DEVILRY, COMPLICITY, AND GREED: TRANSITIONAL JUSTICE AND ODIOUS DEBT

DAVID C. GRAY*

I
INTRODUCTION

As the other contributions to these volumes reveal, issues relating to odious debt and contemporary efforts to expand the odious debt doctrine to cover all debts of odious regimes are maddeningly complex, implicating difficult issues in areas ranging from the international law of state succession to the law of commercial paper—itself a source of biannual trauma for thousands of bar aspirants. Nevertheless, the scope of the debate as it has been developed in the literature is too narrow and, therefore, the questions posed too simple. In particular, any analysis of odious debt must account for issues that inhere to transitions and transitional justice. In this article I make some of these connections and argue that any treatment of odious debts must be consistent with the broader programs of transitional justice in which they are situated. Highest of these are transitional imperatives of truth and justice, which may be compromised in the process of affording successor regimes the opportunity to disavow debts incurred by an odious forebear.

The results of this accounting are not intuitively appealing. In many circumstances, full faith to truth and accountability will require that transitional regimes accept the burden of financial obligations incurred by an odious forebear. Although this is admittedly an unpalatable proposition, the arguments leading to it reinforce assignments of liability to international investors and debtors who supply financial support to odious regimes. Upon a full accounting, then, I argue that the moral discomfort that motivates the odious debt doctrine

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* J.D., New York University School of Law, 2003; Ph.D., Northwestern University, 2004. The author is currently in private practice and may be reached at David.Charles.Gray@gmail.com. He wishes to thank Christopher Anderson, Katharine Bartlett, Sara Sun Beale, Stuart Benjamin, Kristen Boon, James Boyle, Doriane Coleman, Hollin Dickerson, Ronald Dworkin, Barry Friedman, Mitu Gulati, Jürgen Habermas, Shahriar Hafizi, Richard Kraut, Thomas McCarthy, Shadi Mokhtari, Madeline Morris, Bill Nelson, Jedediah Purdy, Lucy Reed, Richard Schmalbeck, Mark Sheldon, and Neil Siegel variously for support and commentary at different stages of this ongoing project. This article is the third in a series addressing moral and jurisprudential issues relating to transitional justice. The first, *What's So Special About Transitional Justice?*, appears in 100 AM. SOC'Y INT'L L. PROC. 147 (2006); the second, *An Excuse-Centered Approach to Transitional Justice*, appears in 74 FORDHAM L. REV. 2621 (2006).

can be satisfied by appeal to the international law of state and corporate responsibility and to fundamental tenets of moral, political, and existential responsibility, without compromising transitional commitments to truth and accountability.

Imposing upon international corporations affirmative duties of restitution and repair presents a number of potential concerns. Nevertheless, I conclude that, even though the moral burdens approach to odious debts proposed in this article may tread in "deep moral waters,"[1] investors who proactively engage their human-rights responsibilities through a robust practice of corporate and social responsibility will enjoy an expanded horizon of financial opportunities. More importantly from an investor's point of view, the proposals made here will result in a world less cluttered with mystery and unpredictability than both the world investors now face and the world they would confront were the odious debt doctrine expanded to cover all debts of odious regimes.

II

A NEW DOCTRINE OF ODIOUS DEBTS?

"Odious debt" is a fundamentally private-law doctrine buoyed by gut moral instincts. The traditional core of the doctrine addresses debts incurred by despots, without the consent of their subjects, for corrupt or profligate purposes that are not in the interests of the population.[2] These debts are odious because they are secured by the resources, sweat, and blood of a subjugated people who enjoy little or no benefit from the financial commitments made by malfeasant or illegitimate leaders. Despite the attendant stink of such transactions, when a people is lucky enough to shrug off the weight of tyrants, the longstanding rules of state succession appear to require a new state to repay debts incurred by its predecessor, even if the proceeds were used to perpetuate oppression or to line the pockets of an autocratic elite.[3] The sense of moral indignation that such a result inspires is the driving force behind the doctrine of odious debt.

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1. Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007).

2. PATRICIA ADAMS, ODIOUS DEBTS 162–70 (1991); ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 340 (1931); ALEXANDER SACK, LES EFFETS DE TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES 157–65 (1927) (It is a great misfortune for contemporary odious debt debates that only a few copies of this foundational work survive in the original French and that there is no reliable English translation.); Buchheit et al., *supra* note 1 at 1203; James Foorman & Michael Jehle, *Effects of State and Government Successions on Commercial Bank Loans to Foreign Sovereign Borrowers*, 9 U. ILL. L. REV. 9, 21–25 (1982); Anna Gelpern, *Sovereign Debt Restructuring: What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 402–06 (2005); Günter Prankenberg & Rolf Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts*, 12 INT'L J. OF THE SOC. OF LAW, 415, 425–30 (1983); Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Doctrine* 14–20 (Ctr. for Int'l Sustainable Dev. Law, Working Paper, 2003), *available at* http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf.

3. GEORGES R. DELAUME, LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT 320 (1967); DANIEL PATRICK O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW

There are, in history and the literature, three main categories of debts relevant to the doctrine: war debts, hostile debts, and corrupt debts.[4] The standard example of a war debt is the claim made by England at the end of the Boer War that it was under no obligation to repay debts incurred by South Africa during the conflict.[5] The claim made by the United States after the Spanish-American War that it was under no obligation to repay debts incurred for the benefit of Spain, and secured by Cuban goods and assets, is the most-cited case of a hostile debt.[6] The relief granted by William Howard Taft to Costa Rica in the Tinoco case provides historical footing for application of the odious debt doctrine to cases of corruption.[7] In all cases, debts that meet the requirements for designation as odious are personal to the despot and do not burden the general population now asked to pay.[8] As Alexander Sack, inarguably the father of the modern odious debt doctrine,[9] put the point,

> If a despotic power contracts a debt not for the needs or in the interests of the State, but to strengthen his despotic regime, [or] to suppress an insurgent population, etc., this debt is *odious for the population of the State as a whole.*
>
> This debt is not obligatory for the nation; it is a debt of the regime, a debt *personal* to the power that contracted it; as a consequence it falls with the downfall of this power.
>
> The reason for which these "odious" debts are not to be deemed burdens of the territory of the State is that these debts do not fulfill one of the conditions that determine the *legitimacy* of State debts, a familiar one: *State debts must be contracted and the funds used for the needs and interests of the State.*
>
> "Odious" debts, contracted and used for purposes, which, *known to the creditors*, are against the interests of the nation, do not bind the nation—in the event it is able to get free of the government that entered the contracts—except insofar as the debt

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AND INTERNATIONAL LAW 417, 452 (1967). This is true of only one train of theory, which has been accepted broadly enough to become accepted international law. Other approaches would make repayment of all inherited debts discretionary or limit lenders' collection authority. *See* Foorman & Jehle, *supra* note 2, at 11–25 (1982) (describing different theories and categories of state succession and debt).

4. There is some equivocation in the contemporary literature about whether war debts, hostile debts, and debts of corruption are all types of odious debt, or whether only debts of corruption are odious debts. *Compare* Buchheit et al., *supra* note 1, at 1212, *with* King et al., *supra* note 2, at 17–21. For present purposes, there is no need to settle this taxonomic issue.

5. A similar argument was made by the United States before the British Claims Commission in 1871 regarding debts incurred by the Confederate States of America. SACK, *supra* note 2, at 17–18.

6. *Id.* at 159.

7. Gr. Brit. v. Costa Rica, 1 R.I.A.A.369 (1923), reprinted in 18 AM. J. INT'L L. 147 (1924) [hereinafter Tinoco Arbitration].

8. SACK, *supra* note 2, at 157.

9. While Sack deserves full credit for elaborating the doctrine, like many contemporary debates, the contours of the contest over odious debt has ancient roots. *See* ARISTOTLE, THE POLITICS, bk. 3, ch. 3, ll. 5–16 (Carnes Lord trans., U. Chi. Press 1984) ("The question of [whether some are citizens] justly or unjustly touches on the dispute mentioned previously. For some raise the question of when the city performed an action and when it did not—for example, at the time when a democracy replaces an oligarchy or a tyranny. At these times, some do not want to fulfill [public] agreements on the grounds that it was not the city but the tyrant who entered into them, or many other things of this sort, the assumption being that some regimes exist through domination and not because they are to the common advantage. However, if some are run democratically in this same fashion, the actions of this regime must then be admitted to belong to the city in just the same way as the actions of the oligarchy or the tyranny.")

> produced real benefits for the state. In this regard, these creditors have committed an act hostile to the people; they cannot therefore look to the nation liberated from a despotic power to assume these "odious" debts, which are personal to the regime.[10]

The reasons—or, perhaps, rationalizations—for providing succor to nations burdened by odious debts are drawn from private-law doctrines.[11] For example, a despotic regime does not, when incurring odious debts, have actual or apparent authority to assume the burdens of the transaction on behalf of its people. Thus, familiar principles of contract and agency prevent the burden of the debt from falling on those who did not consent, did not receive consideration, or were not privy to the transaction.[12] On the other side of the agreement, lenders in odious transactions know or should know they are participating in a fraud. They may not, then, claim either bona fide status as holder of a note or clean hands in equity.

After lying fallow for several decades, the odious debt doctrine has blossomed anew in the wake of the demise of despotic regimes in the southern cone, Eastern Europe, and the Middle East.[13] In the course of this rebirth, the category of odious debts has migrated from the traditional territory of debts that are odious, by virtue of the specific relationships of the parties, to include all debts incurred by odious regimes.[14] Odious regimes, in this context, are despotic, corrupt, and wont to indulge in human-rights abuses, both as a tool for establishing and maintaining power, and to advance the interests of the regime or international investors.

Given the moral unease that sponsors the traditional doctrine, this expansion is not difficult to understand. The traditional doctrine, by requiring close examination of each debt, its conditions, the epistemic positions of the parties, and the actual use of the funds, allows that hideously evil regimes may incur redeemable debts. Whether for reasons of enlightened policy, such as prevailed under the Marshall Plan in post-World War II Germany, or through righteous but blurry application of the traditional doctrine of odious debts, the contemporary instinct is to deny full faith to almost all obligations incurred by a regime committed to systematic human-rights abuses. Why, after all, should the haloed successors to the Third Reich, Hutu Power, Sani Abacha, or Saddam Hussein be burdened by debts incurred by their predecessors? Is it not better to presume that any activity of such regimes is illegitimate and therefore incapable of binding victims to obligations incurred by their abusers?[15] Does not the new regime represent such a complete break with the past that it should get a blank

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10. SACK, *supra* note 2, at 157–58 (translation by author) (emphasis in original).

11. This is a point evidenced by other contributions to this volume, but the centrality of equity and other principles of fairness was evident in the earliest days of the doctrine, when the United States sought to cancel Cuba's debts after the Spanish-American War. *See* FEILCHENFELD, *supra* note 2, at 337–43.

12. SACK, *supra* note 2, at 39–41.

13. *See* Gelpern, *supra* note 2, at 391–94.

14. *Id.* at 410–13; Buchheit et al., *supra* note 1, at 1203.

15. King et al., *supra* note 2, at 14–15.

ledger because it is, in all relevant respects, a completely different "person"? Are we not better off in a world where lenders know that any financial support of or investment in abusive regimes is not secure and will not be repaid if good prevails over evil?

The intuitive answer to such rhetorical barrages is to expand the scope of the odious debt doctrine to allow successor states to shrug off all financial burdens incurred by an odious predecessor without requiring expensive and time-consuming inquiry into the circumstances of the debt or the effects of its proceeds. In this article, I challenge these claims and the general applicability of the odious debt doctrine to abusive regimes. The motivating force behind this challenge is a recognition of the inherent connections between odious debt debates and transitional justice.

III

ODIOUS DEBT AND TRANSITIONAL JUSTICE

Recent revision of the doctrine of odious debts is contemporaneous with an upsurge in scholarly and practical engagement with the political, legal, moral, and technical issues that arise in transitions to democracy. This coincidence is not mere fortuity. Rather, it documents the connection between the odious debt doctrine and broader considerations of transitional justice. "Transitional justice" asks what successor regimes, committed to human rights and the rule of law, can and should do to seek justice for widespread and institutional human-rights violations perpetrated by and under their predecessors.[16] Although the challenges of transitional justice are not new,[17] the subject has become critically important with the rise of an international human-rights culture and the decline of apartheid, colonialism, and communist autocracy[18]—the same phenomena that have sponsored renewed interest in the doctrine of odious debts.

The connection between odious debt and transitional justice is not necessary; but there is, as the statisticians say, a high correlation. It is certainly conceivable that we might find a despotic regime that maintains conservative accounting practices while pursuing programs of targeted abuse or a tyrant who eschews Gygean temptations while torturing and disappearing his ethnic and political rivals. However, a survey of the cases suggests that these are empty categories. More common are regimes that marry programs of abuse with embezzlement of public funds, indulge in profligate spending on military and personality cults in order to preserve personal power, commit massive outlays to perpetrate atrocities, or unlawfully convert public and private property to

16. David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORD. L. REV. 2621, 2621–22 (2006).

17. JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 3–21 (2004).

18. Gray, *supra* note 16, at 2621.

advance programs of abuse[19] and to line their pockets and those of their cronies. The funds necessary to preserve an abusive regime and to extend its program of destruction come most often from the public trough, from privatization of public goods, from resource and manufacturing deals with international corporations, or from borrowing. To put the point tautologically, odious regimes tend to accrue odious debts.

Except in rare cases, harbor is sought in the odious debt doctrine most frequently by heirs to abusive regimes. As is pointed out by other contributors to this volume, the birth of odious debt and its recent resurgence in policy and academic circles have been stimulated by the plights of heirs to regimes such as that of Tinoco in Costa Rica,[20] Sani Abacha in Nigeria,[21] and Saddam Hussein in Iraq.[22] Although heirs to less-irksome and -distasteful regimes may seek the shield of odious debts, the doctrine is more at home in cases of truly unpalatable state practice.

The close correlation between odious debts and abusive regimes is precisely the reason the core of the doctrine has migrated from odious debts to debts accrued by odious regimes. Just as not-necessarily-critical critics—many of whom are more than sympathetic to the moral impulse that girds the expansion of the doctrine—are right to point out that this move ought not to go unnoticed or unjustified,[23] the marriage of odious debt claims to transitions and transitional justice should not be denied or ignored.

All of this goes to say that, as a matter of fact, discussions about odious debt are bound up in broader debates about transitions to democracy and transitional justice that accompany liberal revolutions.[24] The point is of more than mere academic interest. The instincts for reform and justice that underlie much of the debate about justice in transitions reflect the same moral dispositions that underlie the odious debt doctrine, and particularly its contemporary focus on debts of odious regimes. For example, normal rules of state succession assume persistence of identity over time. Although personnel

19. State takings of property belonging to its citizens may violate international law when accomplished as part of a broader genocidal program. *See* Convention for the Prevention and Punishment of the Crime of Genocide, art. 2 (b) & (c), Dec. 9, 1948, 102 Stat. 3045, 78 UNTS 277 (applied in *Prosecutor v. Akayesu*, ICTR-96-4 (Trial Chamber), ¶¶ 505–506 (Sept. 2, 1998); *Prosecutor v. Rutaganda*, ICTR-96-3 (Trial Chamber), ¶ 52 (Dec. 6, 1999); *Prosecutor v. Musema*, ICTR-96-10 (Trial Chamber), ¶ 157 (Jan. 27, 2000); and *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1, 2; ICTR-96-10 (Trial Chamber), ¶¶ 115–116 (May 21, 1999)). At least one brave voice in the United States judiciary has expressed a readiness to follow these precedents by arguing that seizure of property as an element of genocide would render a sovereign state vulnerable to the jurisdiction of U.S. courts under the Foreign Sovereign Immunities Act. *See* Whiteman v. Dorotheum GMBH & Co. KG, 431 F.3d 57, 83–84 n.28 (2005) (Straub, J., dissenting).

20. Tinoco Arbitration, *supra* note 7.

21. At least in name, the Abacha family has enjoyed an ironic revision as sympathetic agents in "419 scams" run out of Nigeria against western "mugu" (fools). *See* Mitchell Zuckoff, *The Perfect Mark*, NEW YORKER, May 15, 2006, at 36.

22. Gelpern, *supra* note 2, at 394–402.

23. Buchheit et al., *supra* note 1.

24. I take this phrase from Bruce Ackerman, whose book, LIBERAL REVOLUTIONS (1994), is essential reading in the transitional justice canon.

and politics may change, the United States under the Kennedy Administration is the same "person" as the United States under the George W. Bush Administration. That continuity of identity is what gives rise to the general rule that governments must respect debts of their predecessors.

Transitions of the sort that give rise to the need for transitional justice are quite different. The shift that attends transition is not just a change of personnel, but a complete shift in normative identity. States produced by liberal revolutions are newborns, defined by their break from and opposition to the racist ontologies, eliminationist teleologies, and disarticulating uses of state power embraced by their predecessors.[25] In keeping with the shift, transitional justice is focused on the need to mark a break with the past.

One common approach to transitional justice reflects this goal by focusing criminal responsibility for past wrongs on those "most responsible." Limiting the scope of blame allows those who remain—including past victims, underlings, and passive observers—to join as comrades in the new state and to enjoy a new national identity as the community opposed to the past. This same Hegelian restructuring underlies the contemporary move toward forgiving not just odious debts, but all debts incurred by odious regimes.

Understanding the connection between transitional justice and odious debt also suggests significant practical motivations for forgiving debts incurred by an abusive regime. The fundamental challenge for transitional regimes is a disparity between needs and resources.[26] In addition to justice, new governments must ensure peace, achieve stability, reform public institutions, repair infrastructure, and institutionalize commitments to human rights and the rule of law. These demands are extraordinary, and even with aid from friendly states and international institutions, all transitions must make difficult decisions. Some of the most troubling are presented by justice initiatives. In most transitions there simply are not enough resources to pursue programs of punishment or to support adequate reparation.[27] If forgiving the debts of odious regimes can free more resources needed for justice, and if paying those debts compromises justice, then there is good reason to void those debts.

As other contributors to this volume argue, there may be significant motivation to pay even odious debts in order to buoy a new state's credit ratings.[28] Of course, these same considerations provide strong reasons to forgive odious debts in order to provide successor states with the liquidity and asset-to-debt ratio necessary to take on new debt.[29] Although the bulk of this debate is beyond the scope of this article, it is worth pointing out that the claim of odiousness solves the default problem. In cases of humdrum state succession, a

25. Gray, *supra* note 16, at 2685.

26. *Id.* at 2624–29.

27. *Id.*

28. Credit ratings of states and functionality of the international credit system have been at the center of odious debt debates since at least 1927. *See* SACK, *supra* note 2, at 11–12.

29. I am in debt to Mitu Gulati for making this point to me.

new state's refusal to pay debts incurred by its predecessor would result in default and a loss of credit capacity. By marking a debt as odious, the heir to an abusive regime negates the implied claim of persistence of identity over time, which is central to the law of state succession, and, therefore, negates any duty to repay.

The recent literature on odious debt has marked a shift in the doctrine from debts that are odious to debts of odious regimes.[30] Although this is technically an expansion of the Sackian rule, the link between odious debt and transitional justice appears to provide some explanation and, perhaps, justification, for this move. It just seems silly to start parsing the details of individual debts incurred by abusive regimes and discomforting, if not nauseating, to risk burdening former victims with debts incurred by their abusers. It would be better, the logic goes, to provide the successors to odious regimes a fresh start.

Albeit elegant, this solution to contemporary challenges of odious debt clashes with fundamental transitional justice imperatives. A more careful accounting of the connections between odious debt and transitional justice suggests three points explored in the remainder of this article. First, it discloses the need for a more expansive taxonomy of debts that might qualify for forgiveness. Second, it reveals potentially fatal objections derived from transitional requirements for truth and justice. Finally, it points toward parallel doctrines of corporate and state responsibility, which may provide an alternative solution for cash-strapped transitional regimes seeking relief from financial burdens incurred by their forebears.

IV

DEVILRY, COMPLICITY, AND GREED: A DIVERSIFIED TAXONOMY OF ODIOUS DEBTS

Viewed in Sackian terms, claims of rescission for war debts and hostile debts are not quite the same as those for debts of corruption. War debts and hostile debts are incurred for public purposes. They just benefit the wrong "public." Claims to avoid these debts are based on lack of continuity of identity, evidenced by the purposes for which they are incurred. Debts of corruption appear to be different. They deal with circumstances in which the true beneficiary of a loan is not *this* state, or *any* state, but an individual, or a small group of individuals, who took advantage of despotic privilege to liberate public wealth for private interests. The case of the Royal Bank of Canada's loans to Costa Rican dictator José Federico Alberto de Jesús Tinoco Granados provides the paradigm example.[31]

In the summer of 1919, as his two-year rule drew to a close, Tinoco arranged an exchange of cash from the Royal Bank of Canada for debt instruments issued by Banco Internacional de Costa Rica. When his regime crumbled,

30. Buchheit et al., *supra* note 1, at 1203.

31. Tinoco Arbitration, *supra* note 7.

Tinoco absconded with the funds. The successor government denied any obligation to repay, arguing that the Tinoco regime had been illegitimate, had not been internationally recognized, and could not even have been regarded as the *de facto* government of Costa Rica. Given these circumstances, it was argued that the debts were illegitimate and that the government of Great Britain, which, with the United States and France, had refused to recognize his regime, was estopped from seeking repayment on behalf of its subject bank.

The case was arbitrated before Chief Justice William Howard Taft, who found that the new Costa Rican government could not void unilaterally all financial obligations incurred by the Tinoco regime based on claims of illegitimacy. However, on a close analysis of the factual record, Chief Justice Taft further found that the circumstances of the loans in question were so irregular that they could not be regarded as debts of the state. Given domestic circumstances at the time of the loan, that the proceeds had been paid directly to Tinoco,[32] and Tinoco's reputation for corruption, Chief Justice Taft found that the loans had not been made in good faith and had been personal to Tinoco.[33] The interpolation of patent corruption converted an otherwise valid state obligation to an odious debt.

Pressure to expand the odious debt doctrine reflects the failure of its traditional focus on corruption to account for a variety of pre-transitional sins. The debts and transactions that support abusive regimes are more diverse than simple loans. Traditional odious debt doctrine therefore fails to capture many of the evils of abusive regimes and the variety of financial burdens left for their successors.[34] The expansion of odious debt to cover all debts of odious regimes reflects an effort to provide some solace by spanning this lacuna.

If the foregoing is true, then most abusive regimes do, as a matter of fact, incur corrupt debts. However, they also incur many obligations that are, while plainly necrotic, not odious in the sense of being corrupt. Consider these not-so-hypothetical examples:

1. In order to finance an agenda of internal repression and institutionalized human-rights abuses, a despotic regime borrows capital from foreign sources.
2. In order to fund and support a cult of personality embraced by the bulk of the nation, a despotic regime incurs foreign financial obligations.
3. An abusive regime enters contracts with an international corporation to supply materials and resources for concentration camps or other

32. *Id.* Most of the funds in question were dispersed "for expenses of representation of the Chief of State in his approaching trip abroad," and for four years' salary and expenses for the newly appointed ambassador to Italy, Frederico's brother, Jose Joaquin Tinoco. *Id.*

33. *Id.* at 176. Based on this finding, Chief Justice Taft limited recovery to the value of a mortgage on a personal estate, which had been secured as interest against the government's obligations to the Royal Bank of Canada. *Id.*

34. Gelpern, *supra* note 2, at 410–13.

detention centers constituted and operated in violation of international human-rights law.

4. In order to fight an insurgency, a regime uses international financing to purchase arms and resources necessary to effect violent suppression and human-rights abuses.[35]
5. In order to consolidate power and financing, a despotic regime sells extraction rights to national resource wealth under terms unfavorable to the nation.
6. In order to acquire unique infrastructure or expertise necessary to carry out a program of repression and abuse, a despotic regime enters extensive contracts with an international corporation.
7. A despotic regime enters commercial contracts with foreign companies and engages in human-rights abuses in support of these transactions.
8. With the support or complicity of an abusive regime, an international corporation acquires private property with state sanction but in violation of international law.
9. A despotic regime supplies slave labor to an international corporation in order to entice and secure industrial investment and development.
10. As a consequence of policy and complicity, an infrastructure project supported by international investment causes major health epidemics.
11. An international corporation continues vigorous trade with and investment in an odious regime.
12. An abusive regime privatizes public works and sells them to an international corporation, which establishes a pricing structure that effectively denies access of primary resources to a substantial portion of the citizenry.

Although far from complete, these examples represent highlights from the spectrum of international financial commitments assumed by odious regimes that might raise the moral bile of a successor asked to assume the burden. They also provide some indication of higher categories that populate an expanded taxonomy of odious debts. Types of conduct comprise a core category. Pursuit of ethnically, religiously, or racially targeted violence is iconic, but odious regimes are often also condemned for labor abuses, irresponsible environmental practices, and exploitation of public goods and resources. The level of engagement by foreign debtors and investors in such activity populates another important category and includes direct engagement with, approving support of, and profiteering from, foul practices. A closely related category identifies different levels of overall engagement with the odious regime. A survey of the headlines eliminates the need to use imagination to combine these

35. Sack, of course, identifies such expenditures as odious to the extent that the insurgency is the true representative of the people and their interests. SACK, *supra* note 2, at 158. To draw such a distinction, however, both is difficult and invites appeals to victor's justice.

elements to form different species of debts and financial burdens, which our moral sense suggests should be subject to rescission.

Though a rough sketch, the foregoing is sufficient to make the point that the contemporary expansion of the odious debt doctrine is meant to capture a family of transactions, which, while not strictly corrupt, occupies a spectrum of engagement by foreign investors with malodorous regimes ranging from the active to the passive—from devilry to complicity. At its core, the expansion is meant to remove from the backs of the abused the burden of paying benefits to those who were at least complicit in their victimization.

V

DEVILRY AND COMPLICITY REEXAMINED: THE UNCOMFORTABLE TRUTH ABOUT ATROCITIES

It is not immediately clear that traditional odious debt doctrine cannot deal with cases of sponsorship of, acquiescence in, or profit from, human-rights abuses, and other species of devilry and complicity that populate the phyla of financial burdens incurred by an odious regime. In fact, quick consideration suggests that it can. The Sackian rule allows a new state to repudiate commitments entered into by its predecessor if 1) the predecessor was a despotic regime, 2) the financial burdens assumed by the predecessor were without the consent of the population, 3) the debts were not in the general interests of the state, and 4) the lender knew the nature of the circumstances. Whereas corruption may provide the paradigm by substituting the interests of individuals for the interests of a nation, there is nothing in the broad language of general interests to exclude, inter alia, programs of state repression or institutionalized human-rights abuses.[36] While initially appealing, this move is too quick.

When reviewing the activities of odious regimes, it is tempting to think that the kind of institutionalized human-rights abuses that define the class could only have been the products of evil, irrational, or savage people.[37] Normal people, people *like us*, could never do what *they* did—at least not willingly.[38] It is equally tempting to think that responsibility for abuses perpetrated by odious regimes resides with a relatively small number of elites who are wont to feed their greed through corruption. To indulge either temptation would be to misunderstand abusive regimes.[39]

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36. Sack so suggests. *See* SACK, *supra* note 2, at 158.

37. *See* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS 111, 112–15 (Stephen Shute & Susan Hurley eds., 1993).

38. *See* DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 14 (1996).

39. This argument is made in more elaborate fashion in Gray, *supra* note 16, at 2624–38.

Contrary to these intuitions, the worst offenses of odious regimes are most frequently perpetrated with the support of average citizens.[40] To borrow from Daniel Goldhagen, genocide and other mass atrocities simply could not occur without the participation and aid of "willing executioners."[41] Furthermore, responsibility is not limited to a handful of elites. Odious regimes are defined by widespread complicity in abuses.[42] Political leaders, military personnel, executive officials, and police are the most prominent,[43] but are joined by tens of thousands of citizens who provide necessary support for programs of abuse through activities ranging from substantive participation to tacit support through denial. In the worst environments, citizens turn on their spouses, friends, and neighbors,[44] and victims turn on each other.[45] When it is time to assign responsibility, then, tens of thousands usually have a share.[46]

It is difficult to comprehend how so many otherwise normal people could engage in or provide support for abuses perpetrated by and under odious regimes. The answer lies in the fact that the institutionalized and systematic human-rights abuses perpetrated by and under odious regimes are not a coincidental collection of independent acts. These events happen for a reason.[47] These reasons, as cause and justification, are found in a social ontology, historical teleology, and a narrative truth that present abusive practices as rational or, in some cases, necessary.[48] Elsewhere I have referred to this complex

40. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 115 (1998); GOLDHAGEN, *supra* note 38, at 164–66; *See also,* Rorty, *supra* note 37, at 112–15.

41. GOLDHAGEN, *supra* note 38.

42. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, *in* TRANSITIONAL JUSTICE VOL. I, 3, 13 (Neil Kritz ed., 1995).

43. GOLDHAGEN, *supra* note 38, at 164–78.

44. This was true in Rwanda, *see generally* GOUREVITCH, *supra* note 40, and in Macedonia, *see* Julius Strauss & Christian Jennings, *Spectre of Ethnic Cleansing Resurrected*, DAILY TELEGRAPH, June 27, 2001, at 13.

45. ELSTER, *supra* note 17, at 152–53; ALEX BORAINE, A COUNTRY UNMASKED 128 (2000); Keynote Speech of Aryeh Neier, *in* DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 1, 4 (Alex Boraine et al. eds., 1994).

46. JAIME MALAMUD-GOTI, GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE, 22–26 (1996); SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 214 (1991) (quoting Vaclav Havel, *New Year's Address*, UNCAPTIVE MINDS, Jan.–Feb. 1990, at 2.

47. GOUREVITCH, *supra* note 40, at 180. This should not be confused with cultural or social determinism. The point is that certain social conditions are *necessary* for mass atrocities. Social mores do not act, however, and just as individual choices and actions are necessary to produce atrocities so are individual moral failures. *See* GOLDHAGEN, *supra* note 38, at 20–22.

48. *See* Gray, *supra* note 16, at 2629–36, GOUREVITCH, *supra* note 40, at 95 ("Genocide, after all, is an exercise in community building."); GOLDHAGEN, *supra* note 38, at 14–15 ("Who doubts that the Argentine or Chilean murderers of people who opposed the recent authoritarian regimes thought that their victims deserved to die? Who doubts that the Tutsis who slaughtered Hutus in Burundi or the Hutus who slaughtered Tutsis in Rwanda, that one Lebanese militia which slaughtered the civilian supporters of another, that the Serbs who have killed Croats or Bosnian Muslims, did so out of conviction in the justice of their actions? Why do we not believe the same for the German perpetrators?").

social truth as "the abusive public face of law"[49] to recognize the symbiosis of social norms and officially sanctioned institutional conduct. Examples of the effects of an abusive public face of law are ubiquitous and are familiar to odious debt debates. For example, the Nazi Holocaust was sustained by an "eliminationist anti-Semitism"[50] that foretold a complete eradication of European Jews.[51] A dehumanizing ontology, in combination with a historical ontology, was at the center of atrocities perpetrated in Bosnia, where abusers did not see themselves as committing offenses because they did not view their victims as humans.[52] The Rwandan genocide was sustained by a historical ontology in which tall and light-skinned Tutsis were aggressors from the North to be sent back on the waters that brought them.[53] Argentina's "Dirty War" allowed state agents a sense of righteousness as they tortured, murdered, and disappeared thousands in the name of a global battle against communism.[54] Sectarian and racial animus played a central role in Saddam Hussein's regime, as they did in the civil war that persisted after he was deposed.

The public face of law in abusive regimes and the role it plays in individual actions highlights a critical difference between normal criminal activity and abuses committed by and under abusive regimes without obscuring the importance of heterogeneity among pre-transitional states. Odious regimes rule "burdened" societies.[55] Atrocities committed by and under abusive regimes reflect an operating set of socially generated and publicly circulated beliefs,

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49. Gray, *supra* note 16, at 2629. Elemental to an abusive public face of law are a social ontology and a historical teleology. *See, e.g.*, GOUREVITCH, *supra* note 40, at 47–62, 96–131; GOLDHAGEN, *supra* note 38, at 27–164; MALAMUD-GOTI, *supra* note 46, at 71–99; CARLOS S. NINO, RADICAL EVIL ON TRIAL 41–60 (1996); Rorty, *supra* note 37, at 112–15. Social ontologies are normalized typologies in which individuals are categorized and situated hierarchically. Teleologies provide abusive regimes with an account of the current conflict in a broader historical context defined by a natural "end of history." Referring to this background, abusive regimes solve current disorder by devising and executing strategies designed to make the real world better approximate their ideal end of history. This "final solution" often means eliminating the target group entirely.

50. GOLDHAGEN, *supra* note 38, at 49–128.

51. ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 11 (1993) ("A review of some of the fateful occurrences that eventuated in the Nazi 'Final Solution to the Jewish Question' will demonstrate that the exterminative activities were the outcome of, among other factors, a virulent antisemitism."); SIMON WIESENTHAL, EVERY DAY REMEMBRANCE DAY 15 (1987); *see generally,* JOSHUA TRACHTENBERG, THE DEVIL AND THE JEWS: THE MEDIEVAL CONCEPTION OF THE JEW AND ITS RELATION TO MODERN ANTI-SEMITISM (1983); JEREMY COHEN, THE FRIARS AND THE JEWS: THE EVOLUTION OF MEDIEVAL ANTI-JUDAISM (1982).

52. Rorty, *supra* note 37, at 112–16.

53. GOUREVITCH, *supra* note 40, at 47–62; *see also* Collette Braekman, *Incitement to Genocide, in* CRIMES OF WAR 192 (Gutmann et al. eds., 1999); HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY (1999), *available at* http://www.hrw.org/reports/1999/rwanda.

54. MALAMUD-GOTI, *supra* note 46, at 71–145; NINO, *supra* note 49, at 44–50; Guillermo O'Donnell, *Modernization and Military Coups: Theory, Comparisons and the Argentine Case, in* ARMIES & POLITICS IN LATIN AMERICA 96 (Abraham Lowenthal & Samuel Fitch eds., 1986); Alexandre Barros & Edmundo Coelho, *Military Intervention and Withdrawal in South America, in* ARMIES & POLITICS IN LATIN AMERICA 437–43; *The Doctrine of National Security Places Argentina Firmly Within the Framework of the Conflict Between the Superpowers in a Third World War, in* NUNCA MÁS: THE REPORT OF THE ARGENTINA NATIONAL COMMISSION ON THE DISAPPEARED 442 pt. V (1984), *available at* http://www.nuncamas.org/english/library/nevagain/nevagain_001.htm.

55. JOHN RAWLS, THE LAW OF PEOPLES 5, 106–13 (1999).

which, in combination with institutional practices and government policies, form a public face of law that at least does not forbid odious conduct by states.

All of this may seem an awkward distraction. Its relevance to odious debt debates is obvious, however, upon a return to first principles. In order to classify a debt or other financial burden as "odious," the initial commitment must have been without the consent of the population and contrary to the general interests of the state and nation at the time it was entered into. The hypothesis under scrutiny in this section is that many of the engagements of odious regimes that appear to stretch the traditional doctrine are part of programs of abuse not in the general interests of the state or nation. Therefore, it is argued, commercial engagements that advance programs of abuse may be classified as odious and as such are subject to unilateral repudiation by a successor state. Clarifying the role of an abusive public face of law cuts off this move.

Although nauseating, the fact is that institutionalized abuses are in the general interest of the state and the nation as it was broadly understood under the odious regime. This is not to say that the abuses were in the interests of the abused, as Aristotle or his brilliant, contemporary acolyte Martha Nussbaum might define them.[56] Patently, they were not. Nor is it to suggest that abuses advanced the Platonic true interests of the state and nation as a whole, for they never do.[57] However, the interest of the state and the nation as it operates on the ground is defined not by individual interests or by the aggregation of citizens' personal interests, but by that collection of social commitments which form the public face of law and constitute the core of national identity.[58] In carrying out programs of abuse in odious regimes, leaders and participants did what prevailing social beliefs thought necessary to preserve and extend the interests of the state and the nation as those interests were then defined. To apply the traditional odious debt doctrine in these circumstances would be naïve or revisionist.

An honest assessment of the unique conditions that define abusive regimes also raises serious doubts about the applicability of the consent arm of the odious debt doctrine. "Consent" in any large state is a political rather than a demographic concept. It refers to the political legitimacy of state actions, not

56. Although she shares the stage with Amartya Sen, among others, Professor Nussbaum is a leading proponent of the "capabilities approach" movement, which aspires to define alternative metrics of economic growth and vitality better attuned to basic issues of social justice than Gross Domestic Product and other high-level indicators. *See* MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE (1999); AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (1982); Martha Nussbaum, *Human Capabilities: Female Beings*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61–104 (Martha Nussbaum & Jonathan Glover eds., 1995); *see also* Jedediah Purdy, *The New Biopolitics: Autonomy, Demography, and Nationhood*, 4 BYU L. REV. 889 (2006).

57. Statement of Senator John McCain on Amendment Establishing the Army Field Manual as the Uniform Standard for Interrogation of Department of Defense Detainees, July 25, 2005, *available at* http://mccain.senate.gov/press_office/view_article.cfm?id=150.

58. *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

poll numbers. Giving due recognition to the political positions of despots at the heads of deeply pathological states often reveals broad support for the onto-teleological self-conceptions that sustain programs of abuse. This support may be culturally inevitable or historically fleeting, inspired by temporary hysteria and the success of personality cults. Either way, the brutal and uncomfortable truth is that human-rights abuses performed by many abusive regimes do claim a degree of legitimacy from significant portions of the politically enfranchised population. Abusive regimes simply could not achieve what they achieve without the socio-psychic and concrete support of their "willing executioners."

This same concern applies equally to versions of the odious debt doctrine that focus on rules of agency rather than the terms of the transaction. In her contribution to this volume, Deborah DeMott provides an enlightening discussion of this approach to the problem of odious debts and the debts of odious regimes.[59] The present article cannot hope to recapture the nuance and insight of her analysis, but the basic case for an agency-grounded doctrine is fairly straightforward. In cases of corruption, the tyrant steps out of his fiduciary role, using his position of power and authority to advance his own personal agenda rather than that of the state and the people who, as principal, have endowed him with agency authority. Rescission by the principal is justified in these circumstances because the tyrant was not acting as agent and the other transacting parties knew, or should have known, that this was so.

Cut down to its basic elements, the agency-law version of traditional odious debt doctrine faces the same challenges as the transaction rule when applied to the expanded category of financial burdens incurred by an odious regime. Financial engagements entered into with the purpose of supporting an abusive regime and its pogroms are within the agent role of the tyrant because he is engaged in policies that find footing in the goals and beliefs of the imagined community that acts as his principal. In such circumstances, unilateral rescission in transition based upon agency principals seems no more defensible than approaches drawn from the law of contracts.

Unfortunately for odious debt advocates, the damage done by a closer examination of the connection between odious regimes and their principals may not be limited to ground newly won by contemporary efforts to expand the doctrine. In some regimes, the self-dealing, personal enrichment, profligate personal spending, and embezzlement that form the core of simple corruption may not be corrupt. Cults of personality constructed around many tyrants and their regimes provide popular support for the personal enrichment of the great leader. In some transitions, then, the traditional rules on odious debt may be forced to give way not only in the relatively new territory of debts of an odious regime, but also in cases in which an honest assessment of pre-transitional

59. Deborah A. DeMott, *Agency by Analogy: A Comment on Odious Debt*, 70 LAW & CONTEMP. PROBS. (forthcoming Autumn 2007).

conditions reveals that what appears to be corruption is actually a perverse form of statesmanship.

VI

FURTHER CONSEQUENCES OF COMPLICITY: THE INTERNAL CONNECTION BETWEEN ODIOUS DEBT AND OBLIVION

Connecting current debates about odious debts and the debts of odious states to broader conversations about transitional justice has so far presented some significant concerns. However, the astute reader may have spotted a tempting opportunity among the dangers. The traditional odious debt doctrine is an exception to the international law of state succession and subsidiary rules on the assumption of state debt. Although complicated in its details, the fundamental rule is easy to grasp. All states endure changes over time. Leadership changes, sometimes peacefully, and sometimes not. The population changes, frequently through immigration, but always due to the cycles of human life. Geographic borders move as well. The core of the law of state succession is that a state enduring these inevitable changes maintains its identity over time despite sometimes significant shifts in public ethos.

There is reason to think that this general claim of persistence of state identity over time may not apply in transitional states. By definition, transitions to democracy mark a deep and definitive break with the past. Transitional regimes identify themselves in positive opposition to the pathological past and their predecessors' opacity, policies of systematic human-rights abuses, and disarticulating uses of power. Abusive regimes are defined by an abusive public face of law and coordinated policies of abuse. By contrast, states engaged in liberal revolution are committed to democracy, human rights, and the rule of law. Given the degree of this break, and the wholesale changes in practice and normative identity that accompany transition, it seems plausible to think that traditional rules of state succession do not create a link in identity between transitional regimes and their predecessors sufficient to justify claims of identity over time. It seems to follow that transitional regimes are entitled to a clean slate, providing them the capacity to advance their reform projects unfettered by financial burdens incurred by their predecessors in support of odious agendas.

There is certainly some support for this view in the literature.[60] As Anna Gelpern has pointed out, the odious debt doctrine is little used, in part due to the difficulty of supporting the claim that a particular regime change is sufficiently profound that the successor can credibly claim "that it is fundamentally a different entity."[61] To her and others, however, the countries at issue in contemporary transitional justice debates—Liberia, Iraq, Rwanda, and

60. *See, e.g.*, Gelpern, *supra* note 2, at 405–07; King et al., *supra* note 2, at 13–21.

61. Gelpern, *supra* note 2, at 407.

the like—present such extreme cases that if they cannot qualify for the doctrine then the whole discussion of odious debts is academic.

The ability of a transitional state to void debts associated with past atrocities also appears to promise a number of benefits directly tied to both the practicalities and the symbolism of transition. A defining challenge of transitions is the disparity between needs and resources.[62] By voiding past debts, transitional governments can free considerable resources for use in advancing critical goals of reform, reconstruction, restitution, and justice. In addition, by highlighting the connection between odious debts and past wrongs, repudiation itself may provide moral and political redress.[63] It may also preserve the creditworthiness of a new regime, where a refusal to repay debts might otherwise have deleterious consequences for its capacity to attract new loans and investment, further compromising transitional goals.[64] In recognition of the clean break with the past represented by transition, the collected weight of these considerations appears to provide conclusive grounds for application of odious debt rules to cover all debts of odious regimes.

Though perhaps initially attractive, this view is in deep tension with a core value and practical necessity of transitions: Truth. Countries exiting periods marked by institutionalized human-rights abuses face a fundamental choice between truth and oblivion.[65] They may choose to face their past and uncover the complete truth about what occurred in all its dimensions, forensic, narrative, social, political, and criminal.[66] Alternatively, they may choose to obscure the truth, in whole or in part, in the shadow of a perceived necessity to just move on. Partial or complete oblivion is usually packaged and sold in these wrappings of practical necessity. Citing threshold needs to negotiate with despots to step down, later dangers of backlash, or leaning on psychological necessity, many transitions have indulged to some degree in oblivion.

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62. Gray, *supra* note 16, at 2624–29.

63. Gelpern, *supra* note 2, at 407.

64. *Id.* at 406–07. *See also* William Bratton & Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 14–16 (2004), for an account of how creditworthiness, as a goal married to reputation costs, is a critical element of states' debt psychology. Gelpern ultimately advocates debt restructuring over repudiation, in part due to these concerns. Gelpern, *supra* note 3, at 409–11.

65. *See* Pablo De Greiff, *Trial and Punishment: Pardon and Oblivion*, PHIL. & SOC. CRIT., May 1996, at 93, 105.

66. *See* Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 22, 33–42 (Robert I. Rotberg & Dennis Thompson eds., 2000); Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647, 667 (1999). I have elsewhere argued in favor of limiting criminal trials in transitions to those at the very top of an abusive regime who were directly exposed to the threats and demands of international human-rights law. Although controversial, that view is derived from a dogged commitment to truth in transitions. The great promise of truth commissions as an alternative to criminal trials is their capacity to provide an expanded truth and a more complete account of the past unencumbered by the procedural niceties of criminal trials and the personal motivational conflicts inspired by threats of punishment. In earlier work on these issues I describe how a program of limited prosecutions requires a parallel program of truth commissions and expands their capacity to develop a complete account of the past. *See* Gray, *supra* note 16, at 2682–92.

Elsewhere I have made the case that the real mass of arguments for oblivion is in the threat of punishment and that, if this threat is removed, resistance to change can give way to positive motivation to participate actively in truth commissions and reform movements.[67] Part of that argument makes the point that the practical advantages of oblivion, to the extent they exist at all, are short-lived, and come at great cost. For example, by failing to comprehend fully the source and nature of the multi-faceted abusive public culture that allowed past wrongs, oblivion leaves in fertile soil the seeds of regression. Transitions to democracy inevitably entail hardship. Facing these economic, political, and social challenges, a population allowed to indulge in oblivion is vulnerable to revisionism, raising additional danger of regression. Oblivion also limits the amount of recognition afforded to victims.

These same concerns apply equally here. Whereas application of the odious debt doctrine to the debts of odious regimes requires some illumination of the past, it is by necessity a limited production. To mark a past regime as odious and to document the participation of debtors, financiers, and investors in past abuses, those seeking to expand the traditional doctrine of odious debt must document what happened in the past. However, they must also indulge in oblivion with respect to the "who" and the "why." Earlier in this article the point was made that the abusive regimes that have inspired expansion of the odious debt doctrine enjoy the broad complicity of large segments of their domestic populations. Expansion of the odious debt doctrine to cover all debts of such regimes entails a compromise against truth because, by necessity, it must deny this broad complicity.

Odious debt designates certain classes of "national" debts as personal to a despot and his close circle of ruling elites. As a function of this move, application of the odious debt doctrine denies broad participation and complicity, limiting responsibility for the past to the core elite. The oblivion that this move entails brings with it a number of concerns. First, it compromises the capacity of a transition to seek full redress for past wrongs by assigning responsibility too narrowly. Second, it denies victims full recognition of what they have suffered by designating a scapegoat who, while hardly innocent, also cannot bear the full responsibility. The oblivion implied by expansion of the odious debt doctrine also provides an effective amnesty, by revisionist fiat, for the broad core of the population who had an active or a tacit hand in past abuses. Finally, by sanctioning this limited revisionism, and by allowing broad categories of those complicit in past wrongs to hide behind the oblivion of limited assignments of responsibility, expanding the odious debt doctrine to cover all debts of odious regimes leaves in fecund soil the seeds of the same abusive culture that sustained past abuses.

The rallying cry of transitions is "Never Again." However, without completely illuminating and confronting the truth about the past, including

67. *Id.* at 2683–89.

broad complicity, and without understanding the underlying dynamics of a culture of violence, we are doomed endlessly to repeat ourselves. Without the critical self-reflection that attends a full accounting of broad complicity, transitions face an abiding danger of regression to old and familiar ways when hard times open the door for identity politics.

In addition to denying the moral and existential guilt of the domestic population, expansion of the odious debt doctrine also provides an easy opportunity for debtors and investors to escape responsibility. By definition, application of the odious debt doctrine designates a financial obligation as personal to a despot by virtue of his malfeasance. The doctrine does not void the debt entirely, but only points out that the former victims should not have to pay. Debtors are free to pursue satisfaction from the despot himself.[68]

This, of course, obscures the affirmative responsibility that international lenders and investors may have for the abuses perpetrated by the odious regime. Although the level of responsibility varies widely, from passive complicity[69] to affirmative participation,[70] those who provide financial support for an odious regime must assume a share of the responsibility for abuses perpetrated by that regime. By assigning exclusive responsibility to a despot, expansion of the odious debt doctrine to cover debts of odious regimes also allows international investors and debtors to obscure their responsibility in a shroud of oblivion.

That veil is particularly opaque in these circumstances because the proposed expansion of the odious debt doctrine makes unnecessary specific findings of fact with respect to any individual debt of an odious regime. All that is necessary is to find that the regime itself was odious, and a unilateral right to rescind follows as a matter of course. This is dissatisfying both from a moral point of view, and—as is elaborated in the next section—from a practical point of view. It allows these institutions to avoid investigations that might uncover uncomfortable truths. It also permits them to escape duties of repair consequent of those findings. Finally, the veil of an expanded odious debt doctrine will ultimately limit the use of corporate liability as a stick for controlling conduct going forward.

The moral rebirth of states and individuals is impossible to achieve with the crude tool of oblivion. Transitional states may engage in wholesale governmental reform and completely change their political practice; but

68. This, in fact, was part of the judgment in the Tinoco case, in which Chief Justice Taft allowed the Royal Bank of Canada to attach property in Costa Rica belonging to the Tinoco family. The new regime was estopped from making a claim of right over the same property in light of its argument for rescission based on the odious debt doctrine. *See* Tinoco Arbitration, *supra* note 7.

69. On this end of the spectrum are garden-variety financial engagements that do no more than enhance the economic viability of an odious regime, without directly profiting from abuses.

70. This end of the spectrum is populated with corporations that, as an essential feature of their financial engagement with an odious regime, actively engage slave labor, takings in violation of international law, transgressions of environmental laws, or that condone the use of violence by state or private security forces.

national character, like individual character, persists, directing the innumerable small acts that, woven together, both *shape* who we are, and *are* who we are.[71] True reform can be achieved only by facing the reality of a guilty past and carrying it into the future as a fundamental element of identity, as a reminder of past mistakes, and as a check on reversion.

Without full consciousness of the past as an element of the present used to illuminate practice and decision, nations and citizens are doomed to repeat their shame in the throes of amnesiatic fugues, or through the collected weight of a thousand small practices that, while comfortably familiar, were elemental to past evils. Oblivion cloaked in attractive platitudes of clean slates and calls to just move on obscure the significance of these patterns of existence behind veils of ignorance and denial. Although devotees of pop psychology and cheap religion can afford such indulgent follies, in transitions there is simply too much at stake.[72]

All this might seem a little heavy. We are, after all, just talking about some bank accounts. The point, of course, is that there is real danger in that simplification. Repudiating debts of odious regimes by identifying a clean break between the past and the present entails denial of the devilry, complicity, and greed that feed the institutionalized abuses characteristic of pre-transitional regimes. Expanding the odious debt doctrine to cover all debts of odious regimes implies a break between past and future. It therefore fails fully to uncover the truth behind burdened societies and threatens to compromise the transitional imperative of truth. In addition, by moving the financial burden from the nation as a whole to the former despot as an individual, an expanded odious debt doctrine fails to account for the reciprocal devilry, complicity, and greed of domestic and international agents. That is a pretty high price to pay for an accounting loophole.

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71. Michel Foucault made a career elaborating this point. I have argued elsewhere that this focus on microphysics is the key to personal and collective reform. *See David Gray, Post-Archeological Revolutions,* Paper delivered at the Conference on Moral and Political Philosophy, Michigan State University, Oct. 6, 2000 (on file with author).

72. There is nothing in this argument that threatens traditional odious debt doctrine. If a transitional state has a financial commitment to a debtor or an investor incurred by its predecessor and the benefits of that investment were lost to corruption and greed, those commitments are voidable under Sack's widely accepted principles of odious debt, except perhaps in extreme cases in which corruption is publicly sanctioned by an extreme cult of personality. At stake in the present conversation are other commitments made by an odious regime which, it is argued here, cannot be captured by traditional odious debt rules and ought not to be subject to rescission by odious debt principles because so doing would compromise truth and justice. That conflict arises only in cases of financial commitments implicated in human-rights abuses consequent of an abusive public face of law. Debts that present transitional governments with this uncomfortable circumstance impose a responsibility on debtors to compensate those victimized by corporate devilry, complicity, or greed. *See infra* Part VII.

VII

A DOCTRINE OF ABUSIVE DEBTS: STAYING AFLOAT IN DEEP MORAL WATERS

Having come some distance in a short time, it is worth a moment's pause to consider our surroundings. The traditional core of the odious debt doctrine deals with simple corruption, war debts, and hostile debts. With the possible exception of some personality cults, this article has nothing to say against rescission of such debts. The arguments here address recent efforts to expand the doctrine to provide a more general right to void all debts incurred by an odious regime. Though intuitively appealing, these efforts fail to confront the reality that abusive regimes operate with the support or complicity of much of the nation. Expansion of the odious debt doctrine entails denial of that engagement and therefore indulges in revisionism and oblivion, which carries moral consequences for victims, abusers, intermediate participants, and the new nation they share. It also presents practical concerns relating to the long-term stability of a successor state if it fails to confront its past and to integrate full accountability as an abiding part of politics and practice going forward. In addition, expansion of odious debt rules to cover all debts of odious regimes lets debtors off the hook, by failing to force them to confront their responsibility for past wrongs through acts of devilry, complicity, and greed.

The paradigm cases implicated by this argument are those truly vile regimes that engage in systematic human-rights abuses. As Part IV points out, however, the taxonomy of cases involved in recent attempts to expand the odious debt doctrine is much more diverse. Labor abuses, for example, almost always prey on persistent indigenous views of race, class, gender, or religion. This is particularly true in many oil regions of the southern hemisphere where the remnants of colonialism have allowed a class of ruling elites to violate the human rights of subjugated groups in order to provide labor, land, and oil rights to international conglomerates for extraction and pipeline projects.[73] These abuses are of a kind with grander schemes of genocide in that they rely on the same elements of an abusive public face of law that sustained the Nazi regime, Hutu power, and the Argentine juntas. Oblivion occasioned by application of the odious debt doctrine in these circumstances therefore plays the same role of preserving past injustice and ensuring future trauma as it would in more extreme cases. It follows that obligations accruing from such transactions may not be subject to repudiation as odious debts.

None of the foregoing says anything about the traditional role for the odious debt doctrine as a check against corruption, with the possible exception of extreme personality cults. The totality of the impact of the argument advanced

73. Doe v. Unocal, 395 F.3d 932, 937–42 (9th Cir. 2005); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92–93 (2d Cir. 2000); Presbyterian Church of Sudan v. Talisman Energy, Inc., 2006 U.S. Dist. LEXIS 86609 (S.D.N.Y. 2006); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 22 (D.D.C. 2005); Mujica v. Occidental Petroleum Co., 381 F. Supp. 2d 1164, 1168–69 (C.D. Cal. 2005); Bowoto v. Chevron, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004).

here is against expansion of the doctrine to cover the debts of odious regimes when the conduct identified as odious is derivative of prevailing social, political, and legal sentiments. The claim is that application of the odious debt doctrine in these circumstances would do a greater injustice by acting in concert with other forces to hide the truth about the past. In order to achieve a full account of the past, both for its own purposes and at the service of preventing future harm, a transitional state must take full account of the widespread devilry, complicity, and greed at the heart of past abuses. Absent this accounting, it must face persistent injustice, revisionism, and the promise of future tragedy. A complete commitment to truth will often require a transitional state to face the fact that financial burdens incurred by its predecessor were at the service of the state in the throes of a pathological condition to which many of its citizens were contributors.

The consequence of this argument is troubling. If the foregoing is true, then burdened societies do not have a right to, and ought not to, unilaterally disavow debts incurred by their predecessors. This occasions some concerns. There are good reasons, both fiscal and psychic, that a transitional regime might not want to recognize and repay debts attached to past abuses. Repayment certainly imposes economic strain, and may compromise pursuit of other transitional goals. There is also something malodorous about permitting foreign financiers, whose devilry and greed has made them complicit in past wrongs, to profit at the expense of victims and a transitional state. However, as has been argued here, expansion of the odious debt doctrine to remove this stench raises the specter of revisionism and compromises critical efforts to preserve broad moral accountability for pre-transitional abuses. In short, transitional regimes burdened by the financial obligations of their predecessors face a dilemma. On one horn, they accept the burden to repay debts tied to the vile activities of an odious predecessor. On the other, they indulge oblivion, compromising goals of truth and full accountability.

Faced with such unsavory options, transitional states may find significant solace in a developing body of international law that imposes on corporations liability for their participation in human-rights abuses.[74] By appealing to these norms, and by imposing duties of restitution and repair upon those who provide financial support for odious regimes, transitional states can avoid being impaled on either horn.

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74. The foundations for corporate liability for human-rights violations were laid at Nuremberg in the Krupp and Farben cases. *See* Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations*, 20 ST. JOHN'S J. LEGAL COMMENT. 287, 291–92 (2006); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon*, 20 BERKELEY J. INT'L L. 91, 104–19 (2002). That foundation has been shaped and added to in recent cases in United States Courts testing causes of action against multi-national corporations under the Alien Tort Claims Act and the Torture Victim Protection Act. *See supra* note 73. More recently, the United Nations Commission on Human Rights adopted *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev2, 26 Aug. 2003, which provides a condensation of duties and responsibilities of corporations under international law.

Whereas human rights was once solely the purview of states, the intersection of a number of global phenomena in recent decades has established the duties, responsibilities, liabilities, and potential of non-state actors in the field of international human rights.[75] For example, much recent attention has been given to the role of the World Trade Organization and the World Bank in ensuring respect for international human rights. Although initially icy to the prospect of mixing economics and politics, these International Financial Institutions (IFIs) now routinely integrate "conditionalities" linking financial support to good governance. More recent policy papers demonstrate an expanded vision of the inherent links between fiscal health and human rights, foretelling a complementary expansion of conditionality practice.[76]

At the same time that IFIs have gotten into the carrot business, international corporations and private financial institutions have increasingly been subjected to the stick. Tort actions alleging corporate liability for human-rights abuses have become a cottage industry in U.S. courts in recent years with the renaissance of litigation under the ancient Alien Tort Claims Act and the more modern Torture Victim Protection Act.[77] Particularly noteworthy have been cases pursuing compensation from individuals, corporations, and financial institutions for their involvements with the Third Reich and their profits from the Holocaust and its victims.[78] But equally significant have been suits brought against corporations for their complicity in abuses of more recent vintage in Indonesia,[79] Burma,[80] Sub-Saharan Africa,[81] and South America.[82] Although few of these cases have been resolved on the merits, with some reaching settlement and others mired in persistent procedural issues,[83] they are part of a broader

75. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations Under International Law*, 44 VA. J. INT'L L. 931, 944–52 (2004).

76. *See* François Gianviti, General Counsel, Int'l Monetary Fund, Address at International Monetary Fund Conference: Economic, Social and Cultural Rights and the International Monetary Fund 38–40 (2002), *available at* http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (describing the connection between social and political rights and economic viability that justifies the conditioning of IMF aid on good governance).

77. See cases cited *supra* note 73.

78. Cases filed against the Swiss Banks have grabbed the headlines, but corporate interests were implicated in Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57 (2d Cir. 2005); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degussa, 65 F. Supp. 2d 248 (D.N.J. 1999); and half a century ago in *U.S. v. Krauch* (Case no. 6), VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1952); *The Flick Case*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1952); and *United States v. Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1952). *See also* RICHARD BERNSTEIN, I.B.M. AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

79. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005).

80. *See, e.g.*, Doe v. Unocal, 395 F.3d 932 (9th Cir. 2005).

81. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Presbyterian Church of Sudan v. Talisman Energy, Inc., 2006 U.S. Dist. LEXIS 86609 (S.D.N.Y. Dec. 4, 2006).

82. *See, e.g.*, Mujica v. Occidental Petroleum Co., 381 F. Supp. 2d 1164 (C.D.Cal. 2005).

83. Ramasastry, *supra* note 74, at 157. *See, e.g.*,*Whiteman*, 431 F.3d at 57; *Iwanowa*, 67 F. Supp. 2d at 424.

trend in international law that provides grounds for imposing on corporations duties of restitution and repair when their commercial activities have human-rights consequences.

The standards for imposing liability upon multi-national corporations for their complicity in human-rights abuses is under contest, but developments in individual criminal responsibility under public international law over the last decades considered in tandem with tort standards drawn from United States and European law paint a clear picture of what the future holds. In particular, investors and lenders who know, or should know, that the continuing economic benefit of their relationships with odious regimes are derived in whole or in part from human-rights violations may expect to be held accountable.[84]

The rise of corporate liability for human-rights and international-law violations offers an elegant path for transitional regimes between the Scylla of oblivion and the Charybdis of potentially crippling debt. The odious debt doctrine provides a shield against claims of repayment. Where that shield is unavailable, or wielding it is otherwise ill-advised, tort claims provide a sword. Because the amounts owed to investors and debtors will be bound closely to the harms done by their involvement with a predecessor regime, deployment of claims for restitution and repair are likely to require either loss of their investment or affirmative judgments that at least offset debts owed.

So, that transitional regimes do not have a right to repudiate unilaterally debts incurred by an odious forebear does not mean that investors in such regimes will have a right to collect when the accounting is done. Those who invest in abusive regimes do so either because they want to support the inhumanity or because they want to profit by it, directly or indirectly. In the first case, the lender certainly does not have clean hands, and equitable considerations may warrant voiding the contract whether or not investors can be held liable for supporting abuses. In the profit-taking cases, complicity and greed during the reign of an odious regime provide grounds for tort liability that promises to at least offset financial obligations transferred to the new regime. The form and structure of this offset inevitably will be a function of the contingencies of particular regimes and individual transactions. In some cases, loans may be forgiven or restructured. In others, the terms of contracts for capital investment may be renegotiated. In all cases, however, the resolution in transition of financial obligations incurred by a predecessor regime will advance truth-seeking and full accountability rather than coming at the cost of these moral and transitional justice imperatives.

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84. Ramasastry, *supra* note 74, at 117–19. As Ramasastry points out, this general standard has firm historical footing in the United States Military Tribunal decisions in the *Farben* and *Krupp* cases. Although language from that tribunal's decision in the *Rasche* case set limits on how far corporate liability for human-rights abuses might extend, intervening progress in international human-rights law in the last half decade has all but erased those artificial lines, providing good grounds for holding liable those who choose to profit from abuses. *Id.* at 104–59.

This may seem no more than a new edifice on the same results proposed by efforts to expand the odious debt doctrine, and the structures here constructed far too baroque if that is the case. Of course, such criticisms fail to appreciate the substantial gains to transitional justice achieved by preserving an open path for truth and by requiring a more complete account of responsibility for past wrongs. Voiding a debt as odious effectively puts all the blame for past wrongs on the shoulders of a few elites who are made to bear as personal both the weight of the debts and the weight of blame for past wrongs, providing a free pass for those whose complicity is ignored and for corporations, banks, and other investors who have a share of the responsibility.

Where expansion of the odious debt doctrine would rewrite history, limit responsibility for past wrongs to a narrow class of elites, and all but absolve those complicit in past wrongs, assigning duties of repair would enhance truth-seeking and provide a clearer picture of accountability. Rather than being merely an alternative path to the same spot, then, the approach to debts of odious regimes outlined here requires active engagement with the past in order to document contributions to abuses and to assign duties of restitution and repair. Such a result benefits not only contemporary transitional regimes, but holds promises to prevent future abuses by revealing for international investors the moral and human-rights pitfalls of their economic engagements while providing the unique illumination that only economic consequence can provide.

Although it is temptingly elegant, this trilateral complementarity does raise some challenging concerns. As Buchheit, Gulati, and Thompson have put it, appeals to the law of corporate responsibility throw the conversation into "deep moral waters." Among the many Ketea that lurk in these murky depths are debates about the effectiveness of isolation versus engagement as tools for advancing human-rights agendas in nations that have yet fully to join the international human-rights community.[85] Transnational economic engagement can provide extraordinary benefits for investors, nations, and residents alike. Given this, there is reason to step carefully into these waters for fear that threats of liability arising from foreign investments may push investors away. This risk will be particularly acute if the way in which the rules function provides only limited prospective warning. In addition, investors may also cry foul in circumstances where they act in good faith, but find themselves partially liable for abuses they did not intend.

These are certainly tremendous challenges. Though a full response is beyond the scope of this article, there are a few points worth consideration going forward. First, given trends in domestic litigation and international law, it is inevitable that international corporations will be held liable for activities that result in human-rights violations, particularly when their profits are derivative of or directly tied to abuses. If there is a convergent teleology of open societies

85. These issues have been particularly acute in debates about United States foreign policy in China, Cuba, and South Africa.

and tort, it is that occupying a field boasting opportunities for both good and ill is a moral choice begetting responsibility for the consequences of acts and omissions that result in harm. Global commerce is such a place. Like domestic commerce in the decades of the last century, those who inhabit it have a choice between embracing an inevitable shift in consciousness or being forced by operations of law to approximate conscientious action.[86]

Second, there are tremendous bilateral benefits from transnational investment, particularly in marginal states, which are too seductive to sustain real worries that international investors will avoid engagement for fear of being held responsible for the consequences of their actions. The evolving norms of corporate responsibility for human-rights abuses will certainly cause growing pains. However, the imperative of growth is simply too strong to justify real concerns that assignments of liability for corporate complicity in human-rights abuses will mean an end to investment.

Third, while complaints about lack of predictability rest on respectable foundations of legality,[87] they are somewhat disingenuous. The kinds of human-rights violations at issue here are not defined by esoteric norms too technical and ethereal for investors to comprehend. They are, rather, abuses of a kind and on a scale that appeal to the moral intuitions of any person capable of basic empathy.

The real complaints about predictability come from corporations that view themselves as amoral actors without duties of conscience. To the extent that imposition of liability for human-rights abuses occasions a shift in corporate consciousness in these institutions, that is a good thing. To the extent these corporations refuse to embrace their capacities for good and evil in the world, their complaints of surprise when held responsible are a function of willful ignorance, not injustice. Just as Ford could not in good conscience complain about being held liable for its cold decision to sacrifice lives rather than deal responsibly with the fuel-tank design defect in its Pinto, and tobacco companies cannot honestly complain about being held to account for intentionally misleading the public about the dangers of smoking, international corporations engaging in activity in marginal nations cannot cry foul when held liable for harms indelibly linked to their investments and profits, particularly where they have made no effort to avoid or ameliorate harm.

Of course, those advocating for corporate responsibility need not appeal to esoteric notions of moral truth or Pollyanna hopes for the triumph of empathy and human decency. The role of corporations in our international human-rights culture is signaled both in international human-rights documents, such as the United Nations Economic and Social Council's Norms on the Responsibilities

86. Kant draws this distinction, pointing out that law is a tool designed to deal with a race of devils which, when perfectly wielded, can only approximate the kingdom of ends that results from universal moral conduct. *See* IMMANUEL KANT, PERPETUAL PEACE 24–32 (Lewis White Beck ed., 1957) (1795).

87. Gray, *supra* note 16, at 2629–49, provides a discussion of the legality principle and its role in transitions and transitional justice.

of Transnational Corporations and other Business Enterprises with Regard to Human Rights, and by successful efforts to hold business institutions responsible for their conduct in relation to human-rights violations.[88] Though, like many human-rights instruments, the draft Norms will not be strictly enforceable, and, despite the fact that successful court actions are at least matched by those that have faltered and failed, warning of what the future holds is as clear as it can be. International corporations choosing denial do so at their own risk.

None of this implies that imposing duties of repair on international corporations and financial institutions doing business with marginal or patently odious regimes is without difficulty or challenge for those who want to invest in oil pipelines or build factories. It most certainly will. However, with these same challenges comes promise in the form of a relatively new area of legal practice designed to give advice to corporations on their social responsibilities domestically and abroad. Practitioners in the decades after Sack developed a set of strategies in due diligence and drafting to contend with the threats to international commerce posed by the traditional odious debt doctrine.[89] Practice groups have formed today in a number of leading law firms designed to advise clients on how best to pursue international transactions while minimizing risk of sanction and maximizing the financial and public relations benefits of responsible foreign investment. Not surprisingly, corporate responsibility practitioners routinely find the best opportunities in transactions that are environmentally sensitive, respectful of basic human-rights norms, and that attend to the reciprocal social duties of those who seek commercial opportunities in areas where the *de facto* government does not, or cannot, provide those protections for its citizens.[90]

With the benefit of good advice, financial interests electing against the temptations of Hobbes's fool will find that embracing their international human-rights duties actually enhances the predictability and security of their foreign investments.[91] Like legal practitioners in all transactional fields, practitioners of corporate and social responsibility offer companies the opportunity to limit their potential exposure to future liabilities. Although there are those who advise strategies of denial and evasion, the best practitioners advise clients to take a proactive approach by reframing potential liability as opportunity. With proper legal advice, international corporations will find that

88. David Weissbrodt & Maria Kruger, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

89. Foorman & Jehle, *supra* note 2, at 37–38.

90. This practice goes under the expansive title "corporate social responsibility," and encompasses a broad set of moral, ethical, political, and economic considerations that practitioners are ethically obliged to consider, though we are often reluctant to pursue them with clients. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002); *The Good Company: A Survey of Corporate Social Responsibility*, ECONOMIST, Jan. 22, 2005, at 2–22; Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075 (2002).

91. Weissbrodt & Kruger, *supra* note 88, at 902.

fully embracing their duties will actually enhance the predictability and security of their investments, while providing the inherent benefits and marketing advantages that accompany doing the right thing.

VIII

CONCLUSION

There is, of course, much more to be said on these topics. However, as is the case with this symposium and its contributions, the purpose here is to open new lines of discussion on a nettlesome issue in international private and public law. In keeping with this goal, it has been argued here that the contemporary effort to expand the odious debt doctrine is the Janus-face of contemporary efforts to expose the human-rights consequences of global commerce and the responsibilities of international corporations to respect human rights. The central claim here is that we should look first at this obverse visage before expanding the odious debt doctrine to cover all debts of odious regimes.

Expansion of the odious debt doctrine to cover all debts of an odious regime is ill-advised. It fails to account for the full truth about the past. It is insufficiently theorized in regard to the responsibilities of corporations. It also compromises transitional justice priorities of truth and accountability. Ironically, then, rather than achieve the purpose of assigning responsibility for human-rights abuses to, inter alia, international investors and others complicit in past wrongs, expansion of the odious debt doctrine obscures the truth and perpetuates both the potential for future abuses and a lack of predictability for investors. By contrast, confronting fully the complicity of all those connected to human-rights abuses, including international investors, and assigning duties of restitution and repair, provides for truth, enhances the possibility of future protections of vulnerable people, and provides investors an opportunity to add additional assurances of predictability to their international engagements through the practice of corporate social responsibility.