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# Puerto Rico's Odious Debt: The Economic Crisis of Colonialism

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# Puerto Rico's Odious Debt: The Economic Crisis of Colonialism

## **Acknowledgements**

This article is written for, and dedicated to, el pueblo puertorriqueño, which has withstood over 500 years of colonial rule and continues to resist.

# PUERTO RICO'S ODIIOUS DEBT: THE ECONOMIC CRISIS OF COLONIALISM

Natasha Lycia Ora Bannan†

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## I. INTRODUCTION

The Caribbean island of Puerto Rico is facing one of the greatest financial crises of our time, where the island is beyond the point of bankruptcy after accumulating \$72 billion in debt, more than its Gross National Product (GNP). The island is home to 3.5 million residents and the homeland of roughly 5 million Puerto Ricans in the diaspora who are watching intently as the island tries to prevent its nation’s collapse. The debt is not only unpayable, as Governor Alejandro García Padilla declared in 2015;<sup>1</sup> it is also arguably the result of unscrupulous business practices largely on the part of hedge funds who bought junk-rated municipal bonds at extremely low prices and then charged excessively high interest rates.<sup>2</sup> Efforts to renegotiate the debt, restructure the debt, or allow for a bankruptcy option for Puerto Rico have all proven unsuc-

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† Natasha Lycia Ora Bannan is Associate Counsel at LatinoJustice PRLDEF and President of the National Lawyers Guild. This article is written for, and dedicated to, *el pueblo puertorriqueño*, which has withstood over 500 years of colonial rule and continues to resist.

<sup>1</sup> Michael Corkery & Mary Williams Walsh, *Puerto Rico’s Governor Says Island’s Debts Are ‘Not Payable’*, N.Y. TIMES (June 28, 2015), <http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html>.

<sup>2</sup> Ed Morales, *How Hedge and Vulture Funds Have Exploited Puerto Rico’s Debt Crisis*, NATION (July 21, 2015), <http://www.thenation.com/article/how-hedge-and-vulture-funds-have-exploited-puerto-ricos-debt-crisis/> [<https://perma.cc/RL6J-PN2T>].

cessful thus far, and creditors have shown no interest in engaging in debt talks. To the contrary, when Puerto Rico attempted to pass a domestic version of bankruptcy protection in 2014,<sup>3</sup> many hedge fund creditors sued immediately to prevent enactment of the law. The matter is currently pending before the U.S. Supreme Court.<sup>4</sup>

Much debate has been generated about the legitimacy of the debt and the brutal and devastating impact it is having on the people of Puerto Rico, who are being forced to repay it in the form of drastically reduced public services, benefits and employment, as well as increased taxes. The debt is odious in effect and impact, and possibly in origin. It is important to note, however, that while the traditional context of odious debt looks at the odious nature of the debt itself,<sup>5</sup> this article discusses the odious nature of the lending by creditors to a democratically elected government within the unique political context of colonialism.

The doctrine of odious debt argues that debt accumulated by an odious regime that burdens, rather than benefits, the people of that nation should not be repaid.<sup>6</sup> An emerging trend in the doctrine of odious debt is derived from the realm of transitional justice, where one sovereign (usually in the form of a dictator or repressive ruler) has transferred power to another (signaling a political shift in governance and ideology), and debt repudiation would promote the goals of that transition.<sup>7</sup> That context, which has been the subject of much discussion and debate, will not be resurrected here. Rather, I argue that the nuanced context of Puerto Rico's political status is relevant to an analysis of whether equi-

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<sup>3</sup> Ley para el Cumplimiento con las Deudas y para la Recuperación de las Corporaciones Públicas de Puerto Rico [Puerto Rico Public Corporations Debt Enforcement and Recovery Act], 2014 P.R. Laws Act No. 71. See also *The Facts About Puerto Rico's Public Corporations Debt Enforcement and Recovery Act*, GOV'T DEV. BANK FOR P.R., <http://www.bgfpr.com/documents/FactsAboutDebtEnforcementAndRecoveryAct.pdf> [https://perma.cc/7HE9-PELM].

<sup>4</sup> The two main cases involving dozens of hedge funds, *Puerto Rico v. Franklin California Tax-Free Trust* and *Acosta-Febo v. Franklin California Tax-Free Trust*, have been consolidated before the U.S. Supreme Court. *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577 (D.P.R. 2015) (holding that Puerto Rico was preempted from enacting its own domestic bankruptcy code that would allow it to restructure municipal and agency debt despite its explicit exclusion from federal bankruptcy law under Chapter 9), *aff'd*, 805 F.3d 322 (1st Cir. 2015), *cert. granted sub nom* *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 582 (2015).

<sup>5</sup> G. Mitu Gulati et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1203 (2007).

<sup>6</sup> Sabine Michalowski & 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*, 48 COLUM. J. TRANSNAT'L L. 59, 92-93 (2009).

<sup>7</sup> *Id.* at 92.

table principles allow Puerto Rico to argue the odiousness of its debt as a defense to repayment under general principles of odious debt as part of debt relief. While most nations whose debt has been declared, or argued to be, odious generated such debt through state-to-state<sup>8</sup> borrowing, Puerto Rico's debt is exclusively generated by the selling of municipal bonds on the bond market, namely to private creditors, such as hedge fund investors. Conflicts arising from contractual disputes, including the selling of state bonds to a private creditor/investor, are usually governed by domestic law, which may include equitable considerations or limitations on the payment of debt. However, such laws rarely, if ever, take into consideration the larger context in which the debt accrued. The doctrine of odious debt begs us to consider the circumstances, such as whether those on whose behalf the debt was incurred ultimately benefitted from such accrual. In this sense, international law and principles provide a broader framework from which to approach debt and debt relief at the nation level.<sup>9</sup> It is in this context that Puerto Rico's unique political situation as a colony for over 500 years becomes relevant.

#### A. *Overview of Odious Debt*

The doctrine of odious debt is one based in principles of equity, not law. It is an equitable remedy, one that considers factors of fairness and justness as critical elements that help make up the "general principles of law of civilized nations."<sup>10</sup> Similar to other equitable remedies, it is a defense to a binding obligation to repay money borrowed.<sup>11</sup> As such, it acts as a limitation to the general obligation to pay back debts accrued by one state when borrowing from other states. As governments transition from old to new, abu-

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<sup>8</sup> In the international context, "state" is synonymous with "nation," not a unit of a nation such as the states of the United States. While Puerto Rico's territorial status means it remains a colony of the United States, subject to the jurisdiction and laws of the United States, I use "state" at times to refer to Puerto Rico as a separate nation with its own obligations and rights.

<sup>9</sup> See generally Alice de Jonge, *What Are the Principles of International Law Applicable to the Resolution of Sovereign Debt Crises?*, 32 POLISH Y.B. INT'L L. 129 (2012).

<sup>10</sup> Robert Howse, *The Concept of Odious Debt in Public International Law*, Discussion Paper 185, U.N. CONF. ON TRADE & DEV., UNCTAD/OSG/DP/2007/4, 6 (July 2007), [http://unctad.org/en/Docs/osgdp20074\\_en.pdf](http://unctad.org/en/Docs/osgdp20074_en.pdf) [https://perma.cc/SC5D-63VC]. The principle of equity embedded in odious debt constitutes "one of the fundamental sources of international law stipulated in the Statute of the International Court of Justice." *Id.* at 21.

<sup>11</sup> *Id.* ("The international law obligation to repay debt has never been accepted as absolute, and has frequently been limited or qualified by a range of equitable considerations, some of which may be regrouped under the concept of 'odiousness.'").

sive to democratic, or governing in war-time to post-conflict societies, they seek to undo the choke hold of debt accumulated unfairly or unconscionably, which burdens nations seeking progress or economic stability.<sup>12</sup>

The principles of odious debt provide a moral foundation for severing, in whole or in part, the continuity of legal obligations where the debt in question was contracted and used in ways that were not beneficial, or were actually harmful, to the interests of the population. Thus the debt is either adjusted or severed (often in the context of political transitions) based in part on the notion that the debt incurred did not benefit, or was even used to repress, the people of that nation. Interestingly, odious debt first appeared in practice when the United States refused to assume the debts acquired by Spain when it was ceded sovereignty over Cuba, Puerto Rico, the Philippines, and other territories in the late nineteenth century after the Spanish-American War.<sup>13</sup> The United States claimed that the debt Spain was attempting to pass on after trading colonial rule was not contracted for the benefit of the Cuban people, and in fact was hostile to their interests.<sup>14</sup> As a result, the United States bore no obligation to honor it. Although Spain maintained the position that the sovereign who gains the benefits of ruling also bears the burdens of assuming its debts, the United States eventually prevailed.<sup>15</sup>

Debt repudiation is not a new concept, although it has gained traction lately as the international community becomes more attuned to the crushing weight of debt and debt repayment on poorer nations whose debt only benefits creditor nations and perpetuates vicious cycles of economic violence on their citizens.<sup>16</sup> The concept of odious debt was originally articulated after World

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<sup>12</sup> See generally Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605, 621–33 (2007) (examining the historical origins of the doctrine of odious debt).

<sup>13</sup> Howse, *supra* note 10, at 10–11.

<sup>14</sup> *Id.* The American Commissioners who refused to pay Spain's debt incurred in Cuba reasoned that "the loans were hostile to the people required to pay them." *Id.*

<sup>15</sup> Paul B. Stephan, *The Institutional Implications of an Odious Debt Doctrine*, 70 L. & CONTEMP. PROBS. 213, 219–20 (2007).

<sup>16</sup> See Chris Jochnick, *The Legal Case for Debt Repudiation*, in SOVEREIGN DEBT AT THE CROSSROADS: CHALLENGES AND PROPOSALS FOR RESOLVING THE THIRD WORLD DEBT CRISIS 132 (Chris Jochnick & Fraser A. Preston eds., 2006); see also Michalowski & Bohoslavsky, *supra* note 6, at 89–90 ("The contemporary legal discussion of odious debts to some extent reflects the view of campaigners that a doctrine of odious debts should address broader political and moral concerns. It demonstrates a widely shared conviction that legal remedies are necessary in order to deal with cases in which debt repayment is regarded as morally repugnant.").

War I by Alexander Nahum Sack, who divided odious debts into several categories, including war debts, subjugated or imposed debts, and regime debts.<sup>17</sup> An odious debt described any debt contracted for purposes that do not conform or comply with customary international law and, in particular, the principles of international law embodied in the Charter of the United Nations.<sup>18</sup>

Various principles in international law contribute to the formation of the notion of odious debt, all of which are applicable in the context of Puerto Rico. Strict interpretation and compliance with traditional contract law and creditor/debtor lending principles shifts to more equitable considerations under the doctrine of odious debt. Such considerations include promoting equitable and fair dealing, protecting human rights, establishing and supporting democracy and democratic movements, and creating processes for true civic participation.<sup>19</sup> The prominence of consideration of human rights in debt accumulation and repayment is particularly salient in the context of Puerto Rico, where the economic crisis has resulted in a foreclosure and housing crisis, increased crime and violence, forced migration, and extraordinarily high levels of poverty and unemployment. As a result of the debt owed, millions have been impacted by austerity measures and cuts to public services.<sup>20</sup>

Since the end of the 1898 Spanish-American War, there has been little opportunity to adjudicate claims of odious debt in the domestic context. Odious debt has not developed much in domes-

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<sup>17</sup> ALEXANDER NAHUM SACK, *LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] (1927); see also Howse, *supra* note 10, at 2.

<sup>18</sup> Mohammed Bedjaoui (Special Rapporteur of the Int'l Law Comm'n), *Ninth Rep. on the Succession of States in Respect of Matters Other than Treaties*, ¶ 129, U.N. Doc. A/CN.4/301 and Add.1 (Apr. 13 and 20, 1977).

<sup>19</sup> Howse, *supra* note 10, at 4 ("Formal concepts of sovereignty and statehood have been influential and so have notions of political justice and accountability, as well as ideas of fair dealing and equity in contractual relations. In recent and contemporary treatments of odious debt, human rights elements have attained importance . . .").

<sup>20</sup> Letter from Annette Martínez Orabona, Caribbean Inst. Human Rights, and Eva Prados Rodríguez, Gen. Coordinator, Cumbre Social, to Emilio Álvarez Icaza, Exec. Sec'y, Inter-American Comm'n on Human Rights (Jan. 20, 2016) (request for a thematic hearing before the IACHR regarding public debt, fiscal policy, and poverty in Puerto Rico) (on file with author) [hereinafter Request for Thematic Hearing]; see also Brief for LatinoJustice PRLDEF et al. as Amici Curiae Supporting Petitioners at 3–20, *Commonwealth of Puerto Rico v. Franklin Cal. Tax-Free Tr.*, No. 15-233 (Jan. 26, 2016), [http://latinojustice.org/civil\\_rights/commonwealth\\_v\\_franklin.pdf](http://latinojustice.org/civil_rights/commonwealth_v_franklin.pdf) [<https://perma.cc/72R6-CVXZ>]; see also Ed Morales, *The Roots of Puerto Rico's Debt Crisis—and Why Austerity Will Not Solve It*, NATION (July 8, 2015), <http://www.thenation.com/article/the-roots-of-puerto-ricos-debt-crisis-and-why-austerity-will-not-solve-it/> [<https://perma.cc/QAH5-QR3Z>].

tic practice because it is not often asserted as a defense to contract enforcement.<sup>21</sup> However, contract law is grounded in common law, and as such evolves with the facts, law, and equitable principles presented in each case; therefore, odious debt and other equitable remedy doctrines develop over time.<sup>22</sup> Inconsistent or even inadequate state practice is neither a reason to disregard the doctrine or discourage its assertion, nor should obligations deemed odious continue to be enforced in domestic fora.<sup>23</sup> Normative considerations and state practice recognize that debt in a wide variety of legal and political contexts has led to determinations of odiousness.<sup>24</sup> As such, strict conditions, terms, or scenarios are not necessary to argue for the non-enforcement of debt obligations.

*B. Economic Crisis and Human Rights Violations in Puerto Rico*

Puerto Rico is spending more on debt service than on education, health, or security.<sup>25</sup> The weight of its crushing \$72 billion debt has resulted in closing over 150 schools,<sup>26</sup> increasing taxes,<sup>27</sup>

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<sup>21</sup> Cf. Stephan, *supra* note 15, at 213 (“The United States originated the concept of odious debt over a century ago, but since World War II, it has regularly upheld the position of creditors in negotiations with defaulting sovereign debtors. At present no treaty or legislation specifically provides for this defense, and no domestic court in any country or any modern arbitral tribunal has embraced it.”).

<sup>22</sup> In the international human rights context, a similar notion is that of customary international law, which is a body of law made by the accumulation of decisions, norms, and principles in domestic, regional, and international fora. It includes the general and consistent practices of states and a sense of legal obligation that binds them to such decisions and practices. Admittedly, it is still debated whether odious debt is considered part of customary international law, in part because it is a remedy at equity, not at law, and because there is not a consistent state practice of successor states assuming the debt of previous regimes. However, that does not necessarily make debt less odious. See, e.g., Michalowski & Bohoslavsky, *supra* note 6, at 65; Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT’L L. REV. 1239, 1247–53 (2004).

<sup>23</sup> See Howse, *supra* note 10, at 8 (“It would be mistaken to invoke cases where the debt was arguably odious but the outcome was adjustment not elimination of obligations to show that state practice does not support the existence of an odious debt concept as customary international law.”).

<sup>24</sup> The United States has historically recognized debt repudiation by various states outside the traditional scope of despotic dictatorships. See Sara Ludington et al., *Applied Legal History: Demystifying the Doctrine of Odious Debt*, 11 THEORETICAL INQUIRIES L. 247, 248–49 (2010).

<sup>25</sup> Jennifer Wolff, *The Human Cost of Puerto Rico’s Limbo*, OPEN SOCIETY FOUND.: VOICES (Jan. 26, 2016), <https://www.opensocietyfoundations.org/voices/human-cost-puerto-rico-s-limbo> [https://perma.cc/GEN6-WNKE].

<sup>26</sup> Danica Coto, *Puerto Rico Struggling to Maintain Its Schools Amid Cutbacks, Exodus*, ASSOCIATED PRESS (May 17, 2015), <https://www.bostonglobe.com/news/nation/2015/05/16/puerto-rico-closes-dozens-schools-economic-woes-deepen/443kazM17Vr8EdvpN2NGYN/story.html> [https://perma.cc/X84P-LNF2].

<sup>27</sup> Danica Coto, *Misery Deepens for Those in Puerto Rico Who Can’t Leave*, ASSOCIATED



laying off public sector workers,<sup>28</sup> proposing to reduce the minimum wage,<sup>29</sup> a growing shortage of medical specialists due to emigration of 3,000 doctors in a five-year period,<sup>30</sup> forcing migration to the United States,<sup>31</sup> increasing unemployment and underemployment,<sup>32</sup> separating families,<sup>33</sup> and increasing food insecurity.<sup>34</sup> Lack of any vehicle to renegotiate the debt will limit the prospects of altering Puerto Rico's bleak economic future and will further the mass exodus of residents from the island.<sup>35</sup>

In a hearing before the United States Senate Committee on the Judiciary, the Governor of Puerto Rico admitted the extent of

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PRESS (Aug. 3, 2015), <http://bigstory.ap.org/article/a4622a3466db460aa33b203830882756/misery-deepens-those-puerto-rico-who-cant-leave> [https://perma.cc/C37P-K5GA].

<sup>28</sup> Greg Allen, *As Puerto Rican Economy Lags, Some Question Cuts*, NAT'L PUB. RADIO (Sept. 26, 2011), <http://www.npr.org/2011/09/26/140802828/as-puerto-rican-economy-lags-some-question-cuts> [https://perma.cc/2C83-3A54].

<sup>29</sup> ANNE O. KRUEGER ET AL., PUERTO RICO—A WAY FORWARD, GOV'T DEV. BANK FOR P.R. (June 29, 2015), <http://www.bgfpr.com/documents/puertoricowayforward.pdf> [https://perma.cc/VEM3-88K6].

<sup>30</sup> Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html>.

<sup>31</sup> See, e.g., Jaison R. Abel & Richard Deitz, *Population Lost: Puerto Rico's Troubling Out-Migration*, FED. RESERVE BANK OF N.Y.: LIBERTY ST. ECON. BLOG (Apr. 13, 2015), <http://libertystreeteconomics.newyorkfed.org/2015/04/population-lost-puerto-ricos-troubling-out-migration.html> [https://perma.cc/EY43-FSLS]; Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico's Declining Population*, 20 CURRENT ISSUES ECON. & FINANCE, no. 4, 2014, at 1–8, [https://www.newyorkfed.org/medialibrary/media/research/current\\_issues/ci20-4.pdf](https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-4.pdf) [https://perma.cc/53UJ-YY2Z].

<sup>32</sup> See DEPARTAMENTO DEL TRABAJO Y RECURSOS HUMANOS NEGOCIADO DE ESTADÍSTICAS DEL TRABAJO, EMPLEO Y DESEMPLEO EN PUERTO RICO: PROMEDIO AÑO NATURAL 2014 [EMPLOYMENT AND UNEMPLOYMENT IN PUERTO RICO] 6–7, <http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=UNPbf00R8Y4%3D&tabid=186> [https://perma.cc/4R28-GUQA]; see also Ed Morales, *Puerto Rico in Crisis: Weighed Down by \$73bn Debt as Unemployment Hits 14%*, GUARDIAN (June 28, 2015), <http://www.theguardian.com/world/2015/jun/28/puerto-rico-debt-unemployment> [https://perma.cc/B5KE-EM5S].

<sup>33</sup> See Brief for LatinoJustice PRLDEF et al., *supra* note 20, at 3–20; Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RESEARCH CTR. (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s/> [https://perma.cc/JT98-N5AQ].

<sup>34</sup> See Senate of Puerto Rico, *Final Report: Senate Resolution No. 237*, Committee on Civil Rights, Citizen Participation and Social Economy, 17th Legislative Assembly - 5th Regular Session (Apr. 9, 2015) (on file with author); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT 17 (2013), <http://www.gao.gov/assets/660/653046.pdf> [https://perma.cc/A8SG-AVKM]; see also *Expuesto Puerto Rico a Una Crisis Alimentaria*, EL NUEVO DIA (Feb. 21, 2014), <http://www.elnuevodia.com/negocios/consumo/nota/expuestopuertoricoaunacrisisalimentaria-1717099/> [https://perma.cc/RGH7-B2JJ].

<sup>35</sup> Wolff, *supra* note 25.

the austerity measures his administration has taken in order to appease creditors:

In the three years of my Administration alone we have, inter alia, reformed our largest pension fund from a defined benefit plan to a defined contribution plan, including for current employees; froze[n] collective bargaining agreements, revenues measures that impacted the sales tax, the petroleum products tax and water rates; reduced government employment as a share of the population to an average lower than in the states though [sic] attrition and hiring freezes; and reduced expenses by twenty percent, the lowest spending level in a decade. The people of Puerto Rico have been the sole bearers of these burdens.<sup>36</sup>

The human impact is both visible (*e.g.*, professionals and students leaving the island to seek employment in the United States)<sup>37</sup> and invisible (*e.g.*, the elderly and ill lying in cots in hospital hallways for days at a time, waiting for a room to become free).<sup>38</sup> There are many potential sources of blame for Puerto Rico's current debt crisis: hedge funds engaged in risky, and perhaps negligent, financial ventures;<sup>39</sup> the government mismanaged funds<sup>40</sup> and has

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<sup>36</sup> *Puerto Rico's Fiscal Problems: Examining the Source and Exploring the Solution: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2015) (statement of Hon. Alejandro J. García, Governor of Puerto Rico), <http://www.judiciary.senate.gov/imo/media/doc/Garcia-Padilla%20Testimony.pdf> [<https://perma.cc/TQ98-CSXQ>].

<sup>37</sup> D'vera Cohn, Eileen Patten & Mark Hugo Lopez, *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW HISPANIC CTR. (Aug. 11, 2014), <http://www.pewhispanic.org/2014/08/11/puerto-rican-population-declines-on-island-grows-on-u-s-mainland/> [<https://perma.cc/79M6-6KS6>]; *see also* Press Release, Instituto de Estadísticas de Puerto Rico, *La Emigración Neta Alcanza Su Punto Más Alto en la Última Década* [Net Emigration Reaches Its Highest Point in the Last Decade] (Sept. 17, 2015), <http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=KMY2LP3VLPw%3D&tabid=39&mid=590> [<https://perma.cc/45LK-54YS>] (P.R.); ALBERTO L. VELÁZQUEZ-ESTRADA, INSTITUTO DE ESTADÍSTICAS DE PUERTO RICO, *PERFIL DEL MIGRANTE 2013* [2013 MIGRANT PROFILE] (Feb. 8, 2015), [http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=U\\_goumCYemA%3D&tabid=165](http://www.estadisticas.gobierno.pr/iepr/LinkClick.aspx?fileticket=U_goumCYemA%3D&tabid=165) [<https://perma.cc/2HHQ-D5VA>] (P.R.).

<sup>38</sup> Alvarez & Goodnough, *supra* note 30; Kate Kilpatrick, *Patients, Doctors Say Puerto Rico's Health System in Critical Condition*, AL JAZEERA AM. (Sept. 4, 2015), <http://america.aljazeera.com/articles/2015/9/4/puerto-ricos-health-system-in-critical-condition.html> [<https://perma.cc/8ABU-W79R>].

<sup>39</sup> Jonathan Mahler & Nicholas Confessore, *Inside the Billion-Dollar Battle for Puerto Rico's Future*, N.Y. TIMES (Dec. 19, 2015), <http://www.nytimes.com/2015/12/20/us/politics/puerto-rico-money-debt.html>.

<sup>40</sup> D. ANDREW AUSTIN, CONG. RESEARCH SERV., *PUERTO RICO'S CURRENT FISCAL CHALLENGES 1-4* (Sept. 25, 2015), <https://www.fas.org/sgp/crs/row/R44095.pdf> [<https://perma.cc/7KP4-FUDT>] (discussing role of Puerto Rican public utility agencies in incurring the majority of the debt).

avoided disclosing its financial capacity to repay its debt;<sup>41</sup> and antiquated federal maritime laws restrict maritime transport of cargo between the United States and Puerto Rico to U.S.-flagged ships.<sup>42</sup>

Yet equally prevalent are proposed solutions to handle the crisis in the face of repetitive deadlines where the government is consistently expected to fail to meet its repayment obligations.<sup>43</sup> Coalitions have formed to demand congressional action, advocating for modifications to the federal Bankruptcy Code in order to allow Puerto Rico to declare Chapter 9 bankruptcy,<sup>44</sup> which would permit the island's municipalities and public agencies to restructure its debt. Prominent progressive leaders and institutions in the United States have voiced public calls to hedge funds to reduce the debt, as well as to the Treasury Department to pressure reluctant creditors to engage in debt renegotiations.<sup>45</sup>

Additional proposals that primarily involve federal action include modifying the Jones Act, the 1920 law that includes the Cabotage Law,<sup>46</sup> which is applied in its entirety to Puerto Rico (and not other affected states or jurisdictions), resulting in extremely high shipping costs to the island; eliminating disparities in healthcare

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<sup>41</sup> COMMONWEALTH OF PUERTO RICO, FINANCIAL INFORMATION AND OPERATING DATA REPORT 15–16 (2014), <http://www.gdb-pur.com/documents/CommonwealthReport-October302014.pdf> [<https://perma.cc/EP8K-SK8V>].

<sup>42</sup> Senate of Puerto Rico, *supra* note 34 (discussing Senate resolution to fund a study examining the impact of the Cabotage and maritime laws on the Puerto Rican economy). *Cf.* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34.

<sup>43</sup> Governor Alejandro García Padilla has put forward a five-year debt restructuring and economic recovery plan. WORKING GRP. FOR THE FISCAL & ECON. RECOVERY OF PUERTO RICO PURSUANT TO EXEC. ORDER 2015-022, PUERTO RICO FISCAL AND ECONOMIC GROWTH PLAN (Sept. 9, 2015), <https://assets.documentcloud.org/documents/2388398/puerto-ricos-debt-plan.pdf> [<https://perma.cc/943D-GEXV>].

<sup>44</sup> Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015). For more on coalition advocacy efforts, see HISPANIC FED'N, NATIONAL DAY OF ACTION FOR PUERTO RICO TOOLKIT (2015) <http://www.hispanicfederation.org/images/pdf/prtoolkit2015.pdf> [<https://perma.cc/3QGD-4PTX>]; HECTOR CORDERO-GUZMAN ET AL., HISPANIC FED'N, PUERTO RICO'S ECONOMIC CRISIS: OVERVIEW AND RECOMMENDATIONS FOR ACTION (Oct. 2015), <http://www.hispanicfederation.org/images/pdf/hfprpolicy2015.pdf> [<https://perma.cc/G2BC-N359>].

<sup>45</sup> See Martin Z. Braun, *NYC Pension Urges Hedge Funds to Ease Puerto Rico Crisis*, BLOOMBERG NEWS (Nov. 13, 2015), <http://www.bloomberg.com/news/articles/2015-11-13/nyc-pension-urges-hedge-funds-to-ease-puerto-rico-debt-crisis> [<https://perma.cc/2X93-7F46>]; *Senator Elizabeth Warren: Treasury Should Step Up to Help Families in Puerto Rico*, WARREN.SENATE.GOV (Oct. 22, 2015), <http://www.warren.senate.gov/?p=video&id=994> [<https://perma.cc/3K2R-4HAU>].

<sup>46</sup> Merchant Marine (Jones) Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (codified as amended at 46 U.S.C. § 55102). See Rory Carroll, *U.S. Shippers Push Back in Battle over Puerto Rico Import Costs*, REUTERS (July 9, 2015), <http://www.reuters.com/article/us-usa-puertorico-shipping-idUSKCN0PJ2TF20150709> [<https://perma.cc/L4A4-JK24>].

funding and reimbursements to the island under Medicaid and Medicare;<sup>47</sup> and extending federal tax credits for working families and parents to Puerto Rico.<sup>48</sup> Investors and those in the financial industry have simply advocated for increased austerity measures<sup>49</sup> like the ones already adopted, which are crippling the island.

However, none of the options listed would necessarily relieve the unbearable economic and social burden on the people of Puerto Rico. The only way to lift this burden is if the government was not required to repay decades of accumulated debt and instead could focus on addressing its underlying economic crisis, which is a product of its political status as a colony.<sup>50</sup> The debt must not only be declared unpayable,<sup>51</sup> but also immoral and perhaps illegal as well. This should be done to prevent a continuous injustice upon the people who were forced to bear exorbitantly-priced goods and diminished public services while their nation became indebted and who are now asked to assume the burden of that debt in the form of austerity.

## II. UNPACKING THE ACCUMULATION OF DEBT FOR THE “BENEFIT OF THE PEOPLE”

The benefits incurred by debt accumulation, if any, are a primary consideration of whether debt relief should be granted.<sup>52</sup> Debt repayment can become illegitimate when it prevents a state

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<sup>47</sup> Maria Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFFAIRS BLOG (Dec. 29, 2015), <http://healthaffairs.org/blog/2015/12/29/the-price-of-inequality-for-puerto-rico> [<https://perma.cc/KML7-HCLH>]; ANNIE L. MACH, CONG. RESEARCH SERV., R44275, PUERTO RICO AND HEALTH CARE FINANCE: FREQUENTLY ASKED QUESTIONS (Feb. 3, 2016), <https://www.fas.org/sgp/crs/row/R44275.pdf> [<https://perma.cc/U4R3-G96M>]; Danica Coto, *NY Governor, NYC Mayor Join Puerto Rico Health Care Rally*, ASSOCIATED PRESS (Nov. 5, 2015), <http://bigstory.ap.org/article/3e6dfaa60b884292a11bea80374728af/ny-governor-nyc-mayor-join-puerto-rico-health-care> [<https://perma.cc/AC8W-49PS>].

<sup>48</sup> Earned Income Tax Credit Equity Puerto Rico Act of 2015, H.R. 3553, 114th Cong. (2015).

<sup>49</sup> KRUEGER ET AL., *supra* note 29.

<sup>50</sup> See RAFAEL BERNABE, PUERTO RICO: CRISIS Y ALTERNATIVAS (2014) for a discussion of the economic, social, political, and environmental consequences arising from Puerto Rico's political status.

<sup>51</sup> Governor Padilla has already characterized the debt as unpayable. Corkery & Williams Walsh, *supra* note 1.

<sup>52</sup> Gulati et al., *supra* note 5, at 1203, 1212–13. For a preview of the argument that debt is unenforceable under agency law, see Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 L. & CONTEMP. PROBS. 83, 92 (2007) (“If the citizens of a country are viewed as the principal, the leaders as the agent, and creditors as the third party,” then “[d]ebts incurred without consent by or benefit to a country's citizens, . . . and to a creditor who is aware of these facts, should be deemed unenforceable.”).

from fulfilling its human rights obligations.<sup>53</sup>

Equitable defenses beyond odious debt, such as laches and “unclean hands” (a doctrine very similar to odious debt) have long been applied in contract law. International forums and tribunals have also cited such defenses to determine the limitations and fair reach of debt that has been acquired under questionable circumstances.<sup>54</sup> As Robert Howse points out, it is not only the evolution of domestic jurisprudence and interpretation of contract principles that apply to interpretation of a state’s obligations, but international law as well. In particular, the Vienna Convention on the Law of Treaties “requires that the obligations in any one agreement be read in light of other binding agreements . . . .”<sup>55</sup> State responsibility to abide by international law includes human rights obligations both explicitly assumed by the signing and ratification of bilateral or multilateral treaties,<sup>56</sup> or less explicitly assumed yet still binding, such as customary international law.

The United States, and Puerto Rico as a political entity of the United States, is obligated to affirmatively ensure that the rights enshrined in the contracts and treaties it has signed are not jeopardized, compromised, or superseded by any contracts signed subsequently.<sup>57</sup> In fact, contractual obligations cannot supersede a state’s human rights responsibilities. Similarly, the government may not interfere with, undermine, or violate any of the protected

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<sup>53</sup> Cephias Lumina (Special Rapporteur on the Effects of Foreign Debt and Other Related Int’l Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights), *Rep. on Guiding Principles on Foreign Debt and Human Rights*, U.N. Doc. A/HRC/20/23, ¶¶ 3–4, 6–7 (Apr. 10, 2012) (“States’ human rights obligations are clearly relevant in the context of their external debt arrangements.”).

<sup>54</sup> Howse, *supra* note 10, at 6 (“Equitable limits to contractual obligations . . . have included illegality, fraud, fundamentally changed circumstances, knowledge that an agent is not properly acting on behalf of the contracting principal and duress.”).

<sup>55</sup> *Id.*

<sup>56</sup> The United States is a party to several human rights treaties, which have the same weight as federal law under Article VI of the Constitution. U.S. CONST. art. VI. *See* International Covenant on Civil and Political Rights arts. 2(1), 6(1), 17, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). In addition, the United States has signed, but not ratified, other prominent human rights treaties. *See* Convention on the Elimination of All Forms of Discrimination Against Women arts. 1, 10, 12, Dec. 18, 1979, 1249 U.N.T.S. 13; G.A. Res. 2200A (XXI); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>57</sup> U.S. CONST. art. VI; Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

rights.<sup>58</sup>

Puerto Rico's debt has been accumulating over the last several decades, while the nation has been in a recession for at least the past ten years<sup>59</sup> and public services have been cut steadily for the past six years.<sup>60</sup> There is a constant threat of continued cuts to public services and a government shutdown if the island is forced to pay in full every time payment becomes due.<sup>61</sup> Meanwhile, local businesses are suffering the brutal impact of lost revenue, talent, and clientele.<sup>62</sup> Austerity measures like the ones proposed and implemented in Puerto Rico<sup>63</sup> are not only disastrous for the people of Puerto Rico, but they seriously undermine and even violate the economic and social rights contemplated by the United Nations Charter and enshrined in international human rights law.<sup>64</sup> Austerity measures imposed under the pretext of fiscal stability actually create harmful long-term fiscal policy and ultimately burden those affected more, creating no benefits for the citizenry in either the accumulation of debt or its repayment.

As a result of the crushing weight of debt repayment, human rights violations are occurring on the island.<sup>65</sup> The government is not using increased tax revenue to fund necessary services and programs, but rather to pay back creditors.<sup>66</sup> The traditional context of odious debt recognizes the immorality of a debt that was accrued to suppress, repress, or oppress a people, and which often

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<sup>58</sup> The Nature of States Parties' Obligations, Comm. on Econ., Soc. and Cultural Rights, Fifth Sess., U.N. Doc. E/1991/23 (1990); see Jernej Letnar Cernic, *State Obligations Concerning Socio-Economic Rights in Times of the European Financial Crisis*, 11 B.Y.U. INT'L L. & MGMT. REV. 125, 128, 131–36 (2015).

<sup>59</sup> Allen, *supra* note 28.

<sup>60</sup> *Id.*; Coto, *supra* note 26; Alvarez & Goodnough, *supra* note 30.

<sup>61</sup> Edward Krudy, *Puerto Rico Officials Warn Government Shutdown Imminent*, REUTERS (Apr. 23, 2015), <http://www.reuters.com/article/us-usa-puertorico-idUSKBN0ND2P620150423> [<https://perma.cc/PDY7-LXZB>].

<sup>62</sup> Coto, *supra* note 27.

<sup>63</sup> See Lauren Carasik, *Gutting Schools Won't Solve Puerto Rico's Debt Crisis*, AL JAZEERA AM. (Aug. 11, 2015), <http://america.aljazeera.com/opinions/2015/8/gutting-schools-wont-solve-puerto-ricos-debt-crisis.html> [<https://perma.cc/SD7R-9ADG>].

<sup>64</sup> Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ICESCR, *supra* note 56; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>65</sup> See Request for Thematic Hearing, *supra* note 20; see also *Public Affairs Secretary Testifies on Puerto Rico Crisis*, CARIBBEAN BUS. (Apr. 4, 2016), <http://cb.pr/puerto-rico-testify-on-fiscal-crisis-before-human-rights-forum/> [<https://perma.cc/JP6N-4U7W>].

<sup>66</sup> Suzanne Gamboa, *Puerto Rico Makes Debt Payment; Governor Issues 'Distress Call'*, NBC NEWS (Dec. 1, 2015), <http://www.nbcnews.com/news/latino/puerto-rico-makes-debt-payment-governor-issues-distress-call-n472126> [<https://perma.cc/5DZA-7DJZ>].

results in atrocious human rights abuses.<sup>67</sup> Those civil and political rights abuses that occurred because of the loan's procurement are recognized as odious.<sup>68</sup> The economic and social rights abuses that occur as a result of loan repayment should be seen as equally odious. Whether borrowed money is being used to commit human rights violations, or whether repaying borrowed money is causing the same, both contribute to the full panorama of human rights and debt.

### III. KNOWINGLY ENGAGED IN RISK

The concept of odious debt forgiveness also takes into account whether or not the creditor knew or should have known of any risky circumstances at the time the debt was contracted.<sup>69</sup> The United States was able to repudiate the debt Cuba had accumulated as a Spanish colony by showing that the original "creditors knew that the pledge of Cuban revenues to secure the loans had been given in the context of efforts to suppress a struggle for freedom from the Spanish rule. Therefore the creditors 'took their [sic] obvious chances of their investment on so precarious a security.'" <sup>70</sup>

In the context of Puerto Rico's borrowing of billions of dollars, the considerations are less about whether the creditor knew of the state's purported intention for the use of such funds—in this case keeping their government afloat—and more about the ethical and responsible nature of lending under the new concept of "odious lending," a proposed expansion of odious debt doctrine.<sup>71</sup> Guidelines have long established ethical and socially responsible

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<sup>67</sup> Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 146–47 (2008).

<sup>68</sup> David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 L. & CONTEMP. PROBS. 137, 140 (2007).

<sup>69</sup> Howse, *supra* note 10, at 17 ("Short of actual subjective knowledge, the notion that the lender ought to have known the intent of the debtor raises the issue of the nature and extent of the burden imposed on creditors to take positive steps to inform themselves of the purposes of the loan, and to assess the credibility of assertions of borrower state officials in that respect . . . [including] whether an agent (the debtor State) is exceeding its authority."); Bolton & Skeel, *supra* note 52, at 92–93 ("[T]he domestic-litigation strategy might be limited still more by the need to show that the lender knew or should have known the debt was wrongfully incurred.").

<sup>70</sup> Howse, *supra* note 10, at 10–11.

<sup>71</sup> See Ochoa, *supra* note 67, at 158; STEPHEN MANDEL, NEW ECON. FOUND., ODIIOUS LENDING DEBT RELIEF AS IF MORALS MATTERED 5, <http://www.dette2000.org/data/File/Odiousslendingfinal.pdf> [<https://perma.cc/59RY-BLE6>] [hereinafter ODIIOUS LENDING].

investments and lending practices by financial institutions.<sup>72</sup> These guidelines perform a range of functions, such as ensuring the use of fair interest rates and penalties; providing transparency in transactions (such as fees and charges); recognizing instances where a dramatic change in circumstances may prohibit a borrower from being able to repay the loan (in part or in its entirety); ensuring that loan contraction procedures and repayment plans protect human rights; ensuring that loans comply with social, labor, and environmental standards (both in borrowing and the terms of repayment); and promoting orderly debt restructuring or repayment processes that provide incentives for responsible lending and fair burden-sharing.<sup>73</sup>

Many creditors—particularly hedge funds known as “vulture funds,” who buy distressed debt at extraordinarily high rates—knowingly engaged in precarious financial investments in Puerto Rico, even during the economic recession and after Puerto Rico’s credit rating was downgraded.<sup>74</sup> In fact, they charged higher interest rates because of that risk in order to protect themselves from a default.<sup>75</sup> A report by staff for a congressional committee pointed out that hedge funds knowingly engaged in high-risk transactions and sought to profit from it at exorbitant and unethical rates. As the report explains, the hedge funds:

had no excuse for not knowing the risks of buying Puerto Rico municipal bonds. Rather than absorbing the occasional investment losses that are expected as a matter of course when assessments are wrong, even by the most successful investing firms, these hedge funds are now working to pad their profits by cutting off relief options for families in the territory.<sup>76</sup>

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<sup>72</sup> ODIUS LENDING, *supra* note 71, at 21–24; *see also* PRINCIPLES FOR RESPONSIBLE INVESTMENT INITIATIVE, RESPONSIBLE INVESTMENT AND HEDGE FUNDS: A DISCUSSION PAPER (2012), <http://www.unpri.org/wp-content/uploads/2012.11RIandHF.pdf> [<https://perma.cc/PTU7-MHVD>].

<sup>73</sup> PRIVILEGE HAANGÁNDU, JUBILEE USA NETWORK, THE RESPONSIBLE LENDING AND BORROWING IMPERATIVE: ADDRESSING THE ROOT CAUSES OF POVERTY 8 (Mar. 2012), [http://www.jubileeusa.org/fileadmin/user\\_upload/Resources/2012\\_Jubilee\\_USA\\_Files/RLB\\_New\\_Formatting\\_FINAL.pdf](http://www.jubileeusa.org/fileadmin/user_upload/Resources/2012_Jubilee_USA_Files/RLB_New_Formatting_FINAL.pdf) [<https://perma.cc/86G4-RLND>].

<sup>74</sup> *See, e.g.*, Joel Cintrón Arbasetti, *Vulture Funds Have Puerto Rico Cornered*, CENTRO DE PERIODISMO INVESTIGATIVO (Apr. 9, 2015), <http://periodismoinvestigativo.com/2015/04/vulture-funds-have-puerto-rico-cornered/> [<https://perma.cc/KB4N-T4SB>]; Morales, *supra* note 2.

<sup>75</sup> Mahler & Confessore, *supra* note 39; David Dayen, *Don’t Reward the Greedy Vulture Funds Who Recklessly Invested in Puerto Rico*, NEW REPUBLIC (July 1, 2015), <https://newrepublic.com/article/122218/dont-reward-vulture-funds-who-recklessly-invested-puerto-rico> [<https://perma.cc/PZB2-83Z9>].

<sup>76</sup> RAUL M. GRIJALVA, PROFIT AT ANY COST: HOW SOME HEDGE FUNDS WIN BY MAKING SURE PUERTO RICO LOSES 1 (2015), <http://democrats-naturalresources>.



Puerto Rico's government and people are now forced to shoulder the disastrous impact of the public debt, but the problem is rooted in the perilous behavior of creditors and other private entities.<sup>77</sup> Those creditors, along with other hedge funds, have largely refused to engage in discussions regarding debt restructuring, much less debt relief.<sup>78</sup> In fact, days before Puerto Rico enacted its *quiebra criolla* law on June 28, 2014, which allowed its municipalities and agencies to access a debt restructuring regime identical to Chapter 9 of the federal Bankruptcy Code, a hedge fund filed suit challenging the constitutionality of the law and Puerto Rico's ability to implement its own domestic version of bankruptcy protections.<sup>79</sup> Dozens of other hedge funds later joined the suit against Puerto Rico.<sup>80</sup>

The notion of "unsustainable debt" as an emerging concept of odious debt doctrine (under the larger construct of illegitimate debt<sup>81</sup>) is instructive here. Unsustainable debt maintains that a debt whose repayment (as opposed to accrual) causes governments

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house.gov/imo/media/doc/Profit%20at%20Any%20Cost%20Hedge%20Fund%20Report.pdf [https://perma.cc/MLF5-WVLF] ("The risks of these investments were well known in advance of their sale – indeed, in publicly available documents, clear warnings were offered to investors that profit was not guaranteed and that the bonds carried significant potential for investor losses.").

<sup>77</sup> *Id.* The questionable and unethical behavior of the hedge funds, the primary creditors, has been detailed at length, including their efforts to take advantage of Puerto Rico's precarious financial position. In essence, hedge funds have:

pushed Puerto Rico to take on more debt at extremely generous terms for creditors. In April 2015, they proposed backstopping the island's proposed \$3 billion debt issuance, but only if it was made "bulletproof" in a way that protected creditor interests. They requested "acceleration rights," for instance, which would mean that the entire amount would be due if the government defaulted. They also proposed requiring the government to hold proceeds from the debt in escrow in case proposed tax reform was not enacted in advance of the issuance—essentially using their participation in the debt deal as leverage for securing austerity measures.

*Id.* at 3 (quoting *Hedge Fund Vultures in Puerto Rico*, HEDGE CLIPPERS (July 10, 2015), <http://hedgeclippers.org/hedgepapers-no-17-hedge-fund-billionaires-in-puerto-rico/> [https://perma.cc/J92V-RNBV]); see also Sam Thielman, *Puerto Rico Poised to Miss Another Debt Deadline as Financial Crisis Rages On*, GUARDIAN (Dec. 1, 2015), <http://www.theguardian.com/world/2015/dec/01/puerto-rico-debt-repayment-default-financial-crisis> [https://perma.cc/WU3K-WGE5] (discussing how one creditor, UBS, has engaged in financially risky, and perhaps reckless, lending).

<sup>78</sup> Editorial Board, *Congress Needs to Throw Puerto Rico a Lifeline*, N.Y. TIMES (Mar. 12, 2016), <http://www.nytimes.com/2016/03/13/opinion/sunday/congress-needs-to-throw-puerto-rico-a-lifeline.html>.

<sup>79</sup> *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577 (D.P.R. 2015).

<sup>80</sup> *Id.* at 584–85, nn.1–2.

<sup>81</sup> A. Mechele Dickerson, *Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate*, 70 L. & CONTEMP. PROBS. 53, 61 (2007).

to deprive people of basic needs in order to service the debt should be declared unpayable and cancelled.<sup>82</sup>

Where a debt may be legal and used for the benefit of the people and in isolation its terms are not overly onerous, it may nevertheless be unpayable because of the overall level of indebtedness of the country relative to its debt-servicing capacity. The concept of debt sustainability is at present defined very narrowly by the creditors and has focused almost entirely on a country's ability to pay in terms of its export earnings. National governments, however, have an obligation towards their citizens to provide their basic needs for clean water, health and education and at least not to frustrate their citizens' attempts to meet their needs for food, clothing and shelter. The freedom of the population to pursue the meeting of these needs is a fundamental human right. If a government can only meet its debt servicing by failing to provide basic health and education services and by taxing its citizens so that they cannot pay for enough food or shelter, this violates these human rights. It is therefore essential that any concept of debt sustainability includes an assessment of a) what level of taxation is reasonable, and b) what minimum expenditure is required to enable a government to meet its obligations to its citizens. Only after this obligation is met can funds be set aside for debt servicing. Debts incompatible with human rights should be cancelled.<sup>83</sup>

Creditors argue that the government of Puerto Rico actually benefitted from the debt by purportedly using the funds to continue to provide ongoing government services, and thus repudiation of the debt would constitute unjust enrichment. However, the other equitable considerations that underlie the concept of odiousness and make it particularly applicable in the colonial context of Puerto Rico present a rich defense against such an assertion. To find unjust enrichment, one party must have been enriched at the expense of the other.<sup>84</sup> There has been no enrichment of colonial Puerto Rico. There is no credible way to argue that Puerto Rico has

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<sup>82</sup> For a discussion on the expansion of the odious debt doctrine to include questioning the legitimacy of current lending practices and the disproportionate and consequential impact on the developing world as an extension of neoliberal economic policies, see Larry Catá Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems, and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, 70 L. & CONTEMP. PROBS. 1, 19 (2007).

<sup>83</sup> ODIIOUS LENDING, *supra* note 71, at 7; see also STEPHEN MANDEL, NEW ECON. FOUND., DEBT RELIEF AS IF JUSTICE MATTERED: A FRAMEWORK FOR A COMPREHENSIVE APPROACH TO DEBT RELIEF THAT WORKS 2 (2008), [http://www.i-r-e.org/docs/a008\\_a-comprehensive-approach-to-debt-relief.pdf](http://www.i-r-e.org/docs/a008_a-comprehensive-approach-to-debt-relief.pdf) [<https://perma.cc/5JZZ-6AEM>] [hereinafter DEBT RELIEF AS IF JUSTICE MATTERED].

<sup>84</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011).

been “enriched” by continuing to indebt itself to the point of owing more than it is capable of producing and paying. The parties actually enriched by Puerto Rico’s debt remain its creditors, who by the same principles of equity may not profit off of their actions, which both helped place Puerto Rico in debt and now continue to keep it there.<sup>85</sup> Ultimately, “in the case of state contracts with private creditors, . . . there is no evidence of general international law establishing the sanctity of such contracts.”<sup>86</sup> In fact, repudiation of debt, even in violation of domestic law, must be based “on notions of justice and equity, and therefore would imply the relevance of considerations such as the odiousness of the debt.”<sup>87</sup>

Declaration of debt as odious may not always have the effect of repudiating it or imposing a moratorium on debt payments; instead, it could constitute grounds for renegotiating or restructuring the debt. For example, in some instances, a “debtor State [may] invoke concerns of odious debt in negotiations with its creditors in order to reach compromise that promotes financial stability and future access to credit.”<sup>88</sup>

#### IV. DEBT MADE MORE ODIIOUS BY COLONIALISM

It is a basic tenet of odious debt doctrine that analysis of debt repudiation or renegotiation between a state and a private creditor must consider the overall political context in which the debt initiates.<sup>89</sup> If we extend that analysis to include the geopolitical and macroeconomic factors that give rise to indebted nations, we real-

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<sup>85</sup> *Id.* (internal citations omitted). The Restatement makes clear that the tangible *unjustified* enrichment of the debtor is key in ascertaining whether the principle applies.

Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient’s wealth . . . Restitution may strip a wrongdoer of all profits gained in a transaction with the claimant, but principles of unjust enrichment will not support the imposition of a liability that leaves an innocent recipient worse off, apart from costs of litigation, than if the transaction with the claimant had never taken place.

*Id.*

<sup>86</sup> Howse, *supra* note 10, at 6.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 8.

<sup>89</sup> Robert K. Rasmussen, *Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief*, 70 L. & CONTEMP. PROBS. 249, 252 (2007) (“One does not have to look hard to see that political concerns often loom large when a country is seeking relief from its external debt.”). Because debt is only considered odious when stemming from abuses by a political regime, or, in this case, in part from the political relationship between Puerto Rico and the United States, the nature of the debt cannot be divorced from the context in which it was contracted.

ize that they are inherently “a product of the structural and historical convergence of private economic power and political strategies.”<sup>90</sup> Debt repayment must consider the way that financing, debt, and investment shape domestic and foreign policy.<sup>91</sup> For example, debts accumulated to undermine decolonization efforts or thwart self-determination and human rights of a nation are recognized as wrongful under international law.<sup>92</sup> Such debts typically fall under the category of subjugated debts, or debts incurred by an oppressor or colonizer over an oppressed people unable to assert sovereignty.

Following the United States’ refusal to assume Spain’s debt in Cuba, purportedly to benefit the Cuban economy, scholars began to draw a “distinction between debts according to their purpose, ruling out the transfer of debts in connexion [sic] with subjugation and accepting the transferability only of those that had contributed to a territory’s development.”<sup>93</sup> Despite the clear delineation of debts accrued by a *colonizing* nation on behalf of the colonized, there is far less clarity about the legitimacy of debts accrued by the *colonized* nation. Whereas debts accumulated by a colonizing nation on “behalf” of the colonized are inherently suspicious, debts accumulated by a colony (which remains unable to exercise self-determination and is subject to the laws and policies of the colonizing nation) are presumed to be legitimate and lawful.

The colonial status of Puerto Rico both contributes directly to the economic crisis as well as inhibits comprehensive solutions that would address short-term concerns and long-term economic policy changes. The United Nations Special Committee on Decolonization issued its annual resolution on the colonial status of Puerto Rico in early 2015, noting that the island needs to be able to make decisions in a sovereign manner to address its urgent economic and social needs, including its twelve percent unemployment rate,

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<sup>90</sup> Louis A. Pérez, Jr. & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. INT’L L. & COM. REG. 699, 701 (2007).

<sup>91</sup> *Id.*

<sup>92</sup> Bedjaoui, *supra* note 18, at 69. In the context of war debts, “[t]he question of ‘odious debts’ in a case of State succession arises . . . in connexion [sic] on the one hand with human rights and the right of peoples to self-determination and, on the other hand, with the unlawfulness of recourse to war.” *Id.* The same holds true for subjugated debts, which are “debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory.” *Id.* at 72.

<sup>93</sup> *Id.* at 73.

marginalization, and the widespread poverty of its residents.<sup>94</sup> The Committee recognized that the economic vulnerability of Puerto Rico is a direct consequence of its colonial status and that Puerto Rico's lack of political power to affect decision-making in the United States is reflected in the policies and politics that shape and ultimately cripple the island's economy.<sup>95</sup>

The colonial relationship of Puerto Rico to the United States is relevant to the question of odious debt because Puerto Rico's political status is a critical impediment to its ability to negotiate or renegotiate the debt, to seek foreign investment or financing from international banking institutions, or to implement economic policies that would allow it to restructure the debt in the short-term and build a viable economy for the future.<sup>96</sup> In a 2015 amicus brief, the United States officially acknowledged for the first time since Puerto Rico's 1952 constitution was created that it in fact has no separate sovereignty and cannot pass laws without the approval and consent of Congress, essentially affirming its colonial status.<sup>97</sup> This colonial relationship is further illustrated in the text of the Puerto Rican constitution, which contains an unusual clause that requires that the island pay back general-obligation bonds before virtually any other government expenditure, perversely prioritizing private creditors at the expense of public needs.<sup>98</sup>

Puerto Rico's political status cannot be divorced from its ability to make decisions and implement economic policies. The Commonwealth must follow federal law and precedent, except in

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<sup>94</sup> Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Decision of the Special Comm. of 23 June 2014 Concerning Puerto Rico, U.N. Doc. A/AC.109/2015/L.6 (2015).

<sup>95</sup> For a brief explanation of how Puerto Rico's colonial status impacts its economic standing, see Victor Rodriguez, *Puerto Rico's Economic and Fiscal Crisis: Made in the U.S.A.*, COUNTERPUNCH (July 3, 2015), <http://www.counterpunch.org/2015/07/03/puerto-ricos-economic-and-fiscal-crisis-made-in-the-u-s-a/> [<https://perma.cc/DLJ7-LLL6>].

<sup>96</sup> As Howse explains, "[T]he concept of odious debt, rather than a self-standing legal doctrine, might be regarded as a *lex specialis* of transitional justice, a form of justice that is inherently and pervasively political and legal as well as highly contextualized in its specific content." Howse, *supra* note 10, at 7.

<sup>97</sup> Brief for the United States as Amicus Curiae Supporting Respondent at 19–24, *Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 791 (Dec. 23, 2015) (No. 15-108), 2015 WL 9412680.

<sup>98</sup> P.R. CONST. art. VI, § 8 ("In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law.").

circumstances where Puerto Rico has been explicitly removed from protections, such as in the case of Chapter 9 of the Bankruptcy Code.<sup>99</sup> It must follow orders from the U.S. judiciary, to whom vulture funds have appealed to recoup their money. Nowhere is Puerto Rico's status as a colony made more evident than by Congress's willingness to impose a federal fiscal control board to administer the island's finances,<sup>100</sup> regardless of the will of the people and in defiance of any democratic processes or elections. Essentially, Puerto Rico's debt is made more odious because of the lack of viable and dignified options for remedying it, given its inability to engage in meaningful conversations on debt restructuring as a result of its political standing and lack of sovereignty.

Even when it attempts to exercise autonomy, Puerto Rico has been unsuccessful because the island is ultimately bound by federal law. In 2014, a federal district court ruled that the *quiebra criolla* law passed by the Puerto Rican legislature was unconstitutional.<sup>101</sup> The First Circuit upheld the decision, noting that Puerto Rico cannot behave like a state in seeking bankruptcy protections that do not apply to it, and thus circumvent United States federal law.<sup>102</sup> Administratively, the U.S. Department of the Treasury explicitly rejected the idea of a federal "bailout" of Puerto Rico akin to the kind that taxpayers funded for investment banks in 2008 in the amount of hundreds of billions of dollars.<sup>103</sup>

If there are few domestic remedies available, there are even fewer international ones. Because of its colonial status, Puerto Rico

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<sup>99</sup> Puerto Rico was originally included in Chapter 9, until Congress amended it in 1984 and removed Puerto Rico, along with other territories and districts, from bankruptcy protection. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(j)(6), 98 Stat. 333, 368-69 (codified at 11 U.S.C. § 101(52) (2012)).

<sup>100</sup> The fiscal control board, or emergency manager, would retain the authority to make decisions concerning the budget, which implicates critical policy choices, even as Puerto Ricans may elect new leadership with a different vision for governing the island or who may prioritize public services over debt repayment. The decision to force a federal control board on Puerto Rico may be inextricably linked to any federal legislative reform or financial assistance for Puerto Rico. See *The Need for the Establishment of a Puerto Rico Financial Stability and Economic Growth Authority Before the S. Comm. on Indian Affairs*, 114th Cong. (2016), <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=399799> [<https://perma.cc/X47G-Z95A>].

<sup>101</sup> *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 85 F. Supp. 3d 577, 600–01 (D.P.R. 2015).

<sup>102</sup> *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322, 341 (1st Cir. 2015), cert. granted sub nom *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 582 (2015).

<sup>103</sup> Nick Timiraos, *Lew Says No Federal Bailout Being Considered for Puerto Rico*, WALL ST. J. (July 28, 2015), <http://www.wsj.com/articles/lew-says-no-federal-bailout-being-considered-for-puerto-rico-1438118543>.

cannot access international financial institutions such as the Development Bank, Banco del Sur of MERCOSUR, or even the International Monetary Fund, institutions that might offer more favorable rates and terms for lending to Puerto Rico. The lack of sovereignty also complicates Puerto Rico's ability to enter into treaties or commercial agreements. Despite invitations from Venezuelan President Nicolás Maduro, Puerto Rico has not become a member of the Petrocaribe energy initiative between Venezuela and other Caribbean states,<sup>104</sup> which would allow the island to purchase fuel at a preferential price and under favorable terms.<sup>105</sup> Nor does Puerto Rico have control over its borders, customs, aerial space, or communications infrastructure—all areas that could boost the local economy. Ultimately, resolution of Puerto Rico's broader economic crisis will require not only implementation of both short and long-term economic policies but a political solution as well.

#### V. POTENTIAL SOLUTIONS AND THE ROLE OF THE INTERNATIONAL COMMUNITY

Aside from the more obvious economic consequences of the crisis on the people of Puerto Rico, the odious nature of the debt has also resulted in widespread human rights violations, including the erosion of economic and social rights.<sup>106</sup> Austerity measures, both the ones implemented and the ones advocated for, amount to economic violence and have resulted in the forced migration of hundreds of thousands of people, cuts to critical public services serving marginalized and vulnerable communities, reduced employment, and threats to remove federal labor protections.<sup>107</sup> Forced repayment of the debt in full will only result in increased privatization of public services, tax breaks for the very few and very wealthy, and enhanced tax burdens on poor people, creating more

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<sup>104</sup> *Venezuela to Propose Entry of Puerto Rico to Petrocaribe*, EL UNIVERSAL (Jan. 23, 2014), <http://www.eluniversal.com/nacional-y-politica/140123/venezuela-to-propose-entry-of-puerto-rico-to-petrocaribe> [<https://perma.cc/PU5J-HXAZ>].

<sup>105</sup> *Venezuela y PetroCaribe Extienden la Mano a PR*, EL NUEVO DIA (June 27, 2014), [http://www.wapa.tv/noticias/locales/venezuela-y-petrocaribe-extienden-la-mano-a-pr\\_20131122241662.html](http://www.wapa.tv/noticias/locales/venezuela-y-petrocaribe-extienden-la-mano-a-pr_20131122241662.html) [<https://perma.cc/8AE5-JUH4>].

<sup>106</sup> Despite not having ratified the ICESCR, the rights enshrined and the principles embodied make up customary international law, which the United States is obligated to consider and abide by when considering its human rights obligations and interpreting its treaty obligations in light of the evolution of customary international law. ICESCR, *supra* note 56, arts. 2(2), 12; *see also* UDHR, *supra* note 64, art. 3 (representing the broad spectrum of rights that states are obligated to protect, regardless of whether they explicitly recognize them).

<sup>107</sup> *See* Request for Thematic Hearing, *supra* note 20.

wealth disparity and inequality in an already very unequal society.<sup>108</sup>

A. *Public Audit of the Debt*

In response to those who continue to doubt the odious nature of Puerto Rico's debt, many have called for an audit of the debt and full transparency on what is owed and to whom.<sup>109</sup> While the Puerto Rican legislature approved the creation of an audit commission, it has not yet been funded or convened to initiate a full public auditing of how the debt was contracted and what resources were financed by it. A citizen's audit, which would include direct participation by a broad base coalition of civil society groups, could further detail the nature of the debt; how it was accumulated; by whom and under what terms; how the funds received by the government were spent; a thorough risk assessment and what investors knew of the risk at the time; and what benefit was ultimately granted to the people as an unpayable debt.<sup>110</sup> As long as the people of Puerto Rico are being told that the debt is now public, they should be made aware of what they are obliged to pay for.

B. *International Community Response*

Invocation of the doctrine of odious debt as a defense to repayment does not necessarily in itself relieve all obligation of the debtor to pay the debt, but it could aid in establishing a restructuring of the debt or other forms of debt relief. Given that Puerto Rico is constitutionally bound to pay its creditors above public debt,<sup>111</sup> domestic litigation is unlikely to prove successful or useful in addressing the current economic crisis. In traditional transitional justice contexts, the new regime's contention of the odious nature of debt could be raised in bilateral or multilateral negotia-

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<sup>108</sup> Cernic, *supra* note 58, at 137–39.

<sup>109</sup> In 2015, the Centro para Periodismo Investigativo (Center for Investigative Journalism) filed suit against the Governor, requesting that the list of all creditors be made public, along with their demands of the government in order to entertain any notion of debt negotiation. See Mandamus Petition, Centro de Periodismo Investigativo v. Alejandro García Padilla, (Court of First Instance, Superior Court of San Juan, July 13, 2015), <http://27bzcmuksr11z1wycuem83o5.wpengine.netdna-cdn.com/files/2015/07/Demanda.pdf>. The Universal Declaration of Human Rights guarantees the right of citizens to participate in the government of their countries, which naturally extends to an auditing process of government spending and services. UDHR, *supra* note 64, para. 21, 10.

<sup>110</sup> *Debt Audit Committee Intends to Bring About Transparency to Debt*, CARIBBEAN BUS. (Jan. 20, 2016), <http://cb.pr/debt-audit-committee-intends-to-bring-about-transparency-to-debt/> [<https://perma.cc/34CF-SCHQ>].

<sup>111</sup> P.R. CONST. art. VI, § 8.



tions on debt relief. Since the context for Puerto Rico is unique, however, the island should seek support from the international community by asking instead that an independent institution assess the legitimacy of the debt in order to determine its odiousness.<sup>112</sup> Similarly, a specialized body or independent commission consisting of various experts could be created to undertake an assessment of the debt and devise a relief or restructuring plan<sup>113</sup> including the establishment of an international and independent tribunal that operates similarly to a bankruptcy court to help restructure sovereign debts.<sup>114</sup> Puerto Rico could even suggest that the government engage in arbitration with creditors or advocate for the creation of a special tribunal, or quasi-tribunal, to adjudicate claims where Puerto Rico could present equitable defenses.<sup>115</sup> The United Nations Special Rapporteur on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights, has laid out guidelines for establishing a mechanism for resolution of debt repayment issues, which should include the capacity to rule on the odiousness of the debt.<sup>116</sup> Regardless of the forum, which could simultaneously include regional and international human rights, any adjudication must consider Puerto Rico's binding legal obligations to uphold human rights and to promote a development agenda that protects human rights.<sup>117</sup>

## VI. CONCLUSION

Odious debt is ultimately an equitable remedy, not a remedy at law, but it is intended to prevent further injustices and abuses

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<sup>112</sup> See Michael Kremer & Seema Jayachandran, *Odious Debt: When Dictators Borrow, Who Repays the Loan?*, BROOKINGS INST. (Spring 2003), <http://www.brookings.edu/research/articles/2003/03/spring-development-kremer> [https://perma.cc/ALF7-Y8E4].

<sup>113</sup> ODIIOUS LENDING, *supra* note 71, at 3.

<sup>114</sup> Joseph Stiglitz, *Odious Rulers, Odious Debts*, ATLANTIC (Nov. 2003), <http://www.theatlantic.com/magazine/archive/2003/11/odious-rulers-odious-debts/302831/> [https://perma.cc/QB9N-9HXM].

<sup>115</sup> DEBT RELIEF AS IF JUSTICE MATTERED, *supra* note 83, at 2.

<sup>116</sup> Lumina, *supra* note 53, ¶¶ 84–86.

<sup>117</sup> *Id.* ¶ 7 (noting the importance of using human rights forums and tribunals because most international forums “have thus far failed to deliver an equitable and lasting solution to the sovereign debt problem in line with the various commitments made by the international community. In addition, these other forums do not have explicit mandates to promote and protect human rights and have not factored human rights into their policies and programmes in line with the internationally accepted human rights-based approach to development”).

upon the people of a nation who have suffered at the hands of unscrupulous officials and creditors. Puerto Rico's debt is odious, both because of how it was accumulated and because of the human rights toll of the price now required to pay it back. Austerity measures disguised as responsible fiscal policy will only continue to deepen the economic crisis, including the burgeoning wealth disparities, impoverishment, and resulting massive forced migration from the island. Ultimately, though, it is the legacy of colonialism that has created the current economic crisis in the island. The political status of Puerto Rico must be resolved in order to deal with its immediate economic needs, access international capital, grow its economy, create local jobs and sustainable industries, as well as develop long-term economic policies that will prevent economic exploitation and future crises. True economic growth and sustainable development must center human rights and equitable progress, which can only be made possible through self-determination. Puerto Rico must acquire the capacity to determine, fund, and implement its own economic priorities separate and apart from the interests of investors, foreign nations, and the United States. Economic independence cannot be divorced from political sovereignty. The economic collapse of Puerto Rico is the inevitable consequence of its political subordination.

To address the *debt* crisis solely as an issue of debtor-creditor repayment—where Puerto Rico remains subject to the laws, policies, and economic interests that allowed or even facilitated its indebtedness in the first place—misunderstands the source of the ongoing bleeding in an open wound that refuses to heal. Presuming a congressional fix, which alters a few laws and imposes a federal control board under the pretext of “good governance” (but which actually continues to economically colonize Puerto Rico and undermine its democratic processes, subjugating it yet again to the political will of the United States), allows colonialism to remain untouched. The international community has declared such a practice to be immoral and abhorrent.<sup>118</sup> Recognizing, however, that Puerto Rico needs economic and political autonomy to address the overall *economic* crisis the country faces names the source of the bleeding for millions of people and allows the nation to begin to heal by prioritizing its own needs and funding them.

Debt that burdens generations of people without an end in sight is indeed odious, as is colonialism. The people of Puerto Rico

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<sup>118</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960).

should not be required to pay the price of their own demise in order to enhance the profits of a few. Justice requires that their debt be deemed odious.

