Title: Odious Debt and *Jus Post Bellum*

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Abstract:

Odious debt concerns the repudiation and cancellation of debt accrued by a State for "odious" purposes. Despite a burst of scholarly interest in the topic since 2003, the idea of odious debt, remains largely without practice in international law, but holds significant potential for clarifying the legitimate expectations of foreign investors in societies in the aftermath of conflict. This article argues that a coherent approach to a State's finances will subject its existing debt and other financial commitments to human rights standards after the existence of conflict in its territory and, in particular, after the commission of gross violations of human rights. It argues that odious debt can play a role in *jus post bellum* in lessening the financial burden placed on States who experience conflict and seek to provide a plethora of public goods and generate a clear standard for investors who seek to enforce a State's obligations to repay its debts and other financial obligations after conflict.

This article highlights several challenges inhibiting the translation of the proposal of odious debt into an international legal principle. It offers a conception of odious debt that seeks to resolve these challenges by aligning the conception with other areas of public international law which operate concurrently. This article considers how international human rights law could give clear meaning to the contested term "odious", how to conceive of the appropriate standard of care for creditors and examines potential institutional fora for the resolution of this debt, and the incentives and postures of actors involved. The experiences of Iraq, Ecuador and South Africa will be considered.

Keywords: Odious debt, equity, human rights and business

I. Introduction

Since the invasion of Iraq in 2003, the idea of odious debt has emerged from obscurity to become a popular academic proposal to alleviate the financial difficulties facing societies emerging from conflict or authoritarian rule.[1] The idea was proposed as a legal solution to the economic problem and moral proposition that a new government should not struggle to re-pay the debt of a prior regime at the expense of the substantial costs of its post-conflict re-construction and

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[1] Alexander Sack, Les effets de transformations des États sur leur dettes publiques et autres obligations financières (Paris, Recueil Sirey.1929); Alexander Sack, The judicial nature of the public debt of States. (1932) 10 *N.Y.U. Law Quarterly*: 341; Alexander Sack, Diplomatic claims against the Soviets, (1938) *Contemporary Law Pamphlets*, Series 1 (7), NYU L. Q. Rev., New York University; Adams, "Iraq's Odious Debts" Policy Analysis, Sept. 28, 2004; Alexander & Rowat, "A Clean Slate in Iraq: From Debt to Development" *Middle East Report*, No. 228. (Autumn, 2003), pp. 32-36; Kaiser and Queck, Dialogue on globalization: odious debts – odious creditors?
Friedrich Ebert Stiftung: Occasional Paper No. 12 March 1/2004, available at http://library.fes.de/pdf-files/iez/global/02018.pdf (last visited 19-05-14)

development efforts.[2] Though eventually not adopted as the solution to alleviating Iraqi debt, odious debt became a *cause celebre* among scholars and activists, who saw its potential to extend beyond the Iraqi context to other post-conflict or transitional societies.[3] With many competing views, including one recent treatise, the precise effects and legitimate basis of odious debt in international law and policy remain unclear - with precious little debt repudiated.[4] One should therefore describe odious debt as a policy proposal or a body of academic literature rather than a "doctrine" of international law.[5]

The discourse of *jus post bellum* is at a similarly early stage. It has emerged to potentially provide an overarching framework for considering moral, legal and political issues relevant to the termination and aftermath of armed conflict, and arguably, state fragility and transition in general.[6] Building on fragments found in classical writings on public international law and just war theory, modern theorists and international lawyers have organised a variety of conceptions and issues relevant to the challenging pursuit of justice after war in a shared discourse of *jus post bellum*.[7]

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[2] International Crisis Group, Reconstructing Iraq, Middle East Report #30, 2 September 2004; Barnett, Eggleston and Webber, "Peace and Development in Post War Iraq", in (2003) *Middle East Policy*, Vol X, No 3, 2003

[3] Damle, "The Odious Debt Doctrine after Iraq" (2008) 70(4) *Law and Contemporary Problems* 139-156, 144-150 ; Gulati and Ben-Shahar, "Partially Odious Debts?" 70 *Law & Contemporary Problems 47,* 58; Feinerman, "Odious Debt Old and New: The Legal Intellectual History of an Idea" (2008) 70 *Law & Contemp. Probs. 193;* New Economic Foundation, Odious Lending: Debt Relief as if Morals Mattered, available at http://www.dette2000.org/data/File/Odiouslendingfinal.pdf (last visited 19-05-14)

[4] North Carolina Journal of International Law and Commercial Regulation, Odious Debt: Exploring the Outer Limits of Sovereign Debt Relief 2007; Gulati and Skeel (eds), Odious Debts and State Corruption, (2007) 70(4) Law and Contemporary Problems, available at https://www.law.duke.edu/journals/lcp/; Yvonne Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (2012 Edward Elgar); Raffer, "Odious, Illegimate, Illegal or Legal Debts: What Difference Does it Make for International Chapter 11 Arbitration" (2007) 70 Law and Contemporary Problems

[5] Robert Rasmussen, "Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief" (2007) 70 Law and Contemporary Problems 249; Yianni and Tinkler, "Is There a Recognized Legal Doctrine of Odious Debts?" (2007) 32 NCJ Int'l L & Com. Reg 749

[6] Carsten Stahn and Jann Kleffner (eds) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace* (TMC Asser Press, 2008); Carsten Stahn, Jennifer Easterday and Jens Iverson (eds) *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014); Larry May and Andrew Forcehimes (eds) *Morality, Jus Post Bellum and International Law* (Cambridge University Press 2012)

[7] Christine Bell, "Of *Jus Post Bellum* and *Lex Pacificatoria:* What's in a Name? Carsten Stahn, Jennifer Easterday and Jens Iverson (eds) *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 181-207

This article shall consider the proposals for odious debt as a potential component of a *jus post bellum* discourse and framework. The emergence from conflict, civil war or the collapse of authoritarian rule both challenges the state to pursue costly re-construction and public goods, but also threatens their ability to attract investment and lending to finance the demands of this period. For instance, at the end of 2011, Moodys downgraded Egyptian debt to B1 because of the weak economic situation in the country, the deteriorating financial situation and the absence of political stability.[8] The report noted a steep downgrade in foreign direct investment. Debt-service costs alone account for 22% of the Egyptian government's total expenditures, which has led one economist to suggest the application of odious debt repudiation to Egypt.[9] Similar concerns are present in Libya and Tunisia.[10] Moreover, a recent suggestion for an *ex ante* flagging of Syria as an odious debtor emerged after reports of that State's widespread and systematic gross violations of human rights in 2012.[11] One recent estimate by UK think tank the New Economic Foundation suggests that globally $726 billion of odious debt existed between 1970 and 2004, including in conflict affected states.[12] A high burden of sovereign debt is especially pronounced when held by a society unable to repay in the short or medium term, with the result that the debt becomes inter-generational in nature.[13] This article will proceed as follows. Section II will examine and critique the existing discourse on *jus post bellum*. Section III will examine and critique the existing discourse on odious debt. Section IV will consider whether the idea of odious debt be reconciled with other rights in the context of *jus post bellum*? Can the concept of odious debt make a legitimate and feasible contribution to a just and sustainable peace? A final section concludes.

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[8] Moody's Downgrade Egypt's Government Bond Rate to B2 http://www.businessweek.com/news/2011-12-22/moody-s-downgrades-egypt-s-government-bond-rating-to-b2.html

[9] http://www.project-syndicate.org/commentary/mubarak-s-odious-debts

[10] http://www.jubileedebtcampaign.org.uk/Egypt%27s%20debt%20must%20fall%20with%20Mubarak%27s%20regime+6761.twl;

[11] Charles Kenny, "Odious Obligations" Foreign Policy 19 March 2012

[12] New Economic Foundation, Odious Lending: Debt Relief as if Morals Mattered (n3)

[13] Yvonne Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (n4) 71-2

II. The Emergence of *Jus Post Bellum*

The term *jus post bellum* challenges the dualistic conception of international law and the just war doctrine that privileges *jus ad bellum* and *jus in bello*.[14] Just as the rules of international humanitarian law apply to the use of force and the conduct of armed conflict, so too should those rules extend to the termination of war regardless of the original justice or the manner in which the hostilities were conducted.[15] Though some thoughts on justice after war can be found in classical thought on public international law, modern just war theorists have also made the moral case for *jus post bellum*.[16] Brian Orend has called for a new Geneva Convention dealing exclusively with issues concerned with *jus post bellum*.[17] In *After War Ends,* Larry May offers an account of *jus post bellum* based on the pursuit of several moral principles to guide the conduct of States after conflict.[18] A recent comprehensive edited volume raises several diverse approaches and challenges for the emergence of express *jus post bellum* in international law and the policies of States and international organisations.[19] Existing interest in *jus post bellum* thus has a long heritage, and recently revived interest, but little concrete relationship to modern international law and policy.

Several strands exist in current *jus post bellum* discourse. First, there are institutional questions about whether current international organisations and policies would benefit from a *jus post*

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[14] Carsten Stahn, "Jus ad bellum, jus in bello, jus post bellum?Rethinking the Conception of the Law of Armed Force" (2006) 17 European Journal of International Law 943

[15] Protocol Additional to the Geneva Conventions of 12 August 1949 (Preamble); Serena K Sharma, "Reconsidering the Jus Ad Bellum/Jus in Bello Distinction" in Kleffner and Stahn (eds) *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace,* 9-30

[16] Brian Orend, "Kant's Just War Theory" (1999) Journal of the History of Philosophy 323-53

[17] Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist" (2007) 20 Leiden Journal of International Law, 571, 575-7; see further Brian Orend, "Justice After War" (2002) 16(1) Ethics & International Affairs

[18] Larry May, *After War Ends: A Philosophical Perspective* (CUP 2012); James Gallen. "L. May, After the War Ends; A Philosophical Perspective" (2013) 82 *Nordic Journal Of International Law* 447-552

[19] Carsten Stahn, Jennifer Easterday and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: OUP 2014)

bellum approach.[20] Second, questions persist about how *jus post bellum* interacts with existing bodies of international law such as international humanitarian law, international human rights law, or international criminal law.[21] Third, specific issues of public international law, such as the status of forces agreements, amnesties under international humanitarian law and environmental integrity, can be considered under a *jus post bellum* discourse.[22] However, at present, a significant proportion of the discourse remains focused at the level of theory and principle, considering how it relates to other existing concepts, fields and discourses that populate the post-conflict space, such as peace-building or transitional justice.[23] In this context, I have previously suggested that a legitimate and feasible function for *jus post bellum* at this time may be to provide an interpretive framework for considering the operation.[24] To facilitate this approach, I argued that a coherent approach to interpretation, based on Ronald Dworkin's principle of integrity, should be pursued. To facilitate that approach I recommended the use of further principles of stewardship, accountability and proportionality. Several other authors have offered accounts that suggest *jus post bellum* could operate around moral-legal principles.[25] Larry May's account of *jus post bellum* operates around the principles of retribution, reconciliation, rebuilding, restitution, reparations and proportionality.[26] May characterises his principles of jus post bellum as primarily moral principles

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[20] Fraye Baetens, Facilitating post-conflict reconstruction: is the UN Peacebuilding Commission successfully filling an institutional gap or marking a missed opportunity?. In: Stahn C., et al. (Eds.) *Jus Post Bellum: Mapping the Normative Foundation*. Oxford: Oxford University Press. 347-375

[21] Dieter Fleck, "*Jus Post Bellum* as a Partly Independent Legal Framework" in: Stahn C., et al. (Eds.) *Jus Post Bellum: Mapping the Normative Foundation*. Oxford: Oxford University Press 43-56

[22] Mark Freeman and Drazan Djukic, "Jus Post Bellum and Transitional Justice" in Carsten Stahn and Jann Kleffner (eds) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace* (TMC Asser Press, 2008) 213-230

[23] Ruti Teitel, "Rethinking Jus Post Bellum in an Age of Global Transitional Justice" (2013) 24(1) European Journal of International Law 335–42, 339.

[24] James Gallen, "*Jus Post Bellum:* An Interpretive Framework" in Carsten Stahn, Jennifer Easterday and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: OUP 2014) 58-79; *Jus Post Bellum* - The Value of an Interpretive Conception, available at http://opiniojuris.org/2014/05/05/jus-post-bellum-symposium-jus-post-bellum-value-interpretive-conception/ (last visited 19-05-14)

[25] Mark J Allman & Tobias L Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice* (Orbis 2010); Brian Orend, "The Perspective of a Just-War Theorist", (2007) 20 Leiden Journal of International Law 571-91; Alex Bellamy, "The Responsibility of Victory: *Jus Post Bellum* and Just War" (2008) 34 Review of International Studies 601–625

[26] Larry May, *After War Ends: A Philosophical Perspective* (n18) 19-23

for establishment of future international law, not legal principles themselves. This position enables May to state "normative principles of jus post bellum are to be sure only guides to conduct, certainly not proper rules or laws."[27] May's distinctive contribution is to introduce the idea of meionexia (taking less than your due), as an appropriate principle for just victors but a vice for victims, and as an appropriate vehicle for considering justice issues after war.[28] When discourse leads to policy, *jus post bellum* may therefore eventually lead to concrete changes in existing public international law and find express reference in a future Geneva Convention or in the policy documents of international organisations, at present *jus post bellum* may effectively operate as an interpretation of the range of laws, actors, issues and fields relevant to the achievement of a just and sustainable peace after conflict. Existing scholarship suggests that such an interpretation can be pursued by reference to moral-legal principles. It is thus possible to assess whether these principles have an application in assessing how international law and policy can contribute to just and sustainable financing of a post-conflict society and State. A just financial settlement may involve those who hold debt and other financial obligations over a post-conflict State taking less than their due and application of the specific principles of May and other authors. To consider the application of this interpretation to issues of finance, this article examines the existing literature, law and proposals regarding odious debt.

[27] ibid, 57-8

[28] ibid, 6-10

III. Odious Debt: The Concept, Contours and Challenges

A. The Concept

The proposal of odious debt emerged in the early 20th century and has been consistently associated with the work of Alexander Sack.[29] According to Sack:

1. The new Government would have to prove and an international tribunal would have to ascertain the following:
    a. That the needs which the former Government claimed in order to contract the debt in question, were odious and clearly in contradiction to the interests of the people of the entirety of the former State or a part thereof
    b. That the creditors at the moment of paying out the loan were aware of its odious purpose.
2. Upon establishment of these two points, the creditors must then prove that the funds for this loan were not utilized for odious purposes – harming the people of the entire State or part of it – but for general or specific purposes of the State, which do not have the character of being odious.[30]

The purported effect of determining that a debt was odious was that it became a personal debt of the prior odious regime and that it could therefore be repudiated at the volition of the debtor State.[31] Sack envisioned the formation of an international tribunal charged with making this determination of odiousness, with the burden of proof on the new government seeking to repudiate this debt.[32] Writing as UN Special Rapporteur on the succession of States for the International Law Commission (ILC), Mohammed Bedjaoui argued that odious debts are best seen

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[29] One should note an alternative formulation of odious debt, see *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* A/CN.4/301 and Add.1 67. Though this definition is generally equivalent to Sack's definition, the latter has gained greater popularity and academic reference. Kremer and Jayachandran, *Odious Debt* (2006) 96 Am. Econ. Rev. 82, 82; others; For a critical analysis of the history of odious debt definitions see Paulus, "*Odious Debts vs Debt Trap: A Realistic Help?"* 31(1) Brook. J. Int'l 83, 84-8

[30] Sack, (n1), 163

[31] ibid, 157

[32] G. Mitu Gulati, Lee Buchheit & Robert Thompson, "The Dilemma of Odious Debts" (2007) 56 Duke Law Journal 1201, 1224

as a broad genus of debt, within which specific species of debts operate.[33] Certain of these species of debt are directly related to the post-conflict context relevant to *jus post bellum*.

The most common types of odious debts are hostile debts and war debts.[34] "Hostile debts" or "subjugation debts" can be defined as debts incurred to suppress secessionist movements or wars of liberation, to conquer peoples or foreign territory, or strengthen the economic colonisation of a territory.[35] Examples of the repudiation of such debts include the refusal of the Soviet regime in Russia to pay the debts of the Tsarist era.[36] Similarly, in Spanish American War of 1898, the United States emerged victorious and Spain ceded to it its sovereignty over Cuba, the Philippines, Puerto Rico and other territories. The United States claimed that the proceeds had been used for the suppression of the independence movement of Cuba and were therefore purposely harmful to the Cuban citizens and refused repayment on that basis.[37] In particular, the USA declared that the creditors must have known that their loans were for 'the continuous effort to put down a people struggling for freedom from the Spanish rule' and therefore accepted that the loan was obviously risky.[38] In addition, the Treaty of Versailles 1919 absolved Poland from having to assume the debt contracted by Germany for the economic subjugation of the Poles by Germans.[39]

Second, "war debts" are debts contracted by the State for the purpose of funding a war which the State eventually loses and whereby the victor is not obliged to repay the debt. The ILC noted that in the 19th century states accepted the repudiation of war debts "since it was inconceivable

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[33] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) 67

[34] Robert Howse, The Concept of Odious Debt in Public International Law UNCTAD Discussion Paper No. 185 UNCTAD/ OSG/DP/2007/4

[35] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) 72

[36] PD O'Connell, *State Succession in Municipal Law and International Law*, (Cambridge: Cambridge University Press, 1967) 460.

[37] Stephanie Bonilla, Odious Debts: Law and Economics Perspectives (Gabler 2011), 6

[38] Ernst Feilchenfeld, *Public Debts and State Succession* (New York: Kraus 1972) 341

[39] Article 255 (2), Treaty of Versailles 1919

that a people who had freed themselves from the political sovereignty of a State by victorious resistance should be required after their victory to pay the debts contracted by the State that had waged war upon them to keep them under its sovereignty."[40] After the Boer War, the victorious British announced that they would take up the debts of the South African Republics which were contracted before the hostilities had begun, but refused to take up those debts which followed after the Boer War had begun.[41] After the First World War, the Allies excluded war debts from distribution against the ceded territories. They insisted that the debts were to be borne by Germany, Austria and Hungary.[42] An oft cited example of odious debt arises from the Tinoco arbitration against Costa Rica. A Costa Rican dictator, Frederico Tinoco, was overthrown and the new government refused to repay loans made by the Royal Bank of Canada to the Tinoco government.[43] Taft ruled that the payments were made by the bank to Tinoco himself and that the case of the Royal Bank depended:

> upon the good faith of the bank in the payment of money for the real use of the Costa Rican government under the Tinoco regime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F Tinoco, for his personal support . . . The Royal Bank of Canada cannot be deemed to have proved that the payments were made for legitimate governmental use. Its claim must fail.[44]

Further types of odious debt may be possible. Jeff King sees a need for four types of odious debt: war debts; hostile/subjugation debts; illegal occupation debts; and fraudulent, illegal and

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[40] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) para 141

[41] Ernst Feilchenfeld, *Public Debts and State Succession* (n38) 394

[42] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) 70-71

[43] Lienau, Odette, "Who is the "Sovereign" in Sovereign Debt?: Reinterpreting a Rule-of-Law Framework from the Early Twentieth Century" (2008). Cornell Law Faculty Publications. Paper 594.

[44] *Great Britain v Costa Rica*, 2 Annual Digest 34 (1923) 176

corruption debts.[45] This typology is useful and would cover a significant range of the foreseeable scenarios in which a debt may be repudiated after conflict. The odious debt proposals demonstrate *prima facie* relevance to post-conflict societies and states and thus for any proposed *jus post bellum* framework. However, beyond the above examples, debt repudiation usually remains informally negotiated. In recent practice, a handful of formal arbitrations and instances of domestic litigation serve as the oft-cited examples to illustrate the potential operation of odious debt.[46] Other recent illustrations show the challenges of formalising odious debt principles in international law and the continued preference of creditor states for informal negotiation.

1. Iraq

Following the overthrow of Saddam Hussein in 2003, the Iraqi National Assembly passed a resolution supporting the recommendation of its Economic and Finance Committee that Iraq should assert the doctrine of odious debts in connection with Saddam's debts.[47] Next to the country's ongoing violence, this debt was the biggest problem facing the new government. The World Bank estimated that even fantastical 33% annual growth would have left Iraq's debt to GDP ratio at 600% to 900%.[48] The US-led campaign for the cancellation of Iraqi debt emphasised that money should not have been lent to the dictatorial regime of Saddam Hussein, and that the lenders should be liable for those improper loans, not the people of Iraq who had no say in the borrowing. However, the justification for such a high level of debt cancellation was eventually articulated in economic and geopolitical terms, not odious debt terms. Iraq's Minister of Finance at that time, Adil Abdul Mahdi stated:

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[45] Jeff King, "Odious Debt: The Terms of the Debate" (2007) 32 North Carolina Journal of International Law and Commercial Regulation 605-667

[46] Patricia Adams, Odious Debts: Loose Lending, Corruption, and the Third World's Environmental Legacy (Probe International 1991), Ch 17; the idea of odious debts were not considered except to confine it to state succession in *United v Islamic Republic of Iran* 32 Iran-US Cl. Trib. Rep. 162 Award No. 574-B36-2 (Arb 1996); the most oft cited case remains *Tinoco Arbitration (Costa Rica v Great Britain)* 1 RIAA 375, Arb. 1948

[47] Resolution Prepared for the Iraqi National Assembly (Nov. 22, 2004),

[48] J Snow, interviewed on 'Your world with Neill Cavuto', Fox News, 11 April 2003, at http://www.foxnews.com/printer_friendly_story/0,3566,83939,00.htm.

> Iraq's need for very substantial debt relief derives from the economic realities facing a post-conflict country that has endured decades of financial corruption and mismanagement under the Saddam regime. Principles of public international law such as the odious debt doctrine, whatever their legal vitality, are not the reason why Iraq is seeking this relief.[49]

The Paris Club of bilateral creditors cancelled $30 billion of Iraqi debt on 21 November 2004.[50] This pragmatic approach did not filter out those debt claims that no longer posed a legal threat to Iraq.[51] Nor did this approach ultimately advocate the use of a legal argument for odious debt, as Western political interests were sufficient to re-negotiate the debt effectively.

2. Ecuador

The practice of Ecuador's debt repudiation in 2008 has moved the modern rhetoric on odious debt from a mere policy proposal to a fledging and controversial State practice, but one not directly connected with *jus post bellum.* It was the first time in modern history that a sovereign debtor had demanded that its external commercial creditors write off most of their claims (65 %), without advancing an argument based on financial distress.[52] Public debt in 2008 was the least burdensome it had been in three decades and had $6.5 billion in international reserves.[53] Rather the claim was that the existing debts were the result of illegitimate and immoral lending.

Ecuador's president Rafael Correa had campaigned in 2006 and asserted that Ecuador was justified in repudiating foreign debt because the bonds represented obligations that were illegally incurred by previous oppressive regimes and because the obligations were substantively unfair and

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[49] Press Release, Paris Club, The Paris Club and the Republic of Iraq Agree on Debt Relief (Nov. 21, 2004), available at http://www.clubdeparis.org/sections/traitements/irak-20041121/viewLanguage/en. Felix Salmon, "Restructuring Debt is Top Priority", Euromoney, Sept. 2004, at 72, 76.

[50] Joseph Hanlon, '"Illegitimate" Loans: Lenders, Not Borrowers, are Responsible' (2006) 27 Third World Quarterly 211, 223

[51] Lee C Buchheit and Mitu Gulati, "Odious debt and Nation-Building" 60 Me. L. Rev. 477, 484

[52] Lee C Buchheit and Mitu Gulati "The Coroner's Inquest," 28 *Int'l Fin. L. Rev.* 22 (Sept. 2009)

[53] Arturo C Porzecanski, When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador, (2010) 73 Law & Contemp. Probs. 251, 256

illegitimate.[54] President Correa created a Public Debt Audit Commission to evaluate the country's obligations incurred between 1976 and 2006. It found that proceeds of various rounds of borrowing and restructuring had been used to unfairly benefit powerful interests in the country and beyond, especially foreign lenders.[55] As a result of the findings of this commission, Ecuadaor defaulted on its debts in 2008. Ecuador had been able to tap the international bond markets on one occasion six years after its prior default.[56] On April 20 2009, six months after the first default, Ecuador launched a cash buyback offer to repurchase the two series of defaulted bonds. The legal ability to repurchase defaulted debts made Ecuador the principal beneficiary of its own default.[57]

The decision has been the subject of criticism and debate and raises the risk that unilateral repudiation of debt could generate uncertainty in global markets and deny developing countries access to credit.[58] In particular, it was suggested that the commission's assessment of prior debt negotiations was problematic. The commission critiqued the actions Ecuador's debt negotiators over the prior 30 years in accepting contractual provisions such as a choice of foreign governing law, submission to foreign court jurisdiction and waiver of sovereign immunity, which are common conditions in such contracts.[59] However, the experience of Ecuador has led to interest in similar commissions in the Philippines, Argentina, Zimbabwe and other African countries.[60] The experience of Ecuador highlights the dichotomy of interests and priorities between creditors and debtor States in establishing international legal rules in this area.

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[54] Adam Feibelman, "Ecuador's Sovereign Default: A Pyrrhic Victory for Odious Debt?", 25-7 Journal of International Banking Law and Regulation 357-62

[55] *ibid*

[56] Yvonne Wong, Sovereign Finance and the Poverty of Nations: Odious Debt in International Law (n4), 96

[57] Lee C. Buchheit and Mitu Gulati "The Coroner's Inquest", (2009) 28 Int'l Fin. L. Rev. 22, 25

[58] ibid; Wade Mansell & Karen Openshaw, Suturing the Open Veins of Ecuador: Debt, Default and Democracy, 2 L. & DEV. REV. 151,153 (2009); Naomi Mapstone & David Oakley, Ecuador Hints at Default over "Illegitimate" Debt, FIN. TIMES, Nov. 18, 2008

[59] Lee C. Buchheit and Mitu Gulati "The Coroner's Inquest" (n58), 23

[60] Yvonne Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (n5) 97-8

3. South Africa

The case of South Africa illustrates the risk of non-repudiation of debt of a prior oppressive regime after conflict, in the absence of geo-political support for significant re-negotiation of the debt. Despite trade and arms sanctions from the UN Security Council in the 1980s, the apartheid regime continued to borrow from private banks throughout the 1980s. The apartheid government in South Africa amassed $21 billion in debt even as it brutally repressed much of its population.[61] In 1993, the total foreign sector public debt amounted to R 49 411 billion.[62] After being elected president of South Africa, Nelson Mandela and the African National Congress came under heavy pressure not to renounce apartheid debt.[63] The South African Truth and Reconciliation Commission recommended that the government repudiate its apartheid-era debts.[64] The new Government distanced itself from calls to nullify its apartheid-era debts. It was considered important not to default on debts to attract foreign investment. However, Hanlon identifies the perils of this approach:

> "Foreign direct investment has been tiny – only two thirds of the profits repatriated by companies on investments they made in the apartheid State. And new lending has not kept up with repayments – over six years South Africa paid out $3.7 billion more than it received. Thus, promises have not been kept and policy advice was wrong. If South Africa had frozen profits on apartheid-era investments and simply repudiated the odious apartheid debt – or even if it had demanded a ten year moratorium – it would have been $10 billion better off. Foreign aid during this period was only $1.1 billion, so even if aid had been cut off, South Africa would have profited by $8.9 billion."[65]

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[61] Joseph Hanlon, '"Illegitimate" Loans: Lenders, Not Borrowers, are Responsible' (n50) 211, 218; K Ovenden & T Cole, Apartheid and International Finance, London: Penguin, 1989; and Commonwealth Intergovernmental Group of Officials, Banking on Apartheid, London: James Currey, 1989.

[62] South African Reserve Bank Quarterly Bulletin, vol. 2 (1998)

[63] William Mervin Gumede, Thabo Mbeki and the Battle for the Soul of the ANC (Zed Books 2007), 79-114

[64] South African Truth and Reconciliation Commission, Final Report, Volume 5, 319

[65] Joseph Hanlon, '"Illegitimate" Loans: Lenders, Not Borrowers, are Responsible' (n50) 28

Naomi Klein thus argues “the country stands as a living testament to what happens when economic reform is severed from political transformation.”[66] South Africa is now among the most economically unequal societies in the world.[67] Such an approach demonstrates the risks of an incoherent approach to questions of justice after conflict, incorporating issues of human rights, including transitional justice, human development, and contrasting with dominant neo-liberal development policies. The victims’ representative group and human rights organisation Khulumani is currently pursuing international financial organisations through the Alien Torts Statute in the United States for their complicity in financing and sustaining the apartheid regime.[68]

It appears that where powerful states such as the United States have an interest in the cancellation of an odious debt, that interest can be facilitated through informal re-negotiation through the Paris Club or equivalent body. However where a State seeks to repudiate contrary to the interests of powerful states, the argument is less likely to be successful through pragmatic means and will not find sufficient support for a rule in customary international law. For instance, For example, in 1996, Iran requested the U.S.-Iran Claims Tribunal to invalidate debt contracted by the previous government with the United States on the grounds that such debt was "odious" and, therefore, was not transferable to the Islamic Republic of Iran. The Tribunal rejected this argument, stating that international law did not allow for such an exception to the general concept of continuity.[69] Beyond this limited mostly informal practice and Sack’s proposed formulation of the concept, in current literature significant disagreement remains regarding its potential implementation in modern international law. The result is that the proposal remains unclear, unsupported by international customary law and potentially unsound for both an affected population of the debtor

[66] Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books 2007) 198

[67] UNDP, South Africa: The Challenge of Sustainable Development (UNDP 2003)

[68] *In re South African Apartheid Litigation* 617 F. Supp. 2d 228 (S.D.N.Y. 2009)

[69] United States v. Iran, 32 Iran-U.S. Cl. Trib. Rep. 162, Award No. 574-B36-2 (Dec. 3, 1996)

State and the international creditor community.[70] Clarity is needed on these outstanding issues. In addition, a strong rationale is needed to add odious debt proposals to the burgeoning agenda for potential elements of a *jus post bellum* framework.

B. The Contours

It is first necessary to separate odious debt from the broader debate of debt relief, forgiveness and global justice that may also impact post-conflict states.[71] As with an interpretive approach to *jus post bellum*, a matrix of several variable factors can be constructed. First, certain authors are critical of the odious debt proposal as unduly narrow.[72] In particular, there is a concern that focusing on relieving merely debt rather than other forms of finance similarly tainted with odiousness would merely provide an incentive for States to use other financial instruments than lending, possibly to greater detriment of the affected population.[73] In this regard, a doctrine of odious finance is proposed, that seeks to extend the normative foundations for odious debt to other financial instruments.[74]

Second, this proposal must also have regard to the particular nature of the debtor as a sovereign entity.[75] In particular, it is fruitful to distinguish between State succession and circumstances of government succession.[76] In cases of State succession, there is presently no clear

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[70] For a critical perspective on the proposals for odious debt, see Albert Choi and Eric Posner, "A Critique of the Odious Debt Doctrine" (2007) 70 *Law & Contemp. Probs.* 33

[71] New Economics Foundation, (n4), 8-10; Gulati, Buchheit, Thompson, (n24), 1208-16

[72] Tai-Heng Cheng, "Renegotiating the Odious Debt Doctrine" (2007) 70 Law & Contemp. Probs. 7, 21-29; Ochoa, "From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine" (2008) 49 Harv. Int'l L.J. 109

[73] Ochoa, "From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine" (n72), 138-51

[74] Anupam Chander, "Odious Securitization" (2004) Vol. 53 Emory LJ 92; Cheng, (n27)

[75] Robert Rasmussen, "Integrating a Theory of the State into Sovereign Debt Restructuring" (2004) 53 Emory L.J. 1159

[76] Jeff King, The Doctrine of Odious Debt in International Law: A Restatement, Available at SSRN: http://ssrn.com/abstract=1027682, 9

rule in international law as to whether a successor State inherits prior financial obligations.[77] Here, the odious debt proposal may be considered as one of many factors in the policy consideration of successor States. In contrast, in cases of government succession, there is a generally accepted rule that a new government is obliged to honour the debts of its predecessor.[78] In this instance, the proposed operation of odious debt may be an exception to this general rule.[79] Third, we should consider a distinction between creditors: sovereign creditors, international financial institutions acting as creditors and commercial creditors.[80] In the former case, cases of succession have usually involved a re-negotiation or re-structuring of the debt between such creditor States or institutions and a new government.[81] In the latter cases, there is a greater potential for transitional governments and private creditors to use litigation and contractual remedies to resolve issues surrounding the contract of debt.

These three factors mean that it is inappropriate to speak of a single "doctrine" of odious debt, particularly with little appreciation of the differentiated application of such a concept required to establish a coherent customary international legal practice or rule. Any proposal for odious debt must either limit itself to a single context or appreciate the complexity of a differentiated application to discrete transitions and financial transitions. It is more appropriate to consider odious debt as a principle of international law, which can be applied to this multiplicity of contexts. This level of complexity requires a nuanced application in public international law or in the policies of international organisations that must address several presently unresolved issues. An approach to odious debt that is grounded in the resources of a *jus post bellum* discourse and framework can

[77] ibid, 6-9; Howse, The Concept of Odious Debt in Public International Law (n34), 4-6

[78] ibid, 9-10

[79] Howse The Concept of Odious Debt in Public International Law (n34) 4

[80] ibid 6

[81] Ana Stanic, "Financial Aspects of State Succession: The Case of Yugoslavia" (2001) 12 EUR.J. INT'L L. 751

achieve this by resolving its outstanding challenges by integrating with the principles and ideas already present in those resources.

C. The Challenges

First, some existing commentary on this subject becomes uncomfortable with the prospect of pronouncing upon the "odiousness" of acts of governments.[82] Existing literature fails to adequately address the *content* of odiousness and the means or forum to make such a determination. Second, the *standard of care* for creditors on which repudiation will be assessed remains unclear. Some authors argue that the debts of an odious regime should be considered as a whole and the purported doctrine should apply to all debts.[83] One argument runs that a case-by-case analysis of the debts will be expensive, complex and seem unnecessarily technical in light of the widespread nature of abuses of the prior regime.[84] Thus debt should be cancelled on a wholesale rather than retail basis, as since the regime was odious, so too were its debts.[85] The other argument is that as money accruing from loans is fungible and it will therefore be difficult to determine which funds were used for odious purposes and which was not.[86] Others have sought to address the issue of fungibility through the application of a partial liability regime, seeking to insulate creditors from liability for that portion of a loan or other financial instrument was used for the benefit of the public rather than making a direct determination of odiousness.[87]

Third, the precise *means* for determining odiousness remain unclear. Some authors have rejected the potential of the sovereign debtor itself to perform this function because of their

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[82] David Gray, "Devilry, Complicity and Greed: Transitional Justice and Odious Debt" (2007) *70 Law & Contemp. Probs.* 137; Adam Feibelman "Contract, Priority, and Odious Debt" (2007) 85 North Carolina Law Review 727, 758-9

[83] Anupam Chander, "Odious Securitization" (n74)

[84] Paul B. Stephan, "The Institutionalist Implications of an Odious Debt Doctrine" *70 Law & Contemp. Probs.* 213, 226-9

[85] David Gray, "Devilry, Complicity and Greed: Transitional Justice and Odious Debt" (n82) 144

[86] New Economics Foundation, (n4), 10; Patrick Bolton and David Skeel, "Odious Debts or Odious Regimes?" (2007) *70 Law & Contemp. Probs. 83*, 112-6

[87] Mitu Gulati and Omri Ben-Shahar, "Partially Odious Debts?" 70 *Law & Contemporary Problems 47*

overwhelming but understandable economic incentive to alleviate the debt of a prior odious regime through the use of this purported doctrine.[88] Some writers have joined Sack in suggesting there be some specialised tribunal established for this purpose, on either an *ad hoc* or a permanent basis or the use of a market approach may be a suitable mechanism for *ex ante* determinations.[89] Finally, there is a challenge in applying this proposal to sovereign creditors international financial institutions and commercial sources from the matrix of scenarios of odious finance identified above, given the current predictable *incentives* of the actors involved. The general reluctance of States to litigate against one another is well acknowledged.[90] In particular, the growing preference of the Paris Club creditors appears to be for informal negotiation on forgiveness and rescheduling.[91] In addition, international financial institutions are generally immune from suit but also maintain presumptive preference among creditors and would be extremely reluctant to entertain the suggestion of debt repudiation.[92] Thus, while existing literature agrees on the moral sentiment behind Sack's original proposals, they remain subject to considerable and unresolved challenges.

In aligning odious debt as part of a *jus post bellum* discourse, the proposals of this article suggest odious debt does not stand alone as a discrete policy advocated by debt forgiveness lobbyists and the governments of third world countries, but reflects the pre-existing commitments of Western donors and international financial institutions in other areas relevant to the post-conflict space. A coherent approach to a just and sustainable peace should enable a clear, predictable and fair operation of the financing of a post-conflict State.

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[88] G. Mitu Gulati, Lee Buchheit & Robert Thompson, "The Dilemma of Odious Debts" (n24) 27

[89] Yvonne Wong, Sovereign Finance and the Poverty of Nations: Odious Debt in International Law (n5); For a critical perspective on the prospects for institutional determination of odiousness, see Stephan (n41) Feibelman, "Contract, Priority and Odious Debt" (2007) 85 N.C. L. REV. 727

[90] JG Merrills, The Means of Dispute Settlement, in Malcolm Evans (eds) *International Law*, (OUP 2003) 533-59

[91] Gelpern, "Odious, not Debt" (2007) 70 Law & Contemporary Problems 81, 93-8

[92] Article IX(3) IMF Articles of Agreement; Article VII, IRDB Articles of Agreement

IV. Odious Debt and *Jus Post Bellum*

What difference does it make to integrate the discourses of jus post bellum and odious debt? The comparative examples discussed above demonstrate that if international political will is sufficient, as in Iraq, then the sovereign debt of a prior oppressive regime may be informally re-negotiated rather than repudiated. The important question is therefore how, not whether, post-conflict countries can ensure that the debts incurred by the former regime will not permanently blight the economic prospects of the rebuilt country.[93]

A distinctive set of reasons are needed to justify the inclusion of odious debt explicitly within a *jus post bellum* account. First, integrating financial issues into a consideration of justice after war provides a more comprehensive and coherent approach to the pursuit of just and sustainable peace. Not everyone in the *jus post bellum* discourse suggests a coherent approach is possible. *After War Ends* seems ambivalent whether a coherent account can be offered of justice after war across the principles identified. May's work elsewhere suggests that he prefers a view of value that permits the existence of incommensurable moral goods.[94] This aligns with the perspective that has long been present in transitional justice discussions about whether there are necessary trade offs to be made between peace, truth and justice in a specific transitional context.[95] However, by exposing the extent of financing for odious purposes, odious debt principles would reveal the depth of the damage caused by perpetrators which goes beyond violence directed against their opponents or against citizens targeted by repressive measures.[96] In particular, an investigation in the nature and extent of a post-conflict state's debts may help reveal on the wealth amassed by a

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[93] Lee C Buccheit and Mitu Gulati, "Odious Debt and Nation Building: When the Incubus Departs" (2008) 60(2) Maine Law Review 477-485, 485

[94] Larry May "Integrity and Value Plurality" Journal of Social Philosophy (1996) 27(1) 123-39

[95] Ruti Teitel *Transitional Justice* (OUP 2002)

[96] Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Economic Crimes" (2008) 2 International Journal of Transitional Justice 310–330

party to conflict, the resources available for reparations and the kind of initiatives that society can afford.[97] Addressing odious debt therefore enables a more robust conception of justice in *jus post bellum*.

Second, integrating questions of debt and finance into *jus post bellum* can overcome the natural dominance of civil and political rights issues, that is reflected in general public international law and human rights discourse. By considering questions of the just financing of a post-conflict State, *jus post bellum* can overcome criticisms of related areas such as transitional justice that have traditionally not focused on issues of socio-economic rights. Balakrishnan Rajagopal attributes to 'the dominance of Western scholars and NGOs,' arguing that it has in turn allowed a 'bias . . . [to be] built into the normative corpus of human rights.[98] Within the *jus post bellum* discourse, there are concerns that it could be manipulated to re-enforce the interests of powerful states.[99] Similar concerns arise in related fields like transitional justice and peace-building.[100] An approach that makes these issues an explicit part of any proposed framework will not resolve these concerns, but at least will ensure they are not unaddressed.

Third, explicit consideration of finance and debt may free funds for achievement of public goods in related areas to *jus post bellum* such as economic reconstruction, security sector reform, disarmament, demobilisation, and reintegration, or transitional justice. Each of these are costly endeavours that often operate in the context of limited funding and additional resources would be

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[97] ibid, 321

[98] Balakrishnan Rajagopal, 'Human Rights and Development: Legal and Policy Issues with Special Reference to Dams,' in Angela Cropper, Daniel Bradlow and Mark Halle (eds) *Regulation, Compliance and Implementation* (Cape Town:World Commission on Dams, 2000), pp. 4–5.

[99] Roxana Vatanparast, "Waging Peace: Ambiguities, Contradictions and Problems of *Jus Post Bellum* Framework" in Carsten Stahn, Jennifer Easterday and Jens Iverson, *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: OUP 2014) 142-159

[100] Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," Third World Quarterly 29, no. 2 (2008): 275-289; Chandra Sriam "Justice as peace? Liberal peacebuilding and strategies of transitional justice," Global Society: Journal of Interdisciplinary International Relations vol. 21, no. 4 (October 2007), pp. 579-91

no doubt welcomed. By providing greater financial support to these initiatives and ensuring that there is less pressure in the post-conflict period of fragility, the use of odious debt may increase likelihood of prevention of reversion to conflict. This aligns with principles or responsibilities to rebuild found in existing *jus post bellum* discourse.[101]

In introducing the *jus post bellum* discourse, we noted that a variety of proposed approach exist at present. Each could be employed for odious debt, but may have limitations. A formal legal approach to *jus post bellum* may suggest odious debt is too far removed and that it would be preferable to focus on conflict issues more closely related to the just war tradition with which *jus post bellum* is associated. A purely contingent or pragmatic approach will allow powerful states to accept odious debt principles in UN Security Council resolutions or western state backed peace agreements but will not provide a remedy, in cases like South Africa, where powerful states oppose debt repudiation or renegotiation. An interpretive approach is therefore more appropriate in providing criteria to assess how post-conflict states assume or repudiate the debts and financial obligations of prior conflict creating governments and States. An interpretive approach may also help resolve ongoing challenges in odious debt proposals that hinder its effective implementation.

A. Odiousness

A central challenge is the need to give content to the term "odiousness". Several authors draw a broad conception of odiousness, as being contrary to the interests of a society, or enacted without popular legitimacy (or a peoples' permission).[102] The ILC noted that "almost any political, economic or social action by a State may be disadvantageous to another State."[103] However only

[101] Larry May, *After War Ends*, (n18) 143-158

[102] However David Gray highlights the challenge of this approach when odious purposes, including human rights abuses, have democratic support. David Gray, "Devilry, Complicity and Greed: Transitional Justice and Odious Debt" (n82) 144

[103] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) para 130

Patrick Bolton and David Skeel directly engage in attempts to formulate a precise and operative legal definition.[104] They propose two criteria: systemic suppression and systemic plundering.[105] The authors provide several examples for systemic suppression, but fail to enunciate precise criteria. Neither term is clearly defined. In regards to systemic plundering, this could be equated to widespread or systemic corruption.[106] Such a conception may be covered by the international legal prohibition on corruption.[107]

Criteria for odiousness could be enhanced by focusing, on a preliminary basis, on areas of existing moral minimum consensus in international law. It is appropriate to consider first those breaches of international law, which receive the strongest normative condemnation and thus receive criminal sanction. In particular, gross violations of human rights are defined by the Rome Statute as the categories of aggression, genocide, war crimes, and crimes against humanity.[108] We can therefore propose that for a financial obligation to be "odious", its consideration has been used for:

(a) the commission, planning, instigation, ordering, aiding or abetting of gross violations of human rights; or
(b) a joint criminal enterprise involving gross violations of human rights; or
(c) command responsibility for gross violations of human rights.

This approach to the normative underpinning of odiousness is useful for several reasons. First, when Sack was writing in the early 20th century, the extent to which international law recognised

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[104] Bolton and Skeel, "Odious Debts or Odious Regimes?" (2007) *70 Law & Contemp. Probs. 83*, 112-6

[105] ibid, 115

[106] Seamus Miller, Peter Roberts and Edward Spense, *Corruption and Anti-Corruption: An Applied Philosophical Approach* (Pearson 2005)

[107] UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422

[108] Rome Statute of the International Criminal Court 2187 U.N.T.S. 90, entered into force July 1, 2002.

and penalised odious acts of State was limited to the limited laws of war and a significantly limited jurisprudence on diplomatic protection.[109] Subsequently, theories of State and individual responsibility have developed for a wide range of crimes, delicts and infractions.[110] The need for business in conflict affected areas to respect human rights was highlighted as part of the Ruggie principles.[111] The ILC noted that subsequent to the UN Charter "debts contracted by a State in order to wage a war of aggression are clearly odious debts."[112] Some scholarship suggests an analogy should be drawn with accomplice liability standards in international criminal law.[113] It is suggested that just as not all breaches of a State's human rights obligations give rise to individual criminal responsibility, so too will not all of such breaches give rise to the description "odious", in the absence of further State support.

Second, in making this proposal, this article does not wish to preclude the expansion of the descriptor "odious" to a broader range of conduct. Rather, for a proposal generously described as in its infancy, it is prudent to focus on those areas of State conduct, which receive the strongest international opprobrium. However, this approach also reflects the commitment to stewardship and accountability that I believe should be a principle of any *jus post bellum* framework, which could be the basis of its future expansion. A focus on international crimes reflects a theory of sovereignty based on a morally minimal theory of a State's duty to protect its citizens.[114] In other areas of public international law and policy, such as the responsibility to protect, we have moved

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[109] M. Cherif Bassiouni, *From Versailles to Rwanda: The Need to Establish a Permanent International Criminal Court*, (1996) 10 HARV. HUM. RTS. J. 1

[110] M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003 Transnational Publishers)

[111] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/17/31, 10

[112] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29) para 136

[113] Sabine Michalowski and Juan Pablo Bohoslavsky "Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts" (2009-2010) 48 Colum. J. Transnat'l L. 59

[114] Purdy & Fielding, "Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power" (2007) *70 Law & Contemp. Probs. 165;*

towards a functional and limited account of sovereignty, where the sovereign acts as trustee of the people in its protection of its citizens.[115] The commission of gross violations of human rights is a paradigmatic failure of a state's stewardship of its sovereign commitments to its own people. By rooting odiousness in a stewardship conception of sovereignty, It is suggested that when government officials act in contravention of these fiduciary duties, they are acting outside the scope of their lawful authority and voids contracts and agreements entered into with that purpose.[116] This provides a clear basis for expanding the set of recognised fiduciary duties over time with State practice. It also provides a means of assessing the conduct of states and international organisations who seek to assist in the post-conflict arena.[117] An approach to odiousness based on stewardship and accountability therefore reinforces principles proposed for *jus post bellum* in the post-conflict space, but also reflects pre-existing commitments of States and international organisations in other relevant areas. A consistent approach to these norms suggests it is a problem for states to on the one hand advocate for transitional justice processes, or peace-building, etc, and on the other hand insist upon payment of debts which had been used to facilitate gross violations of human rights.

Third, focusing on gross violations of human rights is also valuable as accountability for such atrocities forms part of the international community and several states' agendas in transitional societies and fragile states.[118] Responding to gross violations of human rights is an appropriate basis for the odious content of this proposal as it forms the basis of several other fields of practice that operate through public international law and the policies of international organisations and

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[115] Larry May *Crimes Against Humanity: A Normative Account* (CUP 2005)

[116] Lee C Buchheit and Mitu Gulati, "Responsible Sovereign Lending And Borrowing" (2010) 73 Law & Contemp. Probs. 63, 88

[117] James Gallen, "*Jus Post Bellum:* An Interpretive Framework" (n24) 75-77

[118] United Nations Security Council. *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies;* Regulation no 1889/2006 of the European Parliament and Council, from December 20, 2006 which established a financial instrument for the promotion of global democracy and human rights; The European Parliament and Council regulation of November 15, 2006 which established an Instrument for Stability.

donors in transitional societies and fragile states.[119] Perhaps the greatest value added by focusing on these offences as a definition of odiousness is that it contributes expressly to the mutually re-enforcing effect of the other fields of practice that operate in post-conflict and fragile states. Similarly, focusing on gross violations of human rights as odiousness would re-enforce domestic prohibition of gross violations of human rights in creditor states and international institutions and provide coherence between the legal obligations of creditors and their attitude to odious finance. This approach enables the debtor state to pursue a coherent public justification from creditor states, for maintaining financial obligations for odious purposes and supporting international human rights in other areas institutions and enterprises in a way that an alternative framing rhetoric may not be able to achieve.

B. Creditor Standard of Care

The second major issue in need of resolution is the standard of care against which creditor conduct will be assessed. In providing for circumstances in which debt would be repudiated, odious debt could operate as a limitation on the international legal obligation to repay state-to-state debts, formulated as *pacta sunt servanda.*[120] In this regard, Robert Howse indicates that odious debt would represent an *equitable* exception to contracts in circumstances of transition between regimes.[121] Equity has grown as a source of international law, especially as general principle of law recognised by civilised nations but remains comparatively underdeveloped.[122] Equity can be found readily and extensively in the common law tradition, with analogous equitable

[119] Transitional justice, peace-building, security sector reform, refugee law, constitutionalism, economic development as post-conflict reconstruction

[120] Howse, The Concept of Odious Debt in Public International Law (n34) , 4

[121] ibid, 6

[122] Franck, "Equity in international Law" 23-49, in Jasentuliyana (ed), Perspectives on International Law (Springer 1995); van Djik, "Equity A Recognized Manifestation of International Law?" in Maarten Bos By Wybo P. Heere (eds) International Law and Its Sources: Liber Amicorum, (Brill 1989), 1-22; Janis, "The Ambiguity of Equity in International Law" (1983) 9 Brooklyn Journal of International Law 7; Lowe, "The Role of Equity in International Law" (1989) 12 Australian Yearbook of International Law, 54

principles in the Roman and civil law traditions and Chinese and Islamic thought.[123] We also find general reference to it in the writings of Grotius and Pufendorf, which may constitute "teachings of the most highly qualified publicists of the various nations" for the purposes of A38(1) of the ICJ Statute.[124] At present, the nature and structure of this proposed equitable exception remains unclear as it applies to odious debt.

The *jus post bellum* discussion can again shape this conversation. Larry May's overarching approach to the principles of *jus post bellum* was *meionexia,* where victors take less than their due to better achieve humanitarian goals in the transition from war to peace.[125] It has been recently suggested that this idea may be equivalent to the principle of equity or moderation.[126] To give content to this equitable exception, an appropriate standard could be derived from a private law analogy. General principles of *jus post bellum* provide some context for such a standard. May reminds us that Vitoria argued that wrongs committed during war should be punished "proportionate to fault"[127]. He argued that the guide to whether to seek retribution is whether it "be for the public good". He and other scholars have also suggested the use of proportionality as a meta-principle for weighing up demands and goods in the post-conflict space.[128] In this context the competing demands may be the stability of the international financial system and the entitlements of creditors, versus the needs of post-conflict reconstruction and prevention of further war and conflict, on the other.

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[123] Justice Margaret White, Equity - A General Principle of Law Recognised by Civilised Nations? (2004) 4(1) Queensland University of Technology Law Journal 103

[124] ibid, 106-7

[125] Larry may, *After War Ends* (n18), 9

[126] Larry May, *Jus Post Bellum,* Grotius and Meionexia, 21

[127] ibid p16

[128] Larry May and Michael Newton, *Proportionality in International Law* (OUP 2014)

To consider the application of equity, it is important to identify the range of relevant creditors to whom such a standard would apply. Private creditors will likely have clauses for choice of forum and choice of law as part of their loan agreement. Full litigation is unlikely against sovereign creditors, where arbitration is more likely. Third, international financial institutions have a statutory obligation to ensure that the finances they extend are used solely for the intended purposes, but also an immunity from suit.[129] Despite this variety, some formulation of due diligence, constructive notice or negligence standards seems appropriate to these creditors as an equitable and proportionate balance between the competing demands.[130] Sack's original standard was that creditors should have been actually aware of the odious purposes of the loan. Feibelman suggests the use of the American doctrines of equitable subordination and fraudulent transfer to give content to this equitable exception.[131] Furthermore, contracts that are tainted with illegal activity can be subject to the defence of "unclean hands." For instance, in *Adler v. Federal Republic of Nigeria* the United States Court of Appeals for the Third Circuit dismissed the action seeking to recover monies spent to fraudulently extract public funds in Nigeria through the collusion of state officials on the grounds of the "unclean hands" of the plaintiffs.[132] Human rights due diligence is also recommended in the Ruggie principles for businesses.[133] A broad application of these standards could also ameliorate concerns that the fungibility of sovereign finances made any odious standard unfair to creditors. Where a creditor engages in due diligence or lacks constructive notice, it would seem inequitable to void such contracts. An equitable exception for odious debt, liberally applied, would reflect the approach of *meionexia* in calling for creditors to accept or

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[129] For instance World Bank Articles of Agreement, Article III, Section 5 (b)

[130] Jonathan Shafter, "The Due Diligence Model: A New Approach to the Problem of Odious Debts" (2007) 21 Ethics and International Affairs 49-67

[131] Feibelman, "Equitable Subordination, Fraudulent Transfer and Sovereign Debt" (2007) *70 Law & Contemp. Probs. 249*, 179-83

[132] Adler v Nigeria 219 F.3d 869 (9th Cir. 2000); see also Donegal International Ltd. v. Republic of Zambia, 15 February 2007, [2007] EWHC 197 (Comm.)

[133] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (n111) 16

demand less than what is due as it is necessary for a greater good and the achievement of justice after conflict, i.e. the provision of finance in the post-conflict arena.

C. Institutions

Several institutional options arise as there is no established procedure for the bankruptcy for sovereign debt.[134] The desire for institutionalisation also aligns with a commitment to support the development of the international rule of law in issues of *jus post bellum.*[135] Though Sack's original proposal was for a dedicated international tribunal to resolve issues of odious debt, this seems unlikely in the foreseeable future. Howse has argued that the complexity and variety of transitional contexts suggests that there is no single obvious legal forum for the adjudication or settlement of claims of odiousness.[136]

1. *Ex Ante* Institutional Approaches

Two *ex ante* approaches to designation of debt as odious can be suggested. First, it is possible to demonstrate the potential for ethically evaluated use of sovereign wealth in bilateral donors. The Norwegian Government Pension Fund, at 300 billion, the 2nd largest pension fund in the world, established an Advisory Commission on International law to assess whether uses of the fund were in conflict with public international law.[137] The evaluation for ethically questionable use of this fund has been expanded by the establishment of a Council for Ethics in 2004.[138] Therefore individual state donors or international organisations could adopt a policy to assess financial commitments for odious purposes, both *ex ante* and *ex post.* Similarly, the UK Debt Relief

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[134] Yvonne Wong, *Sovereign Finance and the Poverty of Nations: Odious Debt in International Law* (n5), 69

[135] Larry May, *After War Ends* (n18) 19

[136] Howse The Concept of Odious Debt in Public International Law (n34) 22

[137] Simon Chesterman, "The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations - The Case of Norway's Sovereign Wealth Fund" (2007) 23(3) American University International Law Review 577-615

[138] ibid, 582-91

(Developing Countries) Act puts in place a cap on the amount that commercial creditors may recover on the historically-incurred debt of the 40 countries qualifying for the World Bank and IMF Highly Indebted Poor Countries Initiative ("HIPC").[139] However, this only governs debt accrued before 2010, as the UK government felt a forward-looking application of the law, covering future indebtedness, would chill the degree to which sovereign lenders and creditors would choose English law to govern future debts.[140] A similar mechanism could be advocated for in targeted jurisdictions such as the United Kingdom or the United States, especially New York law.

Second, there have been suggestions that as part of its Chapter VI powers, the United Nations Security Council could designate states' conduct as "odious" and therefore create conditions that creditors who thereafter lend to such states, for example Syria at present, could not legitimately expect such financial obligation to be honoured in the event of regime change in that country upon conclusion of the "odious" designation.[141] Existing literature on *jus post bellum* has discussed the potential for the Security Council to regulate post-conflict issues, including in cases of international territorial administrations.[142] However, as political and financially costly and exceptional endeavours, this would be inappropriate as the sole basis for the application of odious debt principles. *Ex ante* approaches represent a highly desirable approach to odious debt, as it would address several of the concerns regarding predictability and stability of the market as well as enabling effective repudiation or management of debt after conflict. However, significant political will is required to achieve an effective global approach to avoid the use of alternative sources of finance.

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[139] Debt Relief (Developing Countries) Act 2010

[140] White and Case, The UK Debt Relief (Developing Countries) Act 2010: Cause and Effects: http://www.whitecase.com/alerts-09072010-2/#.U3oTGF57bG4

[141] Paul B. Stephan, The Insttutionalist Implications of the Odious Debt Doctrine (2007) 70 Law and Contemp. Probs. 213-230

[142] Kristen Boon, Obligations of the New Occupier: The Contours of a Jus Post Bellum, 31 Loy. L.A. Int'l & Comp. L. Rev. 101 (2008)

2. *Ex Post* Institutional Approaches

Other institutional mechanisms provide for exclusively *ex post* assessment of debt as odious. A broad range of contractual and arbitration remedies already exists for sovereign debt to private or sovereign creditors. A dedicated institutional forum could often be precluded by choice of law or forum clauses in the initial loan agreement. In such cases, some have suggested that odious debt can be folded in the pre-existing remedies and defences familiar to contractual disputes in cases of repudiation.[143]

However, the use of existing mechanisms could potentially inhibit contribution of odious debt to re-enforcing other fields of practice in transitional states. In particular, use of existing remedies will likely place the site of adjudication outside of the jurisdiction of the affected State. The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) indicate that if a endeavour in a foreign jurisdiction is to have any effect on the local population of a transitional society, an organised outreach program must supplement the work of the formal legal mechanism.[144] This could be plausibly applied to litigation or arbitration involving a State and private creditors. Greater publicity and communication with the post-conflict state and society may enable greater public awareness and ownership of a process of dispute resolution involving the country's finances.

The situation is different for sovereign creditors, where the practice to date has been the potential for informal re-negotiation or re-scheduling of a new regime's financial obligations, rather than the use of judicial remedies. Given that states are reluctant to litigate against one another, it is extremely unlikely that sovereign creditors would elect to submit to a judicial process that could

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[143] G. Mitu Gulati, Lee Buchheit & Robert Thompson, "The Dilemma of Odious Debts" (n24) 35

[144] Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program" (2005) 3 Journal of International Criminal Justice 950

potentially determine them complicit with or having knowledge of a prior regime and its specific odious acts in a formal setting. This is particularly the case because it would represent a significant shift from a prior background of negotiation and the absence of a formal institutional framework.[145] In addition, we must consider the special situation of the international financial institutions, which maintain a general immunity from suit and for whom there is an obligation to remain non-political which would preclude their capacity to engage in any judicial determination of odiousness.[146] It seems practically and politically unfeasible to use full judicial processes to pursue the defence of odious finance against sovereign creditors or international financial institutions.

Other avenues may be more fruitful. Some post-conflict states have included financial and economic issues as part of the mandate of their truth and reconciliation commissions. Some truthc commissions, such as those in Timor-Leste, Sierra Leone and Peru, have already incorporated an examination of economic crimes into their broader mandate.[147] The broader mandates of these truth commissions did not lead to unreasonable delays in the completion of their work or the submission of their reports.[148] The advantage of incorporating the odious debt issue in a truth commission setting is that it can change the dynamic of debt re-negotiations, by involving the use of public hearings to identify the extent of knowledge and notice of creditors regarding the odious purposes for which their finances had been used. Best practice regarding truth commissions also suggests staffing the commissioners with experts in specific areas, typically human rights, but could now extend to include sovereign debt.[149] Finally truth commissions may offer a formal but non threatening means of assessing the level of odious debt, as they are ideally non-prosecutorial in nature and independent from the government of a post-conflict society.

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[145] New Economic Foundation, Odious Lending: Debt Relief as if Morals Mattered, (n4), 22

[146] Ibrahim Shihata, "Prohibition of Political Activities in the Bank's Work," (July 11, 1995) (hereinafter "Political Activities") at "Part II: Requirements of Relevant Provisions of the Articles of Agreement."

[147] Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Economic Crimes" (n96) 319-321

[148] ibid, 322

[149] OHCHR, Truth commissions (HR/PUB/06/1)

The effect of this distinction would be to provide a forum for the settlement and determination of odiousness that would take the determination away from the government of the sovereign debtor, who has an incentive to maximise the extent of prior odiousness and the creditor who has the opposite incentive. Leaving a range of "soft" rather than the automatic repudiation of the financial obligation better reflects its elective and equitable nature and has particular regard to the circumstances of the sovereign creditor and international financial institution. Soft options would also permit using the recognition of odiousness as a bargaining tool for the sovereign debtor. In this regard, it can be considered a factor in future development assistance and financial assistance but remains distinct from overall considerations of development-based debt relief. Finally, using soft remedies mirrors the need to tentatively build consensus on the definition of odiousness. It may be easier to convince sovereign creditors and international organisations to appear before and contribute to a truth commission where repudiation of financial obligations is not an automatic consequence of their contribution, but rather a potential outcome of subsequent negotiation and a contribution to their expressly stated interest in transitional justice. In the same way as the initial focus in determining odiousness, this should not be taken as determinative of the future consequences of institutional mechanisms for odiousness, but could be seen as what is possible in the infancy of a doctrine and as the potential beginnings for repudiation in the future. Robert Howse expresses this idea as follows:

> "Does an odious debt doctrine impose, as a matter of state responsibility in international law, an obligation on States to ensure that odious debts are not enforced in their domestic legal systems? Or does it simply add to the considerations that courts in most domestic legal systems would weigh in determining the limits of freedom of contract (illegality, fraud, changed circumstances, ostensible authority of the agent to contract, public policy, etc.)"[150]

[150] Howse, The Concept of Odious Debt in Public International Law (n34) 6

Diverse but integrated institutional arrangements reflect the extent of plurality of fora in international affairs generally and the phenomenon of fragmentation across related and overlapping substantive areas of law. The value of a *jus post bellum* as interpretation approach is to further legitimate diverse post-conflict processes by presenting them as part of a coherent whole through shared interpretive norms. Odious debt would therefore form part of a network of ideas, principles and institutions to be assessed in the post-conflict arena and not merely a fragmented and fledging proposal.

D. Incentives

The ILC noted that even in categories of odious debts traditionally repudiated successfully, such as war debts or hostile debts, for reasons of political expediency States have sometimes assumed these debts.[151] The payment of Czechoslovakia of Austrian war debt after World War I is an example.[152] However, it is worth remembering that such cases arise primarily in a context where aggressive war and human rights abuses had not been outlawed in public international law. Today a different set of incentives and reasons of political expediency exist.

The flow of capital to sovereign debtors is exceptionally important to the world economy. In the case of post-conflict states, it is important to facilitate post-conflict reconstruction. However, it is often argued that misbehaviour by sovereign debtors or creditors destabilises this key component of the international financial system and may ultimately hinder access to finance for relevant states.[153] To invoke odious debt in support of the repudiation of sovereign debts could, in the absence of acquiescence from creditors, expose a new government to severely negative economic consequences including seizure of assets located abroad and an inability to attract further direct

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[151] *Ninth Report on the Succession of States in Respect of Matters other than Treaties,* (n29), para 153-6

[152] ibid

[153] Lee C Buchheit and Mitu Gulati, "Responsible Sovereign Lending And Borrowing" (n116)

foreign investments or to secure needed extensions of credit. On the other hand, international lenders have a disincentive to recognise even clear cases of odious debts. An effective principle of odious debt may lead prior unrestrained lending to be questioned.[154] The use of odious debt could mean "that a sovereign borrower will feel emboldened to strategically repudiate obligations in the future."[155] As a result, creditors may charge more when lending by pricing in the cost of repudiation.[156] Raghuram Rajan described the potential operation of odious debt as "more of a neutron bomb than a laser-guided missile. Not only would it make it more difficult for odious regimes to borrow, but it would also make borrowing more difficult for any legitimate regime that had even a remote possibility of being succeeded by an odious regime."[157]

Second, many sovereign debt cases involve a choice-of-law provision. It would follow that one need only persuade the jurisdictions that supply the law applicable to these disputes to adopt a domestic analog to odious debt. Bradley Lewis identifies the problem with this approach is that the jurisdictions may resist adopting odious debt for fear of losing their preferred status among parties to a bond agreement; there is a surfeit of domestic courts in the world, each with the ability to adjudicate claims submitted to it.[158] Finally, debts and other financial obligations may traded in secondary markets by groups free from any knowledge or notice of any odious issues involved.[159]

Each of these arguments must be taken seriously, but should not serve as an absolute prohibition on developing odious principles in international law or policy. Some policy tools and analysis now exist to identify the level of odious debt across transitional societies and developing

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[154] Joseph Hanlon, '"Illegitimate" Loans: Lenders, Not Borrowers, are Responsible' (n50), 216-7

[155] Adam Feibelman, "Ecuador's Sovereign Default: A Pyrrhic Victory for Odious Debt?", 25-7 Journal of International Banking Law and Regulation 357-62, 361

[156] ibid

[157] R Rajan, 'Odious or just malodorous?', Finance & Development, IMF, December 2004, pp 54 – 55.

[158] Bradley Lewis, "Restructuring the Odious Debt Exception" 2007 5 B.U. Int'l L.J. 297

[159] Phillip J. Power, "Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings", (1996) 64 Fordham L. Rev. 2701

countries.[160] Slippery slope or floodgates arguments that odious debt repudiation would lead to severe uncertainty in the financial system are undermined by comparison to the greater uncertainty caused by the disruption of conflict itself to debt repayment and by the clear but informal and political practice of debt re-negotiation after regime change in post-conflict states. Surely however, the destabilising effects of conflict have already affected the attitudes and availability of credit to conflict affected states? Does a subsequent repudiation of conflict-tainted debt have a more destabilising effect than the conflict itself?

The UK and Norwegian examples illustrate the potential for single States to alter their approach based on moral and political pressures. It may be possible over time to gather consensus in the European Union or Council of Europe to adopt a similar approach, or ultimately to develop an agreed set of principles in a universal soft law document. The development of any future odious debt principles thus operates in the context of competing priorities between creditor and debtor states.[161] Both constituencies must be convinced of the value of this principle before it can be an effective element of any *jus post bellum* framework. The debate on odious debt thus far has been complicated by the different rationales employed by these constituencies. Activists and some scholars make a moral case for repudiation of odious debt, whereas those involved in international financial organisations and litigation make legal and economic arguments.[162] The value of integrating odious debt into jus post bellum is to connect it with related areas in a way that seeks to acknowledge there are multiple disciplines and dimensions relevant to the question of justice after war and that a purely moral, legal or economic account will thus be inadequate. Further research is required to demonstrate not only a moral and political but an economic and empirical case for odious debt as justice after conflict.

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[160] The Prevention of Odious debt working group, Preventing Odious Obligations: A New Tool for Protecting Citizens from Illegitimate Regimes (2010 Center for Global Development)

[161] Raghuram Rajan, Odious or Just Malodorous? Finance & Development December 2004 54-55

[162] Lee C Buccheit and Mitu Gulati, "Odious Debt and Nation Building: When the Incubus Departs" (n94) 481

V. Conclusion

The proposal for odious debt and finance considered here potentially enables post-conflict societies an opportunity to better pursue a just and sustainable peace unburdened with the financial commitments of a prior regime. A focus on finance accrued for the purposes of the commission of gross violations of human rights enables this process by focusing on the moral and legal minimum of conduct that could constitute the term "odiousness". This moral minimum reflects not only a strong area of consensus among the international community, but also a priority for *jus post bellum*, which seeks to prevent the re-emergence of conflict and violence. It also reenforces structural norms of stewardship and accountability found in an interpretive approach to the topic. The argument in this article has to been to ease the burden facing transitional societies in paying for these endeavours where creditors have in some way contributed to conflict or gross violations of human rights. An equitable principle, applied across the diverse relevant creditors and institutions, including national litigation and arbitration, seeks to balance the priorities of creditors and debtor states. By not insisting on the strict enforcement of prior contractual obligations, this approach to odious debt seeks to reflect the principle of *meionexia* that undergirds Larry May's approach to *jus post bellum*.

The role of odious debt as an element of *jus post bellum* is to question the legitimacy and efficacy of the financial arrangements of a post-conflict state and query whether any means of repudiating or re-negotiating those financial obligations are possible which re-enforce the shared enhancement of structural conditions that operate in post-conflict and transitional societies. Though the incentives of creditors and debtors make an immediate formal legal expression of this principle implausible, it is hoped that over time the development of odious debt in the context of broader *jus post bellum* discussions can strengthen the case to see this principle expressed and applied in relevant international law and policy.