debts were wiped out in the 1920s.[21]

Recently, the United States may have committed a technical repudiation of debts. For a long time, the United States guaranteed the convertibility of the dollars to gold at the rate of $32 for every ounce of gold. As a result, the dollar became the international currency and medium of exchange. Hence, the poor countries sold their precious resources for dollars and the various Central Banks of most nations kept their foreign currency reserves in dollars. All these dollars were liabilities of the United States, payable in gold bullions. In March 1973, President Nixon declared that the United States government will no longer fix the dollar to the gold, and the price of gold zoomed from $32 to $800 per ounce. In one swoop, the United States reduced its obligations to one-twenty fifth or 4% of its value in gold.[22]

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[20] Hilarion Henares, Jr., *In Defense of NEDA Minister Monsod,* Philippine Daily Inquirer, May 5, 1986, p. 5; See also, Pete Cleto, *The World Bank Story,* Business Day Magazine, vol. 1, no. 7, p. 10; Ellen Tordesillas, *The Global Debt Problem Needs New Solutions,* Malaya, p. 9, col. 1.

[21] *Ibid.*

[22] *Ibid.*

III. PROPOSED THEORY OF DEBT REPUDIATION

The proposed theory of debt repudiation goes beyond the limits of present-day international law. In fact, the various theoretical foundations advanced and discussed here may, in certain instances, warrant the expansion of the frontiers of international law. This must be so because the international foreign debt crisis is a recent development in world relations. Consequently, where the present legal rules are inadequate to meet present realities, there arises a need to develop new rules and norms or at least to refine the present rules to adopt to present world reality.

For purposes of the paper, only the more significant and persuasive grounds have been utilized to support the policy of repudiation. Although the theoretical discussion covers seven international law principles and doctrines, it must be seen as a single whole. The application of the various theories varies in terms of persuasiveness and relevance, and on this point, whether the proposal is to repudiate the debts wholly or just to repudiate partially is not the main focus of the paper. The point being made is that repudiation of debts is defensible as a matter of state policy in international law. Hence, the various legal grounds will have to be modified *pro tanto* when applied to a *specific policy* of total repudiation or partial repudiation.

A. *Sovereignty and State Immunity*

1. Theoretical Framework

In its essence, sovereignty means that whatever may be its internal structure or the form of its government, the State must be free from outside control in the conduct of its affairs.[23] It implies that a State is free from outside control in the conduct of its internal and external affairs.[24] It is but to recognize the cornerstone quality of this doctrine that the United Nations Charter embodies it as its very first principle: "The organization is based on the principle of the sovereign equality of all its members."[25] Flowing naturally from the concept of sovereignty is the concept of equality which makes all sovereign states without respect to their general power, stand on perfect equality.[26]

In the *Island of Las Palmas Case*,[27] the Arbitral said: "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State." The advisory opinion of the Permanent Court of International Justice in the *Austro-German Custom*

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[23] J. BRIERLY, THE LAW OF NATIONS 129-130 (1963); W. HALL, TREATISE ON WESTLAKE, INTERNATIONAL LAW 20 (2nd ed., 1913).

[24] 1 L. OPPENHEIM, INTERNATIONAL LAW 118-119 (8th ed., H. LAUTERPACHT, ed., 1955).

[25] U.N. Charter, art. 2 (1).

[26] *The Penza*, 277 F. 91 (1921).

[27] 2 U.N. REP. ARB. AWARDS 831.

Union Case[28] is more emphatic and definitive: "independence means the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or others with the result that independence is violated as soon as there is any violation thereof either in the economic, political or any other field, these different aspects of independence being in practice, one and indivisible." Consequently, any act, policy or operation which infringes or even influences, directly or indirectly, the exclusive control of all State affairs political, economic or otherwise may be deemed to have violated the fundamental concepts of sovereignty/independence. According to Hall, whenever or in so far as a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights.[29] Thus, for example, no treaty can be taken to restrict by implication the exercise of sovereignty or self-preservation. And in the *Schooner Exchange v. McFaddon,* the US Supreme Court had this to say: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."[30] Thus, every state has the same right to national security and the same obligation to respect the security of another; that every state has the same right to independence, that is, to determine domestic and foreign policies without interference and to exercise jurisdiction within fixed boundaries, and the same obligation to refrain from interfering or intervening in the domestic affairs of another state.[31] It must be noted however that "independence does not mean freedom from law, but merely freedom from control by other states"[32] and that aside from restraint by law, by its own consent, viz., treaty, a State's independence of action may also be curtailed. Nevertheless, such consent must be clear, unequivocal and definite for it to operate as a derogation of sovereignty or independence, and that in case of ambiguity, such must be restrictively interpreted.

As a necessary incident of sovereignty, a sovereign state shall be immuned from suits without its consent. It follows that a state should be immuned from the harassment of litigation in forums and under conditions not agreeable to the state. That is the essence of sovereign immunity and it applies in prospective litigations both under municipal law and under international law.

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[28] See, 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 54 (1949).
[29] W. HALL, TREATISE IN INTERNATIONAL LAW 354-355 (1895).
[30] 11 U.S. 116, 135 (1812).
[31] C. FENWICK, INTERNATIONAL LAW 151 (1934).
[32] BRIERLY, *supra,* note 23 at 130.

It is a general proposition that a State may not be made a respondent in the courts of another State. This rule is said to be implicit in the principle of the independence and equality of States. One sovereign cannot exercise jurisdiction over another: *jurisdictio inhaeret cohaeret, adhaeret imperio; par in parem non habet judicium.*[33] Various justifications have been forwarded to buttress this doctrine[34] but it seems that such doctrine is a necessary result of the practical necessity to promote and maintain friendly intercourse between and among nations. This must be so because peaceful intercourse is predicated only on the respect for other sovereigns. However, once the state has chosen its forum, there seems to be no reason why it should not be subject to the substantive requirements of law and justice. Thus, where a foreign sovereign files a claim, or prosecutes an action in one country, he may be made a defendant to a counterclaim in the same proceeding which the foreign sovereign has himself instituted.[35] But whatever may be the mode of action, it is clear that prior consent of the foreign State must first be established before any proceeding can begin.[36]

The greater area and widening scope of activities of states from purely sovereign or public acts (*jure imperii*) to the so-called private acts (*jure gestionis*) *e.g.*, state trading and operation of merchant vessels, have led most writers to qualify the sovereign immunity doctrine. There is now the theory of restrictive sovereignty under which a state's sovereign immunity is recognized only as to public acts but not as to private acts.[37] There are two main tests for determining the extent and validity of a claim of sovereign immunity. There is the *subjective test* which bases immunity on the capacity, personality or status in which a government may act. And there is the *objective test* which determnies the question of immunity by reference to the nature of the State act which has given rise to litigation.[38] These two tests are meant to determine *jure imperii* or *jure gestionis* as the

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[33] Harvard Research Draft Convention on Competence of Court in Regard to Foreign States, art. 7, Comment, 26 AM. J. INT'L. L. 455 (1932).

[34] One is the implied promise that foreign states which enter the territory of another would not be subject to the jurisdiction of the latter. Another is that the jurisdiction of one state should not be exercised because that would be incompatible with his regal dignity. Another is the explanation that the power to command does not exists is the absence of the duty to obey.

See *ibid.* for more details on this point.

[35] For example, *Norway v. Federal Sugar Refining Co.*, 286 F. 188 (1923).

[36] For instance, Article 8 of the Harvard Draft Convention on Competence of Courts in Regard to Foreign States provides:

a) When it gives express consent at the time the proceeding is instituted; or
b) When, after notification of the proceeding, it takes any steps relating to the merits of that proceedings before asserting that immunity; or
c) When, by contract upon which the proceeding is based, it has previously consented to the institution of such proceeding; or
d) When, by treaty with the State in whose court the proceeding is brought, it has previously consented to the institution of such proceeding; or
e) When, it has previously, by law or regulation or declaration in force when the claim of the complainant arose, indicated that it would consent to the institution of such a proceeding.

[37] BROWNIE, PRINCIPLES OF PUBLIC INTERNATOINAL LAW 454-456 (3rd ed., 1979).

[38] SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES 268-269 (1960).

case may be, but a number of recent restrictive theory writers have expressed their disapproval of the theory that the State like its personal head is endowed with a dual personality.[39]

The legal fiction of *jure imperii-jure gestionis* dichotomy seems to be proper only in determining the diplomatic and/or consular immunities of agents of one country in another but is entirely improper and misplaced when applied to the State itself. This break in the restrictive theory's basic assumption would thus render nugatory the purpose of going into the theoretical delineations in the first place. One eminent writer, George Fitzmaurice, succinctly observed: "The distinction between the sovereign and non-sovereign acts of a State is arbitrary and unreal, and one which is not easy to apply in practice and which might become much more difficult to apply if States cared to take appropriate measures; one which moreover must always leave a sort of no-man's land of actions capable of being regarded as coming within either category. *The conclusion seems to be that the only sound course is to adhere to the doctrine of complete immunity,* any departure from it in specific cases being regulated by international conventions (emphasis mine)."[40] The French writer, Nys, has this following view: "A number of writers have gone to the length that a State can never act in any other capacity or for any other purpose than public, and that an act of a government loses its public character even if it is such that it can be performed by a private person. *The very fact that it is an act of a foreign State is alone conclusive of immunity. A State Act, whatever its nature and character, must necessarily flow from the "imperium" or the "puissance publique" of the State* (emphasis mine)."[41] Clearly therefore, every State act is always in the nature of "imperium" or *"puissance publique"* such that to still go into the restrictive theory's dichotomy is to overstretch this legal theorizing. Consequently, every State act is fully clothed with the mantle of immunity and it is the sole discretion of the State to assert this immunity or to waive it depending on the circumstances.

2. Proposals

The IMF-WB austerity programs cover a very wide range of areas and concerns which are generally within the exclusive and supreme jurisdiction of sovereign states. The broad purposes are to reorder economy, improve efficiency and increase exports, all with the end-view of assuring continued debt payment and/or servicing. Among the more prominent (and controversial) conditions are those relating to exports, public

[39] *Ibid.;* See also, J. Fawcett, *Legal Aspects of State Trading,* XXV BRIT. YRBK. INT'L. L. 34, 35 (1948); W. Fox, *Competence of Court in Regard to Non-Sovereign Acts of Foreign States,* 35 AM. J. INT'L. L. 632, 633 (1941).

[40] G. Fitzmaurice, *State Immunity from Proceedings in Foreign Court,* XIV BRIT. YRBK. INT'L. L. 101, 124 (1933).

[41] 2 NYS, LE DROIT INTERNATIONAL 340 *set seq.* (1912) cited in SUCHARITKUL, *supra,* note 38 at 271.

investments, structural changes, and taxes. For instance, the IMF-WB "suggests" to the Philippines for a shift of exports to processed manufactured goods and mineral products in order "to keep the balance of payments manageable," an increase of public investments in infrastructure projects, structural changes to facilitate increase in investment, and the reduction of the heavy dependence of Philippine revenue on taxes on international trade and corporations and an increase on the tax on individuals by increasing the tax rates and reducing the personal deduction.[42] This constitutes the favorable mechanism of control by the IMF and the World Bank Group on the debtor countries which follow certain monetary, fiscal and tariff measures/policies that are consistent with the interests that the international agencies represent.[43] And in this sense, and to a great degree, there may even be surrender of sovereignty in terms of economic and social policies.[44] Hence, the Philippines in view of these IMF-WB conditions responded by diversifying the exports, by increasing public investments in infrastructures, liberalizing the imports control, instituting an open-arms policy by the relaxation of visa requirements and the guarantee of repatriation of foreign investments/profit remittance, revising the tariff and customs code, banning strikes to promote industrial peace, constructing the Export Processing Zones and granting them tax exemptions and other privileges, and revising the tax structure on individuals and corporations. Clearly these monetary and fiscal policies constitute blatant violations of the sovereignty of states. The austerity programs "proposed" by the IMF-WB in fact constitute impositions upon a sovereign state which are equivalent to exercise of sovereign acts, in total disregard of the sovereignty and independence of a sovereign state. Insofar as these conditions are a direct consequence and a necessary result of the present debt, the repudiation of the source will necessarily result in the termination of the continuing violations of sovereignty and independence. It is the duty and obligation of any state to assert its sovereignty and independence and to abate any infringement and/or derogation of its sovereignty. In this light, repudiation of debts is justified under present international law.

One may argue that there may have been waiver of sovereignty in this instance. Upon closer scrutiny, this argument would not be tenable. Under present international law, waiver of sovereignty to be valid and operational must be clear and unequivocal, and the waiver must delineate the extent and breadth of the abdication, of sovereignty. This waiver is never presumed, and in fact, it is always presumed in law that sovereignty is complete and unimpaired. The basic premise in international law and in international relations is the sovereign equality of states such that any diminution of or

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[42] See, B. VILLEGAS, THE PHILIPPINES AND THE IMF-WB CONGLOMERATE (1972).

[43] J. COCKROFT, M. FRANK & J. JOHNSON, DEPENDENCE AND UNDERDEVELOPMENT: LATIN AMERICA'S POLITICAL ECONOMY 95 (1972).

[44] W. WALL, THE CHARITY OF NATIONS 91-93 (1973); J. PAYER, THE DEBT TRAP 71-72 (1974).

transgression on the sovereignty of any state by contract or otherwise are disfavored and strictly construed. With more reason would these considerations be operational when the primary offender is not another state but a mere international institution. For in law, international institutions do not enjoy the rights, privileges, and character enjoyed by sovereign states as full and primary subjects of international law. They may be subjects of international law now but there remains various delimitations as their capacity under the law. These considerations come in full play because there has never been any waiver made by the Philippines with respect to its exercise of sovereignty within the confines of its territorial jurisdiction.

The above exposition is how the theory of sovereignty operates at the initial stage. In the second stage, it operates as a bar from being made a party to a litigation. This is the so-called sovereign immunity doctrine. Thus, without prior consent by a state, it cannot be bound to be a party in any suit before any court whether municipal or international. Where there may have been prior consent, the consent must be clear and unequivocal since derogation of sovereignty cannot be presumed. Especially to a suit before municipal courts, the act of state doctrine may be applied. This doctrine which is a necessary corollary to the principle of sovereign equality of states asserts that in certain circumstances, American courts will refuse to sit in judgment over the actions of foreign powers even when these damage private American interests and violate principles of both United States and international law.[45] As to acts entered into by the state, it could be persuasively argued that every state act is always in the nature of "imperium" or "puissance publique" such that the distinction between a nation's commercial activities and its sovereign acts enshrined in the laws of the main creditor countries[46] become irrelevant.

However, there is a stark reality insofar as the Philippines is concerned with respect to the foreign community doctrine angle. First, all foreign loans include provisions as to the forum and choice of law in cases where disputes may arise. This is true in both direct state loans and private debts guaranteed by the government. Second, the Philippines has already waived its sovereign immunity in certain cases when, on July 16, 1981, Presidential Decree No. 1807 was issued by President Ferdinand Marcos prescribing the procedure for and conditions of waiver of sovereign immunity. Thus, section 1 thereof provides:

> "In instances where the law expressly authorizes the Republic of the Phiippines to contract or incur a foreign obligation, it may consent to be sued is connection therewith. The President of the Philippines or his duty

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[45] KALETSKY, *supra,* note 13 at 23 citing *Allied Bank v. Banco Credito Agricola de Cartago,* 83-7714, 2d Cir., April 23, 1984 and *International Machinist Union v. OPEC,* 649 F. 2d 1354.

[46] For example, the United States Congress in 1976 approved the Foreign Sovereign Immunities Act and the British Parliament in 1978 passed the State Immunity Act of 1978.

> designated representative may, in behalf of the Republic of the Philippines, contractually agree to waive any claim to sovereign immunity from suit or legal proceedings and from set-off, attachment or execution with respect to its property, and to be sued in any appropriate jurisdiction in regard to such foreign obligation."

The repercussions and implications of this waiver have grave effects as to the propriety of just raising the foreign immunity issue. One may argue that said decree was improperly issued, unconstitutional or even null and void as being contrary to the national interest and welfare. But as long as this law is there, the persuasiveness of this foreign immunity theory would be greatly weakened, if at all invoked.

B. *Self-Preservation of State: Right of Existence*

1. Theoretical Basis

The fundamental rights of States are rights which by custom have come to be associated with very fact of membership in the international community. They constitute the primary conditions of state existence, and they are so intimately bound with the international personality of the state as to make the violation of them an offense of the gravest character.[47] These rights, among them the right of existence and self-preservation, are derived by direct inference from the sovereignty and independence of States which form the cornerstone of the whole system of international law.[48] The most elementary of these rights and certainly the most important is the right of a State to exist and to undertake measures necessary to preserve and defend itself. This right to existence corresponds to the right to life in municipal law and is necessarily the basic precondition of all other rights. It is in fact the ultimate factor determinant of the policies, acts and decisions which a State may undertake and is the bottomline of all State obligations. It must be so because the existence of a party is an indispensable requisite for the execution of obligations, and should the continuance of the obligations on the part of the party amounts to the destruction or the imminent danger of its existence, certainly, the obligations must be repudiated or at least suspended.

International law assumes the existence of a group of States capable of maintaining rights and fulfilling obligations, and thus, the integrity of the personality of a given state may be regarded as its primary right, being the necessary postulate of all other rights.[49] But governments being less concerned with theory have asserted the right in terms of practical situa-

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[47] FENWICK, *supra,* note 31 at 145; 1 C. HYDE, INTERNATIONAL LAW 205 *et. seq.* (1947).

[48] *Ibid.;* see also, MAREK, INTRODUCTION TO INTERNATIONAL LAW 226 *et seq.* (1959) HALL, *supra,* note 29 at 45 *et seq.*

[49] *Id.,* at 159.

tions under various designations but nonetheless having the character of supremacy over all other laws.[50] However, the most common designations have been self-preservation. Although these two are interchangeable, self-defense seems to have been related more often to resistance to attacks from without the state, while self preservation has been put forward in connection with urgent needs of the state both in the resistance to attack and in pursuance of national aims.[51] As enshrined in the United Nations Charter, the right to self defense in its present formulation refers merely to armed attack against a member of the United Nations, which right may be exercised individually or collectively as the case may be "until the Security Council has taken measures necessary to maintain international peace and security."[52] Under these conditions therefore, it is the matter of self preservation which plays a very critical role with respect to debt repudiation.

In recent memory, the historical stage where this theory based on the State's right to self preservation was most persuasively argued was the Mexican nationalization of its petroleum resource and its policy of agrarian reform in the early years of this country. A. Robledo, one of the Mexican legal luminaries who took the cudgels for their country's cause, laid his premises in this wise: "If there is any valid title and any legitimate public order that civilization recognizes, these are the title and the order which result from the right of self preservation inherent to the state, which in the case of petroleum leads it to abolish its condition of a colony subject to international capital, and in the case of agrarian reform to seek justice in the redistribution of its lands in order not to fall prey to the irrepressible *jacqueries* of the hungry masses."[53] Citing Fauchille, he continued: "The conservation of the state is the *untransgressable limit* that puts a full stop to the demands of foreigners, even although there might be real grounds for the claims of some, but for those of all' (emphasis mine).[54] Thus, there is clearly an absolute minimum to the demands of foreigners and/or foreign states. And although Robledo admitted that the rights acquired by aliens are protected by international law, he said that the protection is not in an absolute form *"since these rights can in no way hamper the reforms that the social structures demand."* All that international law perscribes in this respect is that the state should not arbitrarily infringe on the private rights of aliens. International law does not forbid states to restrict or modify the private rights of aliens through the effects of a general law, *provided that according to an impartial judgment such*

50 *Ibid.* Among these designations are national security, right to self-preservation, right of self-defense, the fundamental law, and the like.

51 *Id.*, at 146.

52 U.N. Charter, art. 51.

53 A. ROBLEDO, THE BUCCARELI AGREEMENTS AND INTERNATIONAL LAW 67 (S. de la Silva, trans., 1940); see also, MAREK, *supra*, note 45 at 229.

54 *Id.* at 67-68 citing 1 FAUCHILLE, TRAITE DE DROIT INTERNATIONALE PUBLIQUE, p. 934.

a law is acknowledged to be necessary for the common good of the nation (emphasis mine)."[55] It seems therefore that the state's attempt to pursue its national aims and to promote and maintain the common good of the nation provides the dividing line for the foreigner's pretentions to protections of their rights under international law. For such acts and policies if based on and buttressed by the state's right of self preservation would be paramount. This must be so because this right *"comprises and implies the exercise of all rights necessary to the maintenance of the physical and moral integrity of the state, the faculty to prevent every evil that may present itself, to take adequate measures against any danger of future injury, to take necessary measures in order to maintain intact the very elements of existence, territory, population, the social bond"* (emphasis mine).[56] Since the state is concerned with the moral and economic welfare of its citizens, it cannot bind itself to relationships with individual entities that might in time derogate from the welfare; that by reason of the fundamental importance of self preservation, a state is presumed not to have undertaken obligations toward private entities in derogation of this vital interest.[57] An organ of the state which acts otherwise is considered to have violated the fundamental law of the state, and its act is consequently void.[58] Therefore, a government cannot fetter nor hamper its future action by contract and that therefore it has the inherent power and right to repudiate its contractual obligations.[59]

These purposes, i.e., pursuance of national aims and promotion of the nation's common good are recognized, even institutionalized, in the UN General Assembly Resolution No. 3281 (XXIX) otherwise known as the Charter of Economic Rights and Duties[60] which was adopted on December 12, 1974 through a roll-call vote of 120 votes in favor, 6 against with 10 abstentions. Article 1 provides that "every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural system in accordance with its people, without outside interference, coercion or threat in any form whatsoever." Article 2 reads in part "Every State has and shall exercise full permanent sovereignty including possession, use and disposal over all its wealth, natural resources and economic activities." Article 7 perhaps is more direct and emphatic: *"Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and*

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[55] *Id.* at 68 citing Verdross, Academie de Droit International, 27 RECUIEL DES COURS, p. 371.

[56] *Id.* at 78 citing PILLET, MANUAL DE DROIT INTERNATIONAL PUBLIC, p. 440.

[57] J. Kissam and E. Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 FORDHAM L. REV. 177 (1959).

[58] *Ibid.*

[59] *Ibid.*

[60] 28 U.N. YRBK. 403 (1974).

social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to cooperate in eliminating obstacles that hinder such mobilization and use" (emphasis mine).

2. Proposals

The country's foreign debt at present stands at $26.252 billion as of the end of 1985. With this enormous debt, the Philippines is one of the most heavily indebted countries in the world: 7th in the size of debt; 6th in debt to export ratio; 4th in debt to gross domestic product ratio; and 9th in debt service ratio.[61] As a result, the country had to pay in 1985 some $3.1 billion just for the debt service covering both interest and principal payments of its financial obligations. This constitutes more than two-thirds (2/3) of the 1985 total export receipt of $4.6 billion.[62] And for this year, the Aquino government has to scrape up to $2.1 billion for the interest for the $26.2 billion debts, an amount roughly equal to about 50 percent of the entire 1986 budget of the government.[63] What is outrageous here is that we are just talking of the interest payments which do not yet include the principal of the debts.

The foregoing payments were made pursuant to a program of debt repayment arrangements between the Philippines and various international creditor banks, wherein a moratorium for amortizations through the end of 1986 was provided for. After 1986, the amortizations for the debt would continue. In addition, the rescheduled debt has a 10-year overall maturity and a 5-year grace period, and thus, the amortizations will further increase when the 5 year grace period ends in 1989.[64] The net result of these ominous developments would be a more enormous debt which would lead into the country's sinking deeper into the debt quagmire. In fact, if the Philippine economy cannot grow faster than its debt service burden, a highly anomalous situation would arise wherein the country will have to borrow not just to pay maturing debts but merely to pay the interest of the present debt.

Considering the limited resources of the government and the adverse international economic conditions, the Philippines is fast coming to a point where it has to choose: national existence or the repayments of foreign debt. As early as 1983, it is this debt problem which had caused the Philippine economy to decelerate and has made the country, in the words of one economist, "to stick out like a sore thumb in the Asia-Pacific region." It is also this debt problem, and the social difficulties it brought, that has escalated the Philippines' two-decade old insurgency problem. The con-

61 ECONOMIC RECOVERY AND LONG RUN GROWTH: AGENDA FOR REFORM 46 (1986); see also, Ibon Facts, *supra*, note 10.
62 YU, *supra*, note 16.
63 Philippine Daily Inquirer, May 8, 1986, p. 1, col. 1.
64 See note 61, *supra*.

tinued tightening of the economy may lead to graver escalation of social instability as more and more fall below the poverty line.[65] The enormous efforts to reorder economies, improve efficiency and increase exports have proved inadequate in the face of adverse international economic conditions, and in most cases, the heavy social costs stemming from falling incomes and living standards, increased unemployment and swelling poverty have weakened the political sustainability of adjustment programs.[66] Clearly, the continued repayment of the debt and its interest means a diversion of the much-needed funds and resources to promote, maintain and protect the minimum standards of living for the Filipino people. It also means the suspension of the attempt by the government to promote the economic, social and cultural development of the people. Notice must be made to the fact that the IMF-WB conditions and proposals for the economic recovery program have been labelled as anti-private sector, anti-poor and against the comparative advantage and efficiency.[67] The end result of the recovery program would be to assure continued servicing of debt at the expense of the continuing misery of the Filipino people. Thus, to continue this situation is to perpetuate the blatant violation of the Philippines' right to exist and to exercise all rights appurtenant to said primary right. The reforms that socio-economic development demands must be pursued even to the extent of repudiating foreign debts because the right of existence is foremost to all states. It is the bounden duty of the government to assure the conservation of the state and this conservation constitutes the untransgressable limit, the barest minimum, to all demands of foreign entities.

The present debt problem clearly constitutes a great hindrance to the reasonable reforms geared towards the socio-economic development and welfare of the people. The IMF-WB impositions protect only the foreign creditors without regard to the people's plight, and these impositions are *sine qua non* to the debt situation. The more the country attempts to repay its loans by strictly adhering to the recovery program upon IMF-WB prescription, the more it becomes enmeshed inextricably to the debt trap. In the meantime, the existence of the state, the welfare of the people, are gravely imperilled.[68] The present situation calls therefore for a radical step "to cut and cut cleanly." To avoid being immersed beyond hope and recall in the debt quagmire, it is imperative that the Philippines repudiate most if not all its debts for as in municipal law, self-preservation knows no law.

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[65] See note 16, *supra.*

[66] Address by NEDA Minister Solita Monsod, *Management of the External Debt of the Philippines,* Quezon City, September 4, 1986.

[67] See the controversial White Paper on the Philippine Debt Problem prepared by the economists-professors of the University of the Philippines School of Economics.

[68] Frederick Clairemonte and John Cavanagh, *A Case for Loan Repudiation,* The Manila Chronicle, December 2, 1986, p. 5; Frederick Clairemonte and John Cavanagh, *Third World Debt Crisis Threatens Collapse of World Trade and Finance,* Third World Network Features reprinted in The Sunday Times, December 28, 1986, p. 7.

The modes prescribed to assure such servicing of debts require the reordering of the economy by focusing on exports at all costs and implying that the government must muzzel dissent and reasonable demands of the people for better standard of living which includes more social services, real land reforms, and the like. This muzzling of dissent is the catalyst that propels the insurgency problem to unbelievable proportions, amidst grave mass poverty, economic dislocations, etc.[69] In other words, the debt crisis is the critical chain of these untold miseries. The continued existence of this situation means a very serious peril to national existence. It is submitted that it is a matter of national survival that the Philippines should repudiate our debts in its entirety or at least substantial part of the debts.

C. *The Theory of Nationalization: An Analogy*

1. Theoretical Approach

The doctrinal approach to justify the nationalization of alien property applies equally with vigor and effect in the repudiation of debts. Certain ramifications are peculiar to the contractual nature of debts both public and public-guaranteed private loans, but as a whole, the essential character of a State act flowing from its sovereign status requires a similar approach as in nationalization theory.

Soviet literature is unanimous in its adherence to the "no link" approach in its discussion of the Bolshevik nationalization policy right after the successful 1917 Revolution. According to this theory, the economic foundation of the new order is a socialist system of economy and the socialist ownership of the instrument and means of production, firmly established as a result of the liquidation of the capitalist economic system, the abolition of private ownership and of the exploitation of man by man.[70] Accordingly, the conclusion is that "there is no organic link between the old private undertakings affected by the act of nationalisation and the undertakings created by that act, whether public, state or national under-

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"The Third Word will never be able to pay their debts and that the debt crisis has only resulted in an unprecedented transfer of resources from the developing countries to the industrial countries (falling export earnings, net capital export and capital flight). *Hence, debt repudiation stands out as the only ethically feasible and rational solution for the Third World."*

See also, George Perry, *Austerity Sending Debtor Countries into Economic Ruin,* The Los Angeles Times, reprinted in The Manila Chronicle, December 21, 1986, p. 5.

[69] As to WB operations, see Danie Yu, *No Actual WB, ADB Loans for RP,* Business Day, September 2, 1986, p. 3, col. 1; Susan Rasky, *Manila Banks Disagree,* International Herald Tribune, November 10, 1986, p. 13, col. 2; Ma. Victoria Perez, *Why Debt Negotiations Collapsed,* Business Day, November 26, 1986, p. 2, col. 2; Rigoberto Tiglao, *Government, IMF Agree to Set Up Standby Credit Facility,* Business Day, April 18, 1986, p. 3, col. 4; Henry Breck, *Third World Relief Spelled DEFAULT,* The Manila Times, September 12, p. 5, col. 4.

As to insurgency, see Efren Danao, *Insurgency: The Elusive Search for a Lasting Peace,* Veritas, April 27, 1986, p. 17; Barbara Mae Dacanay, *Two Views on Double Amnesty,* Veritas, April 17, 1986, p. 8; Carol del Rosario, *Human Rights Violations,* Veritas, June 2-4, 1986, p. 14.

[70] K. KATZAROV, THE THEORY OF NATIONALISATION 176 (1964).

takings.[71] The strength of this radical approach however remains inextricably linked to the peculiar characteristics of the 1917 Revolution and the resulting Soviet system, or at least an approximation of the same. This "no link" theory can be forcefully asserted only if there be a *fundamental change of the economic structure and where the revolutionary means led to it.* For then, the present controlling economic forces based on the socialist model may be said to be bereft of any link to the legal nature of the undertakings before nationalization. Consequently therefore, for other countries where the above two pre-conditions may not be present, resort must be had with the nationalization and the legal grounds for justifying the same.

Nationalization in its juridical character appears as a governmental, legislative act, belonging to the class of those designated supreme acts of governments, which are not subject to any judicial control."[72] It involves a unilateral act which does not require acceptance by anyone, let alone the agreement of the party interested or affected, and thus, it is more correct to speak of a "sovereign unilateral act."[73] And because of its practical and political stature, nationalization is an act of high policy, an act of high domestic policy by which the State undertakes to reform the whole or a major part of its economic structure.[74] The Charter of Economic Rights and Duties of State in instructive in this regard: *"every State has the sovereign and inalienable right to choose its economic system in accordance with the will of the people, without outside interference, coercion or threat in any form whatsoever"* and "every State has the primary responsibility to promote the economic development of its people. To this end, each State has the *right and the responsibility to choose its means and goals of development,* fully to mobilize and use its resources, *to implement progressive economic and social reforms* and to ensure the full participation of its people in the process and benefits of development."[75] Clearly therefore, positive international law supports this State act of reforming its economic structure and of pursuing its development goals. And this freedom of each State to organize its own liking necessarily follows from the normally unrestricted freedom of independent States in matters of internal jurisdiction, a facet of sovereignty and equality of all States.[56] Nationalization being part and parcel of State sovereignty, in its being carried into effect, must be regarded as a national domestic question whose solution does not involve reference to international law.[77] The UN Charter is emphatic in this regard: "Nothing contained in the present Charter shall

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[71] *Ibid.;* see also, MAREK, *supra,* note 48 at 133 *et seq.*
[72] *Id.* at 305.
[73] *Ibid.*
[74] *Ibid.*
[75] Charter of Economic Rights and Duties of States, Arts. 1 & 7.
[76] SCHWARZENBERGER, THE PROTECTION OF BRITISH PROPERTY ABROAD 308 (1952) cited in *Id.* at 309.
[77] *Id.* at 306.

authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[78] It is in this context that one authority stated that the act of nationalization is always and absolutely valid, and it does not matter that it injuriously affects or destroys contractual relations between the same parties, that is the State on the one hand and the party affected by the nationalization on the other hand.[79] It must be emphasized however that the proposition that the act of nationalization is not subject to any control by the courts or by some higher authority is true and valid only within the sphere of municipal law.

Under international law, the application of the above rule is subject to one essential limitation, namely that the sovereign judgment of the national legislature is limited by the norms of international law.[80] As in municipal law, international law demands that nationalization must concern specific activities or property which either must be the object of an express provision in the constitution making them liable to nationalization, or must possess a special character, that is, they must be regarded as property or activities of a superior order which on grounds of public policy and social justice cannot be utilized by individuals or in the interests of private individuals.[81] But the most powerful weapon of international law against acts of nationalization is "international public policy" (*l'ordre public international*). The content, least of all the extent, of this concept, is very ill-defined, if not vague, and is more the subject of current discussion and debate, and consequently, innumerable and often contradictory solutions arise.[82] Hence, one authority argues forcefully that nationalization may in fact be supported and justified by this very concept of international public policy: "Where nationalization which rests on a sound ideological and moral basis is introduced and carried into effect in accordance with the provisions of the constitution, it should be recognized as being in conformity with international public policy even if it injuriously affects acquired rights or property, as far as their content abroad is concerned."[83] For by then, the genuineness and validity of the motives which led to nationalization can no longer be placed in doubt. This conceptualization, though admittedly extreme in essence, is nevertheless admissible and persuasive considering the infantile stature, if any at all, of the so-called international public policy. Provided therefore that the act of nationalization conforms with the above mentioned qualifications, it constitutes a "supreme act of government" and falls entirely within the sphere of public policy of the State, and which may be said to be valid under international law.[84] This

[78] U.N. Charter, art. 2(7).
[79] KATZAROV, *supra*, note 70 at 306.
[80] *Ibid.*; see also, HYDE, *supra*, note 44; RALL, *supra*, note 23 at 56; 1 G. SCHWARZENBERGER, INTERNATONAL LAW 183 *et seq.* (1957).
[81] *Id.* at 307.
[82] *Id.* at 321.
[83] *Id.* at 309.
[84] *Id.* at 311.

must be so because until an act of nationalization shall have been challenged in the court of justice, it would be *presumed* to conform to the demands of international law and would be recognized by it.[85]

The above theoretical analysis applies equally with the same vigor to State acts of repudiation of debts. This "supreme act of government" argument becomes much more formidable when viewed in conjunction with the theory of sovereign immunity of States. In fact, the repudiating State may even refuse to be a party to a suit brought in relation to the act of repudiation under the guise of sovereign immunity. And even assuming that it consents to suit, there is another facet of the suit which makes it advantageous to the sovereign State. For as in nationalization, the forum where the act of repudiation would be determined as to its sincerity, urgency and ideological basis would ultimately be with the municipal courts. This is so because resort to an objective international tribunal is preconditioned on a *compromis d'arbitrage,* in which the parties mutually agree to refer their case before said tribunal. And where the State refuses such compromise, there is nothing that can compel or require it to, nevertheless, be subject to the tribunal's jurisdiction since that would be violative of the sovereign equality of States. Besides as stated above, the doctrine of state sovereignty may be forwarded under which the State will not agree to submit the sovereign act of repudiation to the scrutiny of a foreign court, even if it is an international court. Hence, only the national courts remain as the courts capable of examining the compatibility of repudiation with international law. And since the municipal courts will be confronted with a "supreme act of government" of the State, the machinery of which they form part and parcel, it is almost a foregone conclusion that the questioned act would be upheld and validated.

2. An Extension of the Theory

The change which occurred during the "February Revolution" is always subject to debate. Some label it as a revolution, others call it a putsch, still others belittle its significance by stating that "EDSA is not the Philippines, and the Philippines is not EDSA" thus discrediting whatever revolutionary character it may have. Indeed, it may be admitted that the change or rather, the chain of circumstances which installed the Aquino government is not as revolutionary as say, the 1917 Bolshevik Revolution or the Chinese liberation. Yes, the Aquino government was not attended with a fundamental change of the economic structure nor was it propelled by revolutionary means like the Russian or the Chinese experiences.

These apparent demerits however do not mean that the theory of nationalization is inapplicable to the Philippine debt issue. On the contrary, it still is. This is because the theory of nationalization is distinct and sepa-

[85] *Id.* at 320.

rate from these circumstances peculiar to those countries. These circumstances *are by no means preconditions* to the theory, although if present, these circumstances will greatly enhance the theory. Consequently, therefore, the full effects and ramifications of the theory of nationalization as above expounded are analogously applicable to the repudiation of debts. These two modes of action are like branches of a single tree or tributaries of a great river.

D. *The Theory of Odious Debts: An Extension*

1. Theoretical Perspective

In international law, state succession occurs when a new state comes into being, when a state becomes extinct, or when a state acquires a portion of a territory of another state. This must be distinguished from succession of government which arises when a change of government is effected through violence or unconstitutional means. Under the principle of state continuity, a state, despite changes in the form of government, in its leadership, or alteration in the area of its territory, does not lose its identity but remains one and the same international person.[86] The present international law has already defined the nature and extent of the rights and obligations of the succeeded state devolving upon the successor state. This devolution of rights and obligations incident to state succession is subject to some generally accepted exceptions such as the theory of odious debts. It must be noted, therefore, that traditionally, the theory of odious debts is closely intertwined with the principle of state succession, but is held inapplicable whenever there is succession of governments.

General public or national debt is that contracted by the central government in the interest of the entire state. The creditor of the debt may be another state, an international organization, a public corporation or a private creditor, and such debt may be owed under international law, the municipal law of the creditor or that of the debtor.[87] If the debtor state is totally extinguished, its international capacity for rights and obligations, though not necessarily its fiscal capacity, are extinguished with it.[88] The successor state which takes over the entire territory of the debtor is placed in a position where it has to determine the future of the debt. The discharge of the debt is completely within the successor state's control, and here, it must determine whether to provide itself for the service of the debt, to leave the absorbed territory to do so, or to ignore the debt altogether.[89] Whatever may be the successor State's action, said action is determinant because it is the unalterable fate and the inevitable risk of any debt that its value is closely connected with the fate and actions of

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[86] 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW Sec. 56 (1943).
[87] D. O'CONNELL, THE LAW OF STATE SUCCESSION 145 (1956).
[88] *Ibid.*
[89] *Id.* at 146.

the debtor state whose assets are subject to the liability.[90] This result is due to the fact that international law has not evolved strict rules sanctioned by custom or express recognition concerning the treatment of debts of an annexed state and that the various rules forwarded are by and large based on equity.[91] The above mentioned determination of the nature of the public debts is necessary because certain debts are actually in the nature of acquired rights protected by international law and therefore devolving upon the successor state with or without its consent. For such purposes, one authority[92] forwards the following test: "An interest which a creditor possess in a debt must, in order to constitute an acquired right protected by international law, *be an interest in funds utilized for the needs and interest of the State.* Any debt contracted for other purposes is a debt intrinsically hostile to the interest of the territory." (emphasis mine). The latter exception refers to those debts which are personal to the power which contracted them and are *dettes de regime.*[93] These debts are the "state obligations" which can be repudiated under the theory of odious debts, odious in the sense that such debts though formally contracted in the name of the state have been actually used for purposes other than the needs and interests of the state such as private concerns, unnecessary infrastructures (show windows), and the like. However, in order for a successor state to justify the invocation of the doctrine of odious debts, it must be proved, first, that the debts were contrary to the interests of the population of all or part of the absorbed territory, and second, that the creditors were aware of this. Once these two things have been proven, the onus is upon the creditors to show that the funds have in fact been utilized for the benefit of the territory.[94]

The arguments in favor of the inherent revocability of concession agreements as well as other state obligations tend to be a *fortiori* in case of successor states which cannot be compelled to carry on with arrangements made by their predecessors which are either *contrary to their public interests or obstructive of the realization of their own ideas of social development.*[95] It is in this context that one writer noted that the recognition of the predecessor's public debts remains merely a political decision in which the state's discretion is limited only by a fundamental principle of international law — international morality.[96] One of the basic standards

[90] H. Cohn, *The Responsibility of the Successor State for War Debts,* 44 AM. J. INT'L L. 477 (1950).

[91] *Id.* at 478 citing GEIDEL, DES EFFECTS DES ANNEXIONS SUR LES CONCESSIONS 82 (1904) and GUGGENHEIM, ARBITRAGE ZUR VOELKERRECHTLICHEN LEHRE VOM STAATENWECHSEL 42 (1925).

[92] O'CONNELL, *supra,* note 84 at 187.

[93] *Ibid.* citing SACK, DETTES PUBLIQUE, p. 187.

[94] *Id.* at 187-188.

[95] P. WESTON, R. FALK & G. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 671 (1980) citing D. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 3-4 (1967).

[96] Cohn, *supra,* note 90 at 479.

of morality is the principle of good faith which would then be determinant as to the propriety of the state discretion considering that international relations are at stake.[97] But as recognition of the predecessor's public debts is only a question of international morality, the repudiation of the so-called odious debts would have to be considered as conforming with international law and as justifiable if the decision corresponds equally to certain moral principles which are confirmed by well-established traditions of international practice.[98] This argument re-echoes the theory of nationalization: that a state policy is deemed to be in conformity with international public policy when it rests on sound ideological and moral basis and is carried into effect in accordance with the provisions of the constitution.

Since the recognition of certain debts of an annexed state or a ceded area is a political decision, the successor is free to decide in accordance with its own moral, ethical and political conceptions. "Odious debts" are such debts which for *ethical, moral or political reasons are disapproved* by the successor state.[99] This must be so because change of sovereignty ordinarily involves changes in the economic structure or even the political system, in the development goals, and in the direction of governance. However, if the refusal to recognize such debts is founded more on moral and sentimental arguments rather than on rules of international law, such arguments may be taken into full consideration provided that the claim itself is founded on good faith and moral reasons only.[100]

The theory of odious debts has been traditionally associated only with State succession, not to succession of governments. For under the traditional conception, change of government does not affect the personality of the state, and hence, a successor government is required by international law to perform the obligation undertaken on behalf of the state by its successor.[101] There have been discussions as to the effect of revolutionary, unconstitutional changes of government, but where the change in government has come about through peaceful means, there seems to be no serious objection to the new government assuming all liabilities and exercising all the rights of the old government.[102] However, with respect to government succession through revolution, one writer notes that a distinction must be made by the new government between political acts and routinary acts of administration of the old government.[103] With respect to the first type of acts, the new government may denounce and renounce them, but as to acts of administration which must be performed by any kind of government,

97 *Ibid.* citing 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 14 (1945).
98 *Id.* at 480.
99 *Ibid.*
100 *Ibid.* citing G. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 719 (1931).
101 WESTON, *supra*, note 95 at 667 citing D. O'CONNELL, INTERNATIONAL LAW 394 (2nd ed., 1970).
102 SALONGA, *supra*, note 19 at 126 citing *The Republic of Peru v. Dreyfus Brothers*, 38 Ch. D. 348 (1888).
103 *Ibid.*

the new government shall assume responsibility.[104] This tedious attempt to inject certain legal consequences attendant to state succession is but an offshoot of the rigorous application of the state succession — government change dichotomy. This seems to be quite unnecessary now since there is at present an increasingly popular view that affords the same legal consequences whether it be state succession or government succession.

At the present time, the boundary between change of sovereignty and change of government often wears thin to the point of disappearance, and the question has now arisen as to whether or not there is any utility in maintaining a rigid distinction between the legal consequences of one and the other situation.[105] This must be specially true in cases of revolutionary, unconstitutional change where there may be replacement of a state of one historical type of that of another, or the emergence of a new state as a result of national liberation struggle. Under this theoretical approach which is universally adhered to in Soviet legal literature, a state which emerges as a result of social revolution and which, in class character, constitutes a state of a new type is unconditionally the full successor of the extinct state regarding all territories and all properties, both on the territory of the given state and on the territories of other states.[106] Though it is admitted that the question of treaty obligations of the former state, including obligations of a political, economic and financial (loans) character, is complex, this theory forwards that the new state (of a new historical type) may repudiate all the unequal treaties and also all the loan agreements concluded by the former state citing what the French bourgeoisie did after the 1789 Revolution and was done by the Soviet state following the 1917 Revolution.[107] This view regarding foreign debts was due to the fact that the bulk of the sums received under the loans were utilized by the overthrown governments in the struggle against their own people.[108] Indeed, this is the very essence of the doctrine of odious debts above-discussed and consequently, all pertinent elucidations thereunder are equally applicable herein. And like the repudiation of treaty obligations which infringes sovereign rights, this repudiation of foreign debts is a "high act of public policy" in consonance with the new state's moral, ethical and political standards based on the changed socio-political structures. The result, therefore, is that any pressure on a new state to compel it to recognize these undertakings of the overthrown exploiting classes contradicts the principle of state sovereignty and is therefore illegal.[109] The same results persist in the second case of the emergence of new state: a new state making its

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104 See *U.S. (for George Hopkins) v. Mexico*, Opinion of the Commissioner (1927-cited in V. ABAD SANTOS, INTERNATIONAL LAW 140 (1966).

105 WESTON, *supra*, note 95.

106 *Id.* at 668-669 citing INTERNATIONAL LAW 125-127 (D. Ogden, trans. 1961).

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

appearance as an International Person in the course of the colonial and dependent nation's implementation of their right to self-determination.[110]

There is no doubt therefore that a new state of a new historical type or emerging as a result of the national liberation struggle may validly do the acts delineated above. However, at least with respect to unequal treaties and foreign debts utilized by the former regime in the struggle against their own people or in projects or purposes not minutely beneficial to the general public, there seems to be no utility in maintaining rigid distinctions between the legal consequences of revolutionary change of government and those of peaceful, constitutional change. It is submitted that peaceful changes of government must likewise be accommodated in the above paradigm since the doctrine of odious debts or the question of sovereignty as the case may be, is theoretically tenable in all instances, and may be raised by the responsible leadership of a particular state in a particular milieu. The theoretical underpinings of these doctrines do not require that revolutionary modes attend to the change in structures. It is only so delimited by current international law theory. However, the current dynamics of succession of governments in relation to present international law demands that a modification of present theory be made.

2. Proposals

Compared to the Russian and the Chinese experiences, the Aquino administration installed by the so-called February Revolution does not involve such fundamental changes in socio-economic structures or in political structure of another historical type. On the contrary, the present government remains in a liberal democratic and republican context as was before, the social and economic structures are still the same although a different direction in terms of socio-politico-economic development is now being charted. This does not mean however that the theory of odious debts would be inapplicable to the Philippines. Certainly this cannot be so. The theory that debts which though formally contracted in the name of the state have been actually used for purposes other than the needs and interests of the state may be repudiated, equally applies to peaceful changes. The fundamental changes may greatly enhance the persuasion of the theory as in the theory of nationalization but these are not preconditions for the operationalization of the theory. What is relevant in the theory is the "odiousness" of the debts in the sense that a burden is being unduly borne by the state which has not in the first place benefited from it. It is therefore submitted that the present government stands in four-square to the theory.

The theory comprehends two senses at least for the purposes of this paper insofar as "odiousness" is concerned but these two senses nonethe-

110 *Ibid.*

less share a common denominator that an odious burden is carried by the state where it did not benefit in the first place. First, those debts incurred to finance the attempted suppression of the faction that ultimately succeeds in taking power or debts used for purposes other than the welfare of the people or legitimate governmental purposes. Second, those debts where fraud and collusions are present in the grant of the loans, thereby channeling some proceeds of the loan to the pockets of the individual intermediaries.

The crux of the first sense is to show that the proceeds of the loans were used for purposes or activities other than legitimate government purposes. The end use must be clearly shown and it should not be merely inferred from circumstances. For example, in a loan which delineates the purposes to which the loan proceeds are supposed to be used, it may be shown that some of the proceeds were utilized to finance the high official's expenses and concerns or to build personal homes or buildings, and the like. That connection is material and indispensable for the operation of the theory under the first sense. The burden of proof must necessarily be borne by the party repudiating the debt. Not only that, it must be shown that the creditors were aware of this diversion of funds. It must be noted that the creditor banks in dealing with a sovereign state took risks and hence, they should be duty-bound to examine and investigate that the loan proceeds are used for purposes enumerated or embodied in the loan agreement. The fact that the loan agreements contain provisions for the utilization of the loan proceeds ("use of proceeds" clauses) does not relieve the creditor banks of seeing to it that the proceeds are actually used properly. This duty may be harsh but it is a necessary risk involved in sovereign lending. To the extent that the creditor banks have been negligent, they must shoulder the dire consequences of such loans.

The second sense wherein fraud and/or collusion were present in the grant of the loan may be another ground for repudiation as "odious" debts or even as invalid contracts. These contracts are "odious" because the loan proceeds may have been channelled elsewhere or may have been unreasonably and greatly exaggerated in order to accommodate the "shares" of the various partners thereto in the form of "commissions." In effect, the proceeds or a great portion thereof have been utilized for purposes extraneous to legitimate government concerns, such that to burden the state with the loan is certainly odious. A leading candidate to this is the Nuclear Power Plant loan. In 1974, Westinghouse initially quoted the cost for the two reactors at $500 million. In 1975 or a year later, it was quoted at $1.1 billion, an increase of more than 100%. Today, the power plant is estimated to have cost the Philippines more than $2 billion. Some circumstances are telling. First, the US Export-Import Bank (EXIM) extended $644 million in loans and guarantees to finance the deal. This was the largest loan so far ever authorized by EXIM for a single project in an underdeveloped country. Second, EXIM at the time of the loan did not

bother to question the overpriced cost of the power plant when Spain during said time has acquired a power plant of a much larger capacity at only $687 million. Third, EXIM did not hesitate in granting the loan given the fact that power plant was 15% overpriced compared to Westinghouse plants sold to and built in Taiwan and Yugoslavia at about the same time the Philippines applied for the loan. Today, investigations being conducted by government agencies reveal the true reason for the overpricing: reportedly, then President Marcos allegedly received up to $80 million in exchange for the favorable execution of the contracts between Westinghouse and the National Power Corporation.[111] Surely, there may have been "commissions" paid, for Japanese bankers have reportedly complained that doing business in the Philippines means enormous grease that money at every turn to speed project proposals. Certainly, this proves that the creditor banks or their representatives knew of the corruption here, and yet, they nevertheless entered into various loans with the government, loans which have been consummated thru fraud and/or collusion between the parties. For then, it would have been clear that at least the officer's action had been corruptly induced, or at least, it would have been clear that improprieties exist. Notwithstanding these, the loan agreements nevertheless were consummated. The bad faith present in both parties would preclude either from enforcing each other's claims or rights.

E. *The Human Rights Angle*

1. Theory

The international protection of human rights presupposes that the individual must be regarded as a subject of international law. Formerly, only states may be subjects of international law.[112] But as a result of the Charter of the United Nations, and of the other changes in international law culminating in the Universal Declaration of Human Rights, and its two Covenants, the individual has steadily acquired the stature and status of an international law subject, a far cry to its original status as a mere object.[113] Thus, the rights of individuals have been defined and institutionalized, and every individual is entitled to such rights regardless of

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111 See Edmundo Garcia and Elmo Manapat, *Immoral Loans Repudiation Urged*, The Manila Times, April 24, 1986, p. 1, col. 1.

112 The classical view asserts that states alone can be subject of international law since only states can and are able to create international law, that such law is primarily concerned with the rights and duties of states, and only states have full procedural capacity before international tribunals.

113 The most significant international documents and changes of great pertinence are the U.N. Charter, the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. Earlier, the following documents have contributed to this new development: The Hague Convention XII of 1907, the Treaty of Washington of December 20, 1907, the Covenant of the League of Nations, the International Labor Organization established under the Versailles Treaty and now existing under a constitutional instrument adopted in 1946, the European Convention on Human Rights, among others.

race, color, sex, language, religion, political or other opinion, property, birth or other status.

But are these rights binding and legally enforceable? From the point of view of treaty law, one may argue that only state parties to said documents are to be bound thereby as enunciated in the maxim, *Pacta tertiis nec nocent nec prosunt.*[114] This may seem to preclude, therefore, the binding character of these rights as against the state which is not party to these treaties. Indeed, the persuasion of this argument is very significant especially as regards, say, the two covenants. But for the state parties, all these documents are binding and these states must fulfill their obligations thereon in good faith. Some writers have attacked the enforceability of the Universal Declaration of Human Rights as among others not being a code of human rights, as merely having legal significance but no legal validity, as not intended to be a legally binding document.[115] These arguments however, fail to see the effects of an emergence of a new peremptory norm of general international law (*jus cogens*). Alternatively, it may be said that the Declaration having been adopted by the great majority of states must now be interpreted as an expression of the general principles of law. Furthermore, the U.N. General Assembly has time and again through the same unanimous voting upheld these rights that one may argue that this is an exercise of legislative law-making. But whether or not their rights are embodied in a formally binding instrument, it seems correct, as a matter of customary international law and of international morality, to regard such rights or prescriptions as emergent authoritative norms.[116]

Human rights protection has developed from the so-called "legal guarantism" born out of the liberal idea of the 18th century to the so-called "positive rights" since they now depend for their fulfillment on affirmative state action. Hence, the former was characterized by declarations and bills of rights; they involve "arrangements for freedom" whereby the state protected freedom and upheld the rights by forbidding interference with the individual. In effect, the resulting civil liberties are generally correlative to negative duties of the state.[117] During the twentieth century, however, new economic and social claims have come to broaden the spectrum of human rights, and these are collectively known as "positive rights" which place upon the government the task of protecting the people from the misfortunes of industrial life, as well as depend for their realization upon active governmental action.[118] These positive rights are designed *in legal terms* to meet basic human needs not otherwise satisfied by the

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114 M. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956).

115 See P. DROST, HUMAN RIGHTS AS LEGAL RIGHTS 32 *et seq.* (1951).

116 See R. Falk, *Responding to Severe Violations*, in J. DOMINGUEZ, R. PODLEY, W. WOOD & R. FALK, ENHANCING GLOBAL HUMAN RIGHTS 225 (1979).

117 R. Claude, *The Classical Model of Human Rights Development*, in R. CLAUDE, COMPARATIVE HUMAN RIGHTS 41 (1977).

118 *Id.* at 42.

socio-economic system.[119] At present, the state is at the forefront of human rights protection and promotion. It controls the lever that can make or unmake human rights protection in a particular country. The critical and all-important role of the state in this regard is recognized even by the Preamble in the UN Charter which states: "Whereas, Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedom."[120]

It is a truism in law that legal rights of one person mean the corresponding legal obligations on the part of the other. This is also true with regard to human rights: a relation between individuals or group of individuals on one hand and the State on the other. Certainly, inasmuch as human rights, as presently understood, include not only the traditional civil and political rights but also the "new" economic, cultural and social rights, the role of the state in the promotion, protection and upholding of these rights become more all-encompassing and thus, affirmative government actions and policy are *sine qua non* to human rights protection. Hence, to contend that individuals are entitled, as a matter of human rights, to have their basic human needs satisfied is tantamount to insisting that governments are legally and morally compelled to perform, at least to a minimum degree, as a "welfare state."[121] Human rights, in legal terms, impose affirmative duties on governments which are duty-bound to fulfill in accordance with the rule of law. And to speak of basic needs as human rights means referring to, under the circumstances, the minimum requirements for sustaining physical life, i.e., health, food, housing, clothing, work, literacy among others.[122] In fact, in line with this need of affirmative state action, the New International Economic Order (NIEO) is regarded as a movement to assure that individual governments are provided with the capabilities to satisfy the basic needs of their citizens.[123]

The Universal Declaration of Human Rights is not to be regarded as the enumeration of all rights nor should it be deemed as delineating all facets of human life and existence. But certainly, it embodies most of the far-reaching rights hitherto unrecognized by man. Aside from the usual melange of civil and political rights,[124] certain socio-economic rights are included for the first time in international legislation. Thus, everyone, as a member of society has the right to social security and is entitled to

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119 *Ibid.*

120 U.N. Charter, preamble.

121 J. Dominguez, *Assessing Human Rights Conditions,* in DOMINGUEZ, *supra,* note 116 at 25.

122 Falk, *supra,* note 116.

123 *Ibid.*

124 Right to life, liberty and security of person (Article 3); prohibition of slavery or servitude and slave trade (Article 4); prohibition of torture or of cruel, inhuman or degrading treatment or punishment (Article 5); right to recognize as a person before the law (Article 6); equal protection of the law (Article 7); and the like.

its realization through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[125] The right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment is protected.[126] Everyone has likewise the right to a standard of living adequate for the health and well-being of himself and of his family including food, clothing, housing, and medical care and necessary social services.[127] The right to education directed towards the full development of the human personality and towards the strengthening of respect for human rights and fundamental freedom is given premium.[128] These rights are emphasized and developed further in the two Covenants. Thus, the International Covenant on Economic, Social and Cultural Rights[129] speaks of the right to self determination by virtue of which all peoples freely determine their political status and freely pursue their economic, social and cultural development,[130] right to work, and all other incidental rights thereto,[131] right to join and participate in a trade union of one's choice,[132] right to adequate standard of living,[133] right to social security,[134] right to education,[135] among others. The International Covenant on Civil and Political Rights[136] delineate further all the civil rights of man, the delimitations and qualifications, as well as the limitations thereto.

2. Proposals

If the self-preservation theory provides for the framework, the human rights angle adds the flesh to the bones. Both approaches have the same rationale: that the debt issue is the source of the miseries confronting the peoples of the debtor countries, or at least is continuously aggravating these miseries. Unlike the self-preservation approach which focuses on the state, the human rights angle spotlights on the individual. In the main however, these two approaches are essentially intertwined.

The IMF-WB impositions to reorder the Philippine economy, generate exports and promote efficiency have created untold social costs: falling

125 Universal Declaration of Human Rights, article 22.
126 Universal Declaration of Human Rights, article 23.
127 Universal Declaration of Human Rights, article 25.
128 Universal Declaration of Human Rights, article 26.
129 U.N. Gen. Ass. Res. No. 2200 A (XXI) of December 16, 1966 and entered into force on January 23, 1973.
130 International Covenant on Economic, Social and Cultural Rights, article 1.
131 International Covenant on Economic, Social and Cultural Rights, articles 6 & 7.
132 International Covenant on Economic, Social and Cultural Rights, article 8.
133 International Covenant on Economic, Social and Cultural Rights, articles 11 & 12.
134 International Covenant on Economic, Social and Cultural Rights, article 9.
135 International Covenant on Economic, Social and Cultural Rights, article 13.
136 U.N. Gen. Ass. Res. No. 2200 A (XXI) of December 16, 1966 and entered into force on March 23, 1977.

incomes, falling living standards, increased unemployment, swelling mass poverty, among others, but the most pernicious human costs such as malnutrition which blights the bodies and minds of the future generation may never be captured in standard economic statistics.[137] The effects of these stringent austerity program sponsored by IMF created dissent and spawned more demands for better standards of living, respite from inflation, high prices, etc. The government must contend with these and one expects numerous violations, even absolute disregard, of the various civil and political right i.e. free speech, press, strike, etc., all of which are consecrated in the international human rights law. On another level, where the scarce financial resources are geared towards debt payment and/or servicing instead of being used to provide education, social services, reasonable standards of living, there is a corresponding gross violation of these rights.

What brought about these large scale disregard to the human rights promoted and protected by present international law? There is only one answer to this: the debt problem. This is the cause of it all, such that if it were taken out, these miseries may be solved altogether, or at least substantially minimized. The ultimate issue is coming to a head: the rights and individuality of the human person versus the demands of impersoal, non-human, juridical person. When it is to be noted that the individuality and the potentialities of the human species, the human being, are the *ultimate essence* of international law since the individual person is the *ultimate subject* of international law, there is no doubt that the individual person's right and individuality be chosen. To disregard this in favor of juridical entities would be to subvert the ultimate purpose of law: happiness of the person. Each state acts as it does in pursuance of public interest and welfare, or stated otherwise, for the "perceived" happiness of its people. To this extent and upon this basic reason, the country must repudiate the devious debt issue, if only to uphold the individual person.

F. *Rebus Sic Stantibus*

1. Doctrinal Basis

As a rule of positive law, it is a general principle that all international contracts are entered into under certain implied conditions which accompany the express provisions thereof and are equally part of the "valuable considerations" which form the essence of the contracts.[138] Among others,[139] one implied condition is that the contract shall be binding to the parties only if there has been no vital change of circumstances unforseen and not contemplated by them. This is the essence of the Roman

[137] See, Monsod, *supra,* note 66; see also, note 68 *supra.*

[138] FENWICK, *supra,* note 31 *at* 354-355.

[139] *Id.* at 355. The other conditions are the faithful observance of the agreement on both sides, consistency with internationanl law, and consistency with the moral standards of the international community.

law concept of *rebus sic stantibus* as implied in international law. And this is an accepted exception to the general principle of *pacta sunt servanda* in international law.[140]

It is generally accepted that every treaty or contract carries an implied condition that it is morally possible of fulfillment, and this means that a state cannot be expected to sacrifice its very existence to uphold its treaty or contractual obligations.[141] The obligatory force of a treaty or contract remains only if it is consistent with the primary right of self-preservation. Hence, a treaty or contract becomes voidable as soon as it is dangerous to the life or incompatible with the independence or existence of a state, provided that its injurious effects were not intended by the contracting parties at the time of its conclusion.[142] This justification for disregarding an agreement when it becomes unduly onerous in the opinion of the party wishing to escape from its burden has taken so many different forms of excuse. Thus, M. Helfter says that a state may repudiate a treaty when it conflicts with "the rights and welfare of its people,"[143] while M. Hautefeville declares that "a treaty containing the gratuitous cession or abandonment of an essential right is not obligatory."[144] On the other hand, M. Bluntschli thinks that a "state may hold treaties incompatible with its development to be null and void."[145]

2. Proposals

This theory must be seen in the light of the theory on the right to self-preservation. As applied in the Philippine experience for example, the fundamental change of circumstances may be seen in various aspects of the debt issue. First, the repayment scheme under the loan agreements entered into could not be contemplated to be so strictly enforced and to be resulting in untold burdens to the debtor states such that economic growth is effectively deterred or that the bulk of the states' export earnings would be for payments of interests alone. These very severe economic sacrifices and dislocations resulting from the loan agreement could not have been foreseen to endanger the very existence of the debtor states as a viable society or economy. To that extent, the change of circumstances on the part of the debtor states slants towards this theory. Second and correlative to the first, is that it was never the contemplation of the parties that unbearable social costs would attend the repayment of these loans and the stringent austerity program to assure the same. The heavy costs come in the form of massive and large-scale poverty, rising unemployment, high prices, inflation, malnutrition, lack of social servces, etc. The

140 Vienna Convention on the Law of Treaties, article 62.
141 FENWICK, *supra,* note 31 at 355; see also, J. COQUIA & M. DEFENSOR-SANTIAGO, PUBLIC INTERNATIONAL LAW 631 (1984).
142 HALL, *supra,* note 23 at 373; see also, SALONGA, *supra,* note 16 at 326.
143 *Id.* at 374 citing HELFTER, sec. 98.
144 *Ibid.* citing HAUTEFEVILLE, i. 9.
145 *Ibid.* citing BLUNTSCHLI, sec. 415 & 456.

effects of the rigid enforcement of the austerity programs of the IMF-WB in the form of wholesale violations, even absolute disregard of fundamental social and economic rights and civil and political rights, of widespread insurgency, of severe economic dislocations, etc. could never have been contemplated by the parties. Third, it could never have been contemplated that the "cross default" provision[146] operate to such a degree of odiousness and disadvantage as to literally threaten seriously the very foundation of the socio-economic existence of the various states. These three areas could be utilized as basis for *rebus sic stantibus* theory.

G. *In Pari Delicto Rule*

In municipal law, party litigants are to come to the courts only with clean hands. The same principle applies in the international sphere. Hence, parties are precluded from putting forward before an international court (or even before a municipal court *pro tanto*) contentions which are based on acts of bad faith. It would constitute a travestry of international justice if parties could derive rights and benefits before an international court from their own violations of international law.[147] Good faith requires that the parties before the courts, most especially the applicant thereto, must be free from any mental reservation, deceit, fraud or other irregularities.[148]

As regards the debt issue, it is critical to note how certain questionable projects were able to obtain funding in the first place. It should be noted that the bulk of the foreign loans incurred by the Philippines was made in the late 70's to the early 80's and at times when international banks were literally extending loans to developing countries since these banks were then literally flooded with petrodollars from the oil rich Middle Eastern countries.[149] Thus, both parties, the representatives of debtor and creditor were "overeager to do business with each other" *at all costs*. Thus, the representative of the creditor may have most probably turned his back to pertinent matters like viability of the project, overpricing of the loan, among others, which a cautious, reasonable man would have noted carefully in his appraisal. Or he may have been "convinced" by the borrower, who, wanting to get the loan, extended all sorts of "help", official and unofficial, in order to get the credit officer to come up with a good report. In these circumstances, insofar as both parties are equally guilty as to the irregularities involved in some of the loan transactions i.e. fraud and collusion, neither may be able to assert claims as against

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146 A "cross default" provision mandates that a default in one loan agreement with one creditor bank or entity would render due and demandable *all loans* from *all creditor banks or entities*. This result is irrespective of the different terms and conditions of the various agreement, of the different maturity dates, among others.

147 SCHWARZENBERGER, *supra*, note 28 & 438.

148 W. LEVI, CONTEMPORARY INTERNATIONAL LAW 209 (1979).

149 Yu, *supra*, note 16.

the other arising from said "immoral loans."[150] Hence, even if one assumes *arguendo,* that there was a loan, and obligations were created thereby, on this ground of procedure, if not general court practice, the claims of either "guilty party" may not be given due course in court.

IV. CONTRA-ARGUMENTS: REPUDIATION OF DEBTS

A. *The General Rule of Government Succession to Contractual Obligations*

The general rule, recognized in the law of the United States and most other countries, is that a change in the government of a country does not affect the continuity of the state or impair its contractual obligations to foreign parties In other words, the mere fact of a new government assuming power in the Philippines even pursuant to extra-constitutional means would not by itself constitute a legal basis for relieving the country of its liability in respect of debts incurred by the predecessor regime.[151]

B. *Possible Exceptions*

The general rule admits of certain exceptions. These exceptions may however be seen as inapplicable especially when viewed under the circumstances experienced by the Philippines and on the basis of new factors unique to the country.

1. Fundamental Change of Regime

It has occasionally been argued that a change in the nature of a country's government has been so fundamental that it effectively represents a change in the state itself. Because international law has been much less consistent in finding that contractual obligations are automatically binding on successor regimes where the state itself, and not just a government, has been replaced (as for example in situations of conquest, annexation or cession), the legal position of a new regime that attempts to repudiate existing contractual commitments is arguably stronger if a case can be made that the change in the nature of government is so fundamental that it constitutes a circumstance of "state Succession."[152]

While the distinction between state and government succession is sometimes blurred,[153] a United States court would be unlikely to sympa-

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[150] Garcia, *supra,* note 111; see also, Sylvia Mayuga, *We Can Make Legal History on the Nuclear Plant,* Veritas, June 23-25, 1986, p. 18.

[151] Legal Memorandum by Cleary, Gottlieb, Steen and Hamilton for Messrs. Ongpin and Fernandez, *Re: Selective Repudiation of Debts,* April 10, 1986, p. 2.

See also, HACKWORTH, *supra,* note 86 at 56; OPPENHEIM, *supra,* note 24 at 153; *The Sapphire Case,* 11 Wall. 164 (1870); *Guaranty Trust Co. v. U.S.,* 304 U.S. 126 (1938).

[152] WESTON, *supra,* note 95 at 667 citing D. O'CONNELL, INTERNATIONAL LAW (2nd ed., 1970).

[153] Cleary Memorandum, *supra,* note 151; see also SALONGA, *supra,* note 16 at 126 *et seq.; Lehigh Valley R.R. Co. v. State of Russia,* 21 F. 2d 396 (1927).

tize with a claim that the new Philippine administration represents such a fundamental change of regime as to relieve it from contractual obligatons incurred by the prior government.[154] Besides, insofar as the Aquino government is concerned, this may no longer be relevant because the Government has ratified (or about to ratify) contracts that were negotiated and entered into by the previous administration. In fact, it has been stated as matter of government policy that the new government will honor its contractual commitments.[155]

2. Odious Debts

It is unlikely that the doctrine of odious debts could be successfully advanced in a United States court as a legal justification for the repudiation of certain debts incurred by the prior Philippine Government. Whatever the doctrine's applicability to situations in which the proceeds of loans are used to suppress forcibly the regime that ultimately comes into power, it is unlikely to be seen as relevant in the context of the recent change of administration in the Philippines. Moreover, the "use of proceeds" clauses in many debt instruments would tend to contradict any claim that the proceeds of the loans were used for purposes that a United States court might recognize as "odious" in this context.[156]

In addition, most modern loan agreements contain both representations and covenants that tie the use of proceeds to purposes that are broadly governmental in nature and even if monies are ultimately diverted to other purposes, the existence of these contractual provisions would tend to strengthen a bank claim that it was acting in good faith.[157] Apart from cases in which it can be shown that the creditor was in collusion with the corporate officer or Government official in question or had actual knowledge of the impropriety, however, a creditor may have a strong argument that the Government should be estopped from challenging the validity of contracts if all necessary approvals and Government registrations were obtained at the time the money was lent. General principles of agency law might not operate to bind a company or the Government for actions taken by one of its officers within the apparent bounds of his authority, unless the lender had actual knowledge that the officer's action had been corruptly induced or was beyond his authorized powers.[158]

C. *Sovereignty and Pacta Sunt Servanda*

States may be described as "sovereign states" but their sovereignty is sovereign *under* the law to which they have bound themselves by the UN

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154 *Ibid.*

155 See for example, Ma. Socorro Nuguit, *Coming Home,* Veritas, September 25-October 1, 1986, p. 18.

156 Cleary Memorandum, *supra,* note 151 at 3-4.

157 *Id.* at 5-6.

158 *Id.* at 6; see also, FENWICK, *supra,* note 31 at 369; LEVI, *supra,* note 148 at 107; H. BRIGGS, THE LAW OF NATIONS 762 (2nd ed., 1952).

Charter. It is sovereignty in the fields of national or domestic jurisdiction that lie outside the newer areas controlled by international law.[159] The Charter does indeed proclaim as the first of its principles that "the Organization is based on the sovereign equality of all its members" but this means no more than formal legal equality. In other words, it must be understood in a manner consistent with the maintenance of law and order in the international community.[160] Thus, an individual state may indeed defy the law or it may refuse to cooperate in putting the procedures of peaceful settlement into effect; but it cannot offer in justification of its conduct any legal claim of "sovereign right." Therefore, to the extent that the repudiation of debts may be violative of some rules of international law, the repudiating state cannot assert the exercise of sovereignty to support its illegal actions.

The rule of *pacta sunt servanda* is one of the most fundamental principles of positive international law and for some writers, the principle dominates the entire legal system.[161] This norm is of a superior rank which institutes a particular procedure for the creation of other norms of international law namely, the treaty procedure.[162] The effect of treaties (and international contractual obligations) upon the parties is that each one of them loyally carry out the obligations freely undertaken therein[163] inasmuch as in law, from the treaty (and international contractual obligations) result in an obligatory relation which must be executed in good faith.[164] A party may not even invoke the provisions of its internal law as justifications for its failure to perform a treaty.[165]

V. THE RISKS OF DEFAULT: SOME CONSIDERATIONS

The radical steps of repudiation would certainly result in various reactions. The following would certainly be the imminent consequences of repudiation; economic, political, military and legal. The various modes are, by and large, possible only with government intervention. Except for a private suit filed by a private bank, all the other modes are generally based on state policy. Hence, the attitude of the government, whether or not to exercise diplomatic protection of its citizens is critical herein. But insofar as the government itself was the creditor, these modes may be available to assert its claim.

A. *Economic Consequences*

The economic aspect may involve trade embargo, exclusion from international institutions like the IMF-WB, loss of development aid, loss of

159 FENWICK, *supra,* note 28 at 48.
160 *Ibid.*
161 G. SCHWARZENBERGER, INDUCTIVE APPROACH TO INTERNATIONAL LAW 95-97 (1965); see also, MANUAL OF PUBLIC INTERNATIONAL LAW 127 (Sorensen, ed., 1968).
162 J. Kunz, *The Meaning and Range of the Norm Pacta Sunt Servanda,* 39 AM. J. INT'L L. 280, 181 (1945).
163 SCHWARZENBERGER, *supra,* note 28 at 193.
164 Vienna Convention on the Law of Treaties, article 26.
165 Vienna Convenion on the Law of Treaties, article 27.

international credit line and/or loss of financial military assistance. The trade embargo may cause hundreds of export-oriented or import-dependent firms to close up, thereby forcing massive unemployment. Naturally, for an export-oriented economy like the Philippines, this would result in severe economic dislocations. Necessarily, there would be resultant social costs which may be serious and heavy. On the other hand, the cut-off of various aids may stifle the development plans of the government, thus causing more economic and social dislocations. Likewise, the various international institutions and the creditor banks will certainly stop giving new loans and extending import credits to the country while government may freeze the country's assets, if not sequester them all, just like the Iran experience relative to the United States after the fall of the Shah.

However, these consequences are not as grim as they may seem to be. For we must ask: would the government of the creditor banks avail of such modes like trade embargo or cut of foreign aid? This determination of whether diplomatic protection be followed would certainly involve deep considerations of the state's foreign, if not global, policy, East-West relations, geo-politics, and the like. As regards the Philippines, the United States should take into consideration the following factors: presence of Clark Air Base, Subic Naval Base and other facilities, global policy as to Asia in particular, East-West relations. If the political will of the defaulting Philippine government is strong and the government is widely popular, the United States may not risk antagonizing the repudiator; otherwise, American interests in Asia and Pacific may be placed in peril. Assuming that trade embargo be undertaken, there is nothing that precludes the Philippines from developing closer ties, diplomatically and in terms of trade, with Eastern bloc countries. Foregn aid may likewise be had from other countries which may deem advantageous to deal with us, if only to exploit our highly strategic position in the Asia-Pacific. In fact, historically, various countries have defaulted before but no reprisals by government were imposed.[166]

As to loss of new loans and/or import credits, the threat is less real than it seems. Banks know that the country is a poor credit risk; whether we pay or not, they are not likely to increase their lending. Besides, the Philippines was able to withstand the adverse effects of the deprivation of trade financing by international banks and IMF from late 1983 to 1984, and there is no reason why the same may not be repeated. Eventually, banks will resume lending, it is their business. They are more interested in profits than in exacting revenge. The present and the future are more important to them than the past. The fact that today's major borrowers and potential repudiators have defaulted before prove this.[167]

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166 Ibon Facts, *supra,* note 14 at 5.
167 *Ibid.*

In the short run, the economic consequences to the repudiating debtor are difficult. Although the money and other financial resources that should have been used to pay for the debts would then be used to create jobs, produce food and redistribute income, the sudden cessation of availment of world trade and world economic facilities would definitely cause change in, if not reorder, the economy. Stringent programs to confront problems arising from these creditor's reactions must necessarily be shouldered by the people. And here, the strength of the political will of the government and the breadth of its popularity would be determinative.

B. *Political Aftermath*

As in its determination of whether or not to exercise diplomatic protection to its prejudiced citizens/nationals, the decisions of whether or not to initiate diplomatic break-up with the repudiating state depends on various factors. There must be weighing beween its national interest and the private monetary interests of the banks. The national interests, especially to world powers like the United States or even Japan and England for example, are varied and wide ranging: foreign relations and foreign policy, balance of power, strategic nature of the state in the context of global policy, public opinion, even perhaps pursuit of democratic principles. The policy-making process therefore would definitely involve balancing of interests, and in this context, insofar as the Philippines is concerned, it is quite remote that a diplomatc break-up will result in case the Philippine government repudiates its foreign debt. But again, one must take note of the fact that the United States government may be more willing to do this if it were directly prejudiced as what happened in Iran and Vietnam. However, insofar as indirect prejudice is concerned i.e. private banks interests affected by repudiation, it is unlikely for break-up to result.

The breaking of diplomatic relations is by no means the only political consequence of repudiation. The foreign state may choose not to break-off relations but merely to meddle in the internal affairs of the repudiating state. Hence, it may try to destabilize the present government, directly or indirectly with the end-view of manipulating the decision making, or even outright change of government. A very wide range of modes, techniques and operations may be undertaken by said foreign state and this includes *inter alia,* assassinations, protests movements, insurgency, *coup de' etats,* and the like.[168] The world powers are not exceptions to this mode; they

[168] For reference of meddling of foreign countries in the internal affairs of others, see the following materials:

A. APPADORAI, THE USE OF FORCE IN INTERNATIONAL RELATIONS (1958); A. BULLARD, AMERICAN DIPLOMACY IN THE MODERN WORLD (1928); R. FALK, LAW MORTALITY AND WAR IN THE CONTEMPORARY WORLD (1963); R. ARON, PEACE AND WAR (R. Howard and A. Baker, trans., 1966); W. BRANDT, THE ORDEAL OF CO-EXISTENCE (1963); Z. BRZEZINSKI, BETWEEN TWO AGES: AMERICA'S ROLE IN THE TECHNETRONIC ERA (1970); H. GIBBONS, NATIONALISM AND INTERNATIONALISM (1930); M. GRAHAM, AMERICAN DIPLOMACY (1948); E. HAAS, AMERICAN COMMITMENTS AND WORLD ORDER

are the main proponents of it. Consequently, considering the vast and very strategic interests of the United States in the Philippines, it would certainly undertake all measures to insure the continuance of the *status quo*. This factor makes the policy of repudiation a highly risky and perilous decision insofar as any government in a country like the Philippines is concerned. There are simply too great American stakes for the United States to just let go scot-free such decision.[169] The recent history of American policy and activities show a high degree of interference, intervention, or even outright meddling of internal affairs of other countries in cases where perceived American global interests may be imperilled.

C. *Military Actions*

The United Nations Charter categorically prohibits the use of force except in certain very limited and well defined exceptions,[170] and mandates the settlement of dispute by pacific means.[171] As a matter of law, the use of force cannot be permitted as a mode of action, especially when the purpose is merely for enforcement of contractual obligations,[172] it not being one of the exceptions. However, as a matter of practice, military actions in the form of military invasion or at least naval blockades have been utilized to enforce one state's perceived vital state interests. Since the 1920s especially after W. W. II, various instances of military actions have been undertaken in areas from Asia to Africa to the Mediterranean.[173]

(1969); W. LIPPMAN, THE STATUS OF DIPLOMACY (1917); E. MCWHINNEY, INTERNATIONAL LAW AND WORLD REVOLUTION (1967); H. MORGENTHAU, POLITICS AMONG NATIONS (1973).

169 For a much greater insight to the Philippine-American relations, refer to the following materials:

M. TRIYE, THE COLD WAR IN ASIA (1974); D. MIDDLETON, AMERICA'S STAKE IN ASIA (1968); H. ABAYA, THE UNTOLD PHILIPPINE HISTORY (1967); T. BAJA. U.S. AID PROGRAM (1958); S. JENKINS, AMERICAN ECONOMIC POLICY (1954); A. LICHAUCO, THE LICHAUCO PAPER: IMPERIALISM IN THE PHILIPPINES (1973); C. RECTO, THE RECTO READER (R. Constantino, ed., 1965); E. GARCIA, U.S. MILITARY BASES IN THE PHILIPPINES (1967); G. GRUNDER, THE PHILIPPINES AND THE U.S. (1951); W. POMEROY, THE AMERICAN-MADE TRAGEDY: NEOCOLONIALISM AND DICTATORSHIP IN THE PHILIPPINES (1974); G. TAYLOR. THE PHILIPPINES AND THE U.S.: PROBLEMS OF PARTNERSHIP (1964).

170 U.N. Charter, article 2.

171 U.N. Charter, articles 33 to 38.

172 The Drago Doctrine was formulated by the Argentinian Foreign Minister Drago. Essentially, it is meant to "prohibit the exercise of the right of intervention, much less to the occupation of the soil of any American nation by any European power in order to enforce contractual obligations." This doctrine came as a reaction to the combined British, German and Italian blockade of Venezuela in 1902.

173 Since 1920, numerous blockades and several invasions have been undertaken by the world powers and other lesser powers. For reference, see the following materials:

D. GRABER, CRISIS DIPLOMACY: A HISTORY OF U.S. INTERVENTION POLICIES AND PRACTICES (1959); J. HOPKINS, MACHINE GUN DIPLOMACY (1928); E. MOORE, LAW AND THE INDOCHINA WAR (1972); A. STOWELL, INTERVENTION IN INTERNATIONAL LAW (1921); A. THOMAS & A. THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS (1956); R. VINCENT, NON-INTERVENTION AND THE INTERNATIONAL ORDER (1974); L. BERMAN, SELECTED ARTICLES ON INTERVENTION IN LATIN AMERICA (1928); G. LISKA, ALLIANCES AND THE THIRD WORLD (1968); R. FEARCY, THE U.S. VERSUS U.S.S.R. (1959).

Hence, as a matter of practical consideration, military action may not be farfetched in case of repudiation of debts as long as the creditor state believes that its vital interests may be imperilled or prejudiced thereby. Again, the peculiar character of the repudiating state i.e. strategic position in the East-West relations, global defense, and the like will definitely be critical in the determination of the policy or action to be undertaken. But as long as the maintenance of broadly sympathetic regimes in Latin America, the Philippines and some African countries is a major element in America's geopolitical goals. The domestic pressure for retaliation would have to be powerful before it could be considered a preferred policy to conciliation.[174] This must be so because a military action as in diplomatic break-off, trade embargo and the like are, to a great degree, political decisions of the government wherein extraneous factors like global policy, foreign relations, etc. are very critical. But the history of past military actions undertaken against sovereign states is not at all encouraging insofar as the probable repudiating state is concerned; there are simply too many examples for any one state to remain unalarmed: in Asia, Africa, even the Americas itself.[175]

D. *The Legal Angle*

There are two modes whereby the creditor banks and/or creditor states may legally enforce their claims in case of repudiation of debts. First, there is the private suit that may be instituted by the creditors in domestic courts. Second, there is the international claim before international courts, tribunals or commissions.

The most basic problem in this solution is the doctrine of state sovereignty, under which a state may not agree to submit the sovereign act of repudiation to the scrutiny of a foreign court, even if it be an international court.[176] This procedure is possible only as a result of international agreements or a provision in the loan contract as to the forum and the applicable law. One must note that the problem of debt repudiation includes great elements belonging to a state's internal policy which will prevent its being submitted to an international court as a dispute of international law.[177]

There is another ticklish matter as regards an international court action. Although it is well settled that governments may intervene on behalf of a corporation incorporated under its laws in the exercise of its right of diplomatic protection as to its citizens or nationals, this decision is strictly discretionary to the state concerned since the state may choose not to exercise its right to assert that the rules of international law be

174 KALETSKY, *supra*, note 13 at 55.
175 Note 173, *supra*.
176 KATZAROV, *supra*, note 70 at 321.
177 *Ibid.*

respected in the person of its nationals.[178] This decision is definitely colored by numerous factors and considerations but as a whole, governments are generally reluctant to intervene in support of claims of their nationals arising out of monetary transactions with foreign states. It is another question if the issue involves a government-to-government loan for here, the state is directly affected and, hence, the government may naturally defend its own rights and assert its claims.

Insofar as private suits before domestic courts are concerned, the sovereign immunity principle and the corollary act of state doctrine may be obviated by express provisions in the loan agreements as to forum and applicable law. This new development may even be further strengthened where the various agencies of the debtor state have expressed opinions that the government would honor its obligations from loans directly entered into and from loans of private entities but guaranteed by the government.[179]

This may precisely be the Philippine situation in most instances in view of the loan agreement provisions and of Presidential Decree No. 1807 waiving said immunity.[180] However, this is as far as it goes; court proceedings. There is the more difficult question of enforcement of judgment. For even if one assumes that there is a successful suit by the creditor banks against the repudiating state, the judgment may just turn out to be a mere paper judgment in view of the well-established rule that state-owned properties are immune from suit. And it is of no moment that the property is personal or real, of a governmental character or not.[181] The fact of waiver of immunity is likewise immaterial because limitations to sovereignty are very strictly interpreted. Hence, where the waiver is merely as to the institution of court proceedings, it does not mean waiver as to the enforcement of judgment as well. Although logic may seem to support a contrary conclusion, present international law does not permit it. For instance, both the United States with its Foreign Sovereign Immunities Act (FSIA)[182] and Great Britain with its State Immunity Act (SIA)[183] guard immunity from execution more jealously than the general immunity of being cited in a foreign court. Thus, although both the FSIA in the United States and the SIA in Britain allow states to waive their immunity from execution against certain classes of their property, these waivers are subject to important limitations that could often be fatal to the hopes of the aggrieved

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[178] See, *Mavrommatis Palestinen Concessions Case*, P.C.I.J. Ser. A, No. 2, 1 HUDSON, WORLD CT. REP. 207; see also, *The Barcelona Traction, Case*, I.C.J. REP. 3 (1970) reprinted in COQUIA, *supra*, note 141 at 257 *et seq.*

[179] See, Min. of Justice Op. No. 99, s. 1986; Min. of Justice Op. No. 100, s. 1986; Min. of Justice Op. No. 101, s. 1986; Min. of Justice Op. No. 102, s. 1986.

[180] See, Pres. Decree No. 1807 (1981).

[181] FENWICK, *supra*, note 31 at 308.

[182] See, W. Tudor John, *Sovereign Immunity*, in SOVEREIGN BORROWERS 146 (L. Kalderen and Q. Siddiqi, ed., 1984).

[183] *Id.* at 148.

creditors of winning substantial recovery or causing serious commercial harm to the defaulting sovereign.[184]

As to immunity from attachment and execution of property, the FSIA[185] provides:

> "A foreign state's property will normally be immune from attachment, arrest and execution unless the property concerned is used for a commercial activity in the USA and:
>
> (1) The foreign state has expressly or impliedly waived such immunity from attachment (and waivers are effective whenever given and cannot be withdrawn) or
>
> (2) The suit is based upon the commercial activity of the foreign state and the property is or was used for such activity; or
>
> (3) The execution relates to a judgment establishing rights in property taken in violation of international law; or
>
> (4) The execution relates to a judgement establishing rights in US land or in property acquired by gift or succession; or
>
> (5) The property is an insurance policy or insurance proceeds covering the liability on which the suit is based; or
>
> (6) In relation to property owned by a state agency or state-owned corporation, any such property can be attached (whether or not it relates to the suit in question) if the entity concerned is not immune from jurisdiction by virtue of paragraphs 3, 4, 6 or 7 under the "Immunity from Jurisdiction."[186]
>
> *Nothwithstanding the above, however, the following property will always be immune*:
>
> (1) *Embassies or residence of the head of the embassy.*

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184 KALETSKY, *supra*, note 13 at 25.

185 Tudor, *supra*, note 182 at 146-147.

186 The U.S. Foreign Sovereign Immunity Act provides as to immunity from jurisdiction:

"A foreign state will normally be immune from the jurisdiction of U.S. courts unless:

x x x x x x x x x x

3. The suit is based upon the commercial activity of the foreign state in or directly affecting the U.S.A.

4. The suit is connected with property taken in violation of international law and that property either is in the U.S.A. in connection with a commercial activity or is owned by a state agency or state-owned corporation carrying on commercial activity in the U.S.A.

x x x x x x x x x x

6. The suit is an action for damages for personal injuries or death caused by the tortious act of a foreign state or its officials.

7. The suit is an admiralty suit, for which proper notice of action has been given, and is in connection with the enforcement of a maritime lien arising out of the commercial activity of the foreign state."

For the complete list, see Tudor, *supra*, note 20 at 146.

(2) Property of organizations designated by the President of the USA as enjoying the immunities of the International Organizations Immunities Act.

(3) *Property of a central bank* or monetary authority *unless* such bank or authority or the foreign state has *expressly waived immunity in relation thereto.*

(4) *Property is military or is used by a military authority or defense agency.*" (emphasis mine).

In addition, there is in general, nothing to stop a defaulter from moving its property outside United States jurisdiction in anticipation of an adverse judgment, unless his creditors can persuade the courts to grant a prejudgment attachment at the time they first bring their suit. Since a prejudgment attachment is potentially an even more provocative act in diplomatic terms than a seizure of sovereign property after a judgment is rendered, the FSIA narrows even further the conditions in which attachments are allowed. Again it requires an "explicit" waiver of prejudgment attachment to be written into the loan agreement.[187] More important, the FSIA does not recognize any such waiver for the property of a foreign central bank. Thus, it is improbable that central bank property, including foreign exchange and gold reserves, could be attached prior to judgment.[188]

Neither may it be realistic to believe that creditors could bring a repudiating country's trade almost to a standstill by attaching the repudiator's ships, airplanes and export cargoes whenever they ventured into the jurisdiction of a nation prepared to recognize the judgment of a United States or English court.[189] For individual citizens, including corporate citizens, have separate personality distinct from the government, such that a state as a juridical entity must be liable for its own debts and obligations, the innocent citizens may not in justice and fairness be made to bear the state burden. This principle that a judgment against a particular entity can be enforced only against that entity's own assets goes beyond the private individuals-government dichotomy. It even includes nationalized corporations, wholly owned by the government and central banks, which are recognized by the courts of most countries as distinct legal entities, separate from their governments and liable only for their own defaults. This is the so-called "veil of incorporation" doctrine.[190]

Especially in cases of conciliatory default only, banks would have to weigh their interests: limited penalties they could hope to impose upon the borrower and the small financial compensation from attachment and assets sales on one hand, and the costs of litigation, direct and indirect,

187 KALETSKY, *supra,* note 13 at 26.
188 *Ibid.*
189 *Id.* at 27.
190 *Id.* at 29.

on the other hand. First, legal actions against a defaulter exercising a conciliatory default i.e. debtor nation continues to recognize its *ultimate* responsibility for some debt repayment, may result in an outright repudiation. Secondly, the seizure of assets may provoke the debtor state to repudiate the debts altogether thus requiring the bank to write off the total debts as total loss thereby cutting whatever debt service which could have been made under the previous system. And finally, the bank's action will certainly provoke retaliatory action by the defaulting country against the business interests if the creditor banks are within its borders. These so-called "tactical considerations" must be considered especially as regards big debtor countries like Brazil, Mexico, Argentina or Venezuela, and this may as well be the politics of filing of suits before courts of justice.[191]

VI. ASSESSMENT AND PROJECTIONS

The glorious days of the bloodless February "revolution" will always linger in the psyche of both participants and audience, of the Filipino people and the peoples of the world. For a short yet shining glory, the Philippines became the stage of a great and momentous drama of nationwide proportions, an unfolding of events so magnificent and unexpected that one wonders if this were for real. For once the world waited minute after minute for what will happen next, and the entire world witnessed the apex of collective nationalism, of raw courage and unity, and the epitome of a people's desire for democracy.

The stage is still there, the actors are still at the helm of the drama. Yet, the honeymoon is over. After the after-effects and the euphoria are all over, the Philippines is still faced with a most tragic problem besetting the Third World: the debt crisis. The present debt crisis is the omnipresent undercurrent which was already existing years before the February honeymoon, an undercurrent which threatens to pull the entire country into the irreversible depths of mass poverty, social and economic paralysis and virtual peonage to the world financial system. With this problem as well as a host of other socio-economic and political problems, the recent history of the Philippines may be called, more correctly, as a Greek tragedy of a nationwide proportions. Yes, the "death and tragedy" may indeed befall the country if the present course of the country's history remains. The radical circumstances now presently experienced by the country as detailed above require radical solutions to the very source, among others, of the present situation: the debt problem. The reasons for the country's present plight are many and are inextricably interlinked but the solution of the debt crisis may break the link/chain and steer the country away from collapse. However, palliative solutions may not end the suffering but may, in fact, aggravate the situation. It is for this reason that radical solutions.

[191] *Id.* at 30.

that eliminate the problem altogether are more favored in the long run. Such is the nature of debt repudiation as a mode of action.

On the theoretical level, repudiation of foreign debts is not difficult and complicated. The substantive grounds upon which repudiation may be hinged on differ in terms of persuasiveness, logic and relevance. The theory of sovereignty provides a strong justification for repudiation. The doctrine of fundamental rights, specifically the rights of existence and self-preservation, greatly support the act of repudiation under the circumstances detailed above. Then, there is the theory of nationalization, the legal justifications of which are applicable to repudiation of debts *pro tanto*. Likewise, the theory of odious debts strengthens the theory of repudiation most especially as regards certain debts contracted through fraud or collusion. The human rights angle provides some legal grounds and more importantly focuses on the "moral" aspects of the debt crisis. Then, the "act of state doctrine" may likewise justify the act of repudiation which is essentially a state policy of the highest degree. The above substantive grounds are by no means exclusive. Neither must they be seen as justifications singly or solely without regard as to the others. Rather, the various grounds analyzed in this paper must be seen as a whole, as a unified and collective theory to justify debt repudiation. It is in this sense that the theory of repudiation should be seen.

There is another angle that was discussed in the paper which may promote under certain circumstances, the cause of debt repudiation. This refers to the procedural grounds which may preclude the bringing of suits against the repudiating state. Thus, even if one admits that substantive rights have been violated, it is another question whether the cause of action be enforceable or not. In this regard, the doctrine of state immunity precludes any suit against a sovereign state whether it be before national or international court, unless there had been prior express consent. The waiver of sovereign immunity must be express not only implied, since in law, abrogation of, or even mere delimitation of state sovereignty is highly disfavored. Another procedural point to consider is the principle of going to the court with clean hands. Thus, if the circumstances warrant, a party equally guilty of bad faith as the other may not be able to file a suit against the other in a court of law. Any way one looks at it, the theory of repudiation both as to the substantive points and as to procedural matters is defensible and highly persuasive in law and in fact. This does not mean, however, that the counter-arguments as to repudiation of debts are devoid of legal and/or factual bases: it is not suggested to be so. The only point is that repudiation may be undertaken as a national policy without fear being made of lack of legal grounds to support it; that once repudiation be undertaken, such action may in fact and in law be valid, proper and justified.

However, the act of repudiation becomes controversial, complex or even tragic one it is viewed from the practical point of view. Here, one has to contend with the multifarious and complex consequences of repudiation. The problem here is that questions are also answered by questions, that the conclusions are but based on conjectures and projections although come factual, if only historical, bases may support such conclusions. The consequences of repudiation cover literally the entire gamut of society: economic, socio-political, military, even the legal angle. Call it the "risks of repudiation" or the "costs of repudiation" but the nagging question is whether the Philippines for example, or any repudiating state for that matter, be able to withstand the onslaught of these consequences of repudiation. True, this is the aspect of debt repudiation where extralegal, even illegal, acts or process may operate; this is where the politics of repudiation comes into full effect. The consequences of repudiation paint a grim future for any repudiating state, and certainly, these matters must be considered incisively before any state may even contemplate repudiation. That is the essence of every controversial and critical decision or policy: a policy of such magnitude as repudiation of debts certainly carry with it costs, burdens and grave, if not fatal, consequences. *But this is precisely the point: is a debtor state in such a condition that the bitterest of pills be swallowed inspite of the knowledge of the dangers lurking ahead? If the answer is yes, then the state should be able and willing to suffer the consequences.*

Repudiation of debts is a very high-risk ballgame, and the leaders of a state contemplating repudiation must analyze a thousand times whether the cards are stacked for or against their state. At the *very least,* the government contemplating repudiation must be popular and overwhelmingly supported by its people to such a degree that its governance is stable and of relative permanence. This must be so because a country ostracized by most of the world community can withstand the stark realities of repudiation of debts only if the people remain supportive of its crusade and decision. What matters most is that the people must be totally behind the repudiating state all the way; for otherwise, the action is doomed right at its inception, *and whether the repudiation may be justified under international law or not is absolutely beside the point.* For in the last analysis, it is the dynamics of politics, of world relations, of foreign control, and the like which are relevant in the determination of which action is more reasonable and practical under the circumstances. Indeed, legalities and legal technicalities must give way to reality, and this is especially true in power politics.