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## The Case for Reparations for the Color of COVID

José E. Alvarez

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# The Case for Reparations for the Color of COVID

José E. Alvarez\*

*This Article surveys the data demonstrating that COVID-19, far from being the great equalizer, has generated starkly skewed adverse outcomes, including grossly disproportionate deaths, among persons of color in the U.S., Brazil, and India, and in all likelihood globally. The “color of COVID” results from governmental actions and inactions that, when combined with long-standing socio-economic vulnerabilities, produce deadly results for certain groups.*

*Global health reformers are not addressing these injustices. Like those who resist reparations for African-Americans, for the global victims of slavery, colonialism and its legacies, or for all of the current pandemic’s victims, those seeking to reform the WHO resist state responsibility or accountability for COVID.*

*This Article argues that since, under international law, states owe a duty to provide remedies to persons within their jurisdiction who are denied fundamental rights because of de facto or de jure discrimination, there will be a substantial number of COVID-related claims presented in national courts and international venues, such as human rights courts and treaty bodies. States will face a choice between allowing judges to respond to actions or anticipating the most serious of them by establishing reparations mechanisms or commissions to address the color of COVID. As students of transitional justice can attest, there are advantages to doing both: allowing tort-like claims to proceed in judicial fora while establishing, at the national and possibly sub-national levels, mechanisms to enable contextually sensitive responses—from government apologies to forms of recompense. Intrastate reparations are more politically viable than interstate claims seeking to establish blame for the spread of COVID. National efforts to provide a measure of restorative justice to those harmed within each country by*

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\* Herbert and Rose Rubin Professor of Law, NYU School of Law. The author thanks Daniel Rosenberg, NYU class of 2023, for superb research assistance and for undertaking Annexes A and B for this article. Please note that these annexes may be found on JIICL’s website, <https://scholarship.law.uci.edu/ucijil/about.html>. The author also thanks Tendayi Achiume, Judith Bauder, Frank Upham, and Michael Waibel for their comments, and is grateful for additional comments received from participants at workshops at the University of California, Irvine School of Law and the University of Vienna. All errors remain the author’s own.

*discriminatory practices are justified morally, legally, and from a utilitarian perspective. Bringing out the facts of the color of COVID and making states accountable may deter discriminatory actions (and inactions) that have furthered COVID-19 and its variants. Enabling accountability for the color of COVID can help mitigate the impact of future pandemics. Reparations would also advance the idea that all persons, irrespective of color of skin, have a basic right to life and health.*

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“Two hundred fifty years of slavery. Ninety years of Jim Crow. Sixty years of separate but equal. Thirty-five years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole.” Ta-Nehisi Coates<sup>1</sup>

“[O]f all the forms of inequality, injustice in health is the most shocking and the most inhuman.” Dr. Martin Luther King, Jr.<sup>2</sup>

INTRODUCTION

As the United States grapples with renewed calls for reparations for African-Americans triggered by the Black Lives Matter movement, new justifications for reparations have emerged in the age of COVID. Ta-Nehisi Coates’s impressive case

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1. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014.  
 2. Charlene Galarneau *Getting King’s Words Right*, J. HEALTH CARE FOR POOR & UNDESERVED, Feb. 2018, at 5; also quoted in Matingai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820, 1858 (2021).

in favor of reparations for African-Americans was grounded in government-induced injustices on African-Americans. His arguments, from 2014, can now be supplemented with numerous acts of omission and commission by the United States since the coronavirus pandemic reached the United States in early 2020. These actions at the federal, state, and municipal levels have contributed to exceptionally harsh COVID outcomes for Black Americans, along with certain other communities of color.<sup>3</sup> There is considerable (and growing) evidence that discriminatory outcomes with respect to the current pandemic are a global phenomenon not unique to the United States. In common with other commentators, this article describes the phenomenon as the “color of COVID”<sup>4</sup> No one suggests, in using this term, that all non-White persons in the United States have suffered disproportionately from COVID. As indicated by this article’s Annex A, COVID’s harshest effects are well documented within certain historically disadvantaged groups within three states that have experienced exceptionally grave consequences during the current pandemic, namely the United States, Brazil, and India. In the United States, for example, members of Black, Latinx, and indigenous communities have been disproportionately impacted.<sup>5</sup> The “color of COVID” is shorthand for a sadly all too familiar historical phenomenon: namely disproportionate adverse health effects imposed on intersectional victims of discrimination characterized by complex interplays between identity, class, gender, race, and ethnicity.<sup>6</sup> COVID’s “color” is not defined solely by skin color or pigmentation.

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3. This article uses the term “African-American,” “Blacks,” or “Black Americans” when addressing persons in the United States in accord with the underlying source cited. In most cases, the underlying source may have used the three terms interchangeably. The underlying data, including sources cited in annex A to this article, do not usually indicate whether the use of distinct terms for persons of color results from self-identification by persons surveyed or are descriptive terms deployed by the surveyors themselves.

4. See, e.g., Catherine Powell, *Gender and the Color of COVID: Essential Workers, Not Disposable People*, 33 YALE J. L. & FEMINISM 1 (2021).

5. This is not to say that other persons of color in the U.S., such as Chinese-Americans (who have been especially subject to acts of bigoted violence), have not also incurred disproportionate harm during the pandemic. It is possible that future, more granular, studies may reveal, at least within certain U.S. regions or communities, disparities within people of color not yet evident from the sources used to produce Annex A. It is possible, for example, that Chinese-Americans living New York City may have experienced, during certain periods of the pandemic, “color of COVID” disparities comparable to those seen among Black, Latinx, and indigenous communities at the national level. It is also possible that more granular surveys will reveal disparities of class/income level, national origin, gender, and other characteristics within communities of color in the United States and elsewhere. Indeed, one of the merits of establishing mechanisms to examine the color of COVID, as urged here, is precisely to uncover the truth about—and more accurately respond to—COVID’s discriminatory impacts.

6. As discussed *infra*, international law prohibits discrimination on any of these bases. See, e.g., International Convention on the Elimination of all Forms of Racial Discrimination (CERD), art. 1, Jan. 4, 1969, 660 UNTS 195 (defining “racial discrimination” to mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”) The CERD Committee has repeatedly rebuffed India’s efforts to resist the inclusion of “caste”

Thus far, questions about whether states are “responsible” for originating, spreading, or failing to mitigate the impact of COVID and ought to be made “accountable” for the pandemic have largely focused on the prospect of *interstate* claims, as where the United States presents a case against China for violating international law (as for failing to disclose or notify the WHO under that organization’s International Health Regulations (IHR)). Others have raised the prospect of transnational claims directed at states that have acquired the bulk of vaccines but refuse to share them with others. Such claims for transnational accountability, however interesting, are not the focus here. This article argues that, under international human rights law, states have a duty to provide reparations to those subject to their jurisdiction whom they have harmed over the course of the pandemic because of de facto or de jure discrimination. It addresses a state’s obligations under international law not to discriminate through any actions, de facto or de jure, that prevent persons within its jurisdiction from enjoying, on the basis of equality, fundamental rights, including rights to public health or medical care or life.<sup>7</sup> It argues that where states’ actions or inactions during the pandemic violate these human rights obligations, both general international law and the underlying human rights treaties require effective remedies, including reparation, to be

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as included in “descent” within the definition of prohibited forms of racial discrimination. *See, e.g.*, Patrick Thornberry, *Article 1*, in THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 119–120 (2016).

7. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights (ICESCR) entry into force and full UNTA cite?, art. 2 § 2; International Covenant on Civil and Political Rights (ICCPR), art. 2§1 entry into force date 999 U.N.T.S. 171; CERD, art. 1 §1; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), art. 1, Sep. 3, 1981, 1249 U.N.T.S. 13; Convention on the Status of Refugees, art. 3, July 28, 1951, 189 U.N.T.S. 137; International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, arts. 2§2(a) and 3, June 27, 1989, 1650 U.N.T.S. 383; Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention on Human Rights, art. 1 §1, Nov. 12, 1969, 36 O.A.S. , 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221; African Charter on Human and Peoples’ Rights, art. 2, June 27, 1981, 1520 U.N.T.S. 217; Standard Minimum Rules for the Treatment of Prisoners, art. 6 §1 cite needed; Draft Articles on the Protection of Persons in the Event of Disasters, art. 6; Cairo Declaration on Human Rights in Islam, art. 1 §a cite needed. The right to non-discriminatory treatment with respect to access to health care appears in, for example, CERD, art. 5 (e)(iv); ICESCR, art. 12(1); and the Universal Declaration of Human Rights, art. 2 and 25, GA Res. 217A (III), Dec. 10, 1948. The universal bar on non-discrimination with respect to life and security is affirmed in CERD, art. 5(b); ICCPR, art. 2 and 6; and the Universal Declaration of Human Rights, art. 3. Rights to health or health care also appear in other widely ratified human rights treaties such as CEDAW, art. 11(1)(f) (right to protection for health in connection with working conditions), 12 (equal rights with respect to health care); Rights of the Child Convention, art. 24 (rights to the highest attainable standard of health); ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 25; *see also* Standard Minimum Rules for the Treatment of Prisoners, art. 22–26 (assurance of medical services). The Universal Declaration famously applies to “everyone” without distinction but the extent to which the other treaty instruments extend their respective state parties’ obligations to persons outside their respective jurisdictions—extraterritorially—remains more contestable. The CERD, for example, permits states to carve out distinctions, exclusions, restrictions, or preferences between a state’s own citizens and non-citizens. CERD, art. 1 (2). By its terms, the ICCPR applies to individuals within the territory of state parties and subject to their jurisdiction. ICCPR, art. 2(1).

provided to persons harmed.<sup>8</sup> Under international law and practice, making “reparation” includes a range of remedial actions from promises to change the law to prevent repetition (“cessation”) to government apologies (“satisfaction”) to forms of financial or other recompense (“compensation”).<sup>9</sup> In the case of COVID, providing, *ex ante*, reparation mechanisms to provide such remedies may be all the more desirable given the prospect of multiple COVID-related claims before national courts and international forums such as UN human rights bodies and regional human rights courts.

This article has five parts beyond this introduction. Part I surveys the many ways that COVID, like prior epidemics like Ebola, has revealed health-related inequities inside both rich and poor states. Its Annex A uses data generated from the emergence of COVID through the summer of 2021 to indicate how long-standing structural inequalities within three countries that were gravely impacted by the pandemic—the United States, Brazil, and India—reveal dramatically unequal COVID-19 effects on particular groups in these nations: namely Black, Latinx and indigenous communities in the United States, individuals identified by pigmentation or indigenous origins in Brazil, and persons defined by caste in India. The data highlights how negative COVID outcomes in each case are strongly correlated with pre-existing socioeconomic vulnerabilities, particularly regarding employment, housing, and access to medical care. Across all three nations, groups long disadvantaged by legacies of slavery or neo-colonialism associated with race, ethnicity, or social status have experienced COVID’s harshest health effects—from infection to hospitalization to death. The underlying data strongly supports the proposition that, despite sharp differences in GDP among the three countries, in all three COVID has also resulted in sharply unequal economic effects defined by common factors such as degree of access to basic health care.

That first part also examines preliminary, and yet incomplete, data from around the world, synthesized in Annex B, that suggest that COVID’s effects in regions such as Latin America and Africa correspond to levels of income inequality within nations and are not primarily a product of poverty as measured by, for example, low GDP or GNI per capita. There appears to be a global COVID “color” line that mirrors those found in Brazil, the United States, and India. Annex B and the studies it summarizes suggests a stark reality: the hurdles to effectuating the right to health or health care as enshrined in the WHO’s Constitution and in a number of international instruments<sup>10</sup>—along with the right to life itself—are social constructs. Governments have created the hurdles that impinge on the right to health or health care. The racial, ethnic, and other divides made manifest in the age

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8. See Articles of State Responsibility, 28–32, UN Doc Supp. No. 0 (A/56/10) chp. IV.E1 (2001); ICCPR, Art. 3; CERD, Art. 6.

9. See, *e.g.*, Articles of State Responsibility, Art. 34–39.

10. Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, 2679, 14 U.N.T.S. 185, 185, preamble (proclaiming that enjoyment of the “highest attainable standard of health” is a fundamental right of every human being). See also *supra* note 7.

of the coronavirus—results that Martin Luther King would have seen as “shocking” and “inhuman”—support Matiangai Sirleaf’s conclusions that states have long “racialized” certain diseases and have effectively treated some persons as “disposable.”<sup>11</sup>

Part II surveys contemporary efforts to undertake reforms to the global health regime in response to the current pandemic. The horrific scale of the COVID pandemic—at this writing, responsible for over 6 million deaths around the world—has led to renewed calls to reform international organizations and particularly the WHO and its IHR. The seriousness of such efforts are probably also due to the fact that many of those deaths have occurred in powerful states of the Global North, whose influential elites are now appearing to take more seriously prescriptions for change made but ignored in the wake of prior transnational disease outbreaks like Ebola.<sup>12</sup> At the same time, anyone familiar with the ways powerful states racialized the WHO and the preceding sanitary conventions would not be surprised by the color-blind nature of such efforts.<sup>13</sup> Although the ostensible goal is to achieve more effective “pandemic prevention,” today’s reformers are not directing their efforts to preventing the discriminatory outcomes described in Part I or making governments accountable for them—even if both would probably lead to more effective “pandemic prevention.” This part of the article explains in more detail why, absent an extraordinary change in attitudes, global health reformers will probably focus on making technocratic changes to global health law—and not on encouraging inter- or intrastate remedies for those victimized by *de facto* or *de jure* discrimination during the current pandemic or future ones.

Part III of this article considers the arguments for and against reparation proposals in certain other contexts. The goal is to get insights into the reparation prescription made in this article. This section surveys the arguments of those who favor or oppose (1) reparations from the government to African-Americans in the United States, (2) inter- and intra-state reparations from former colonial powers to those whom they colonized in response to the legacies of slavery and colonialism, and (3) general reparations for all the victims of COVID.

Part IV argues that most of the underlying objections to reparations programs are overstated or misplaced when applied to *intrastate* remedies against governments that have discriminated against their own populations during the current pandemic. This part articulates why it is a good idea for governments to take seriously the international legal prohibition on discrimination against fundamental rights and

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11. Sirleaf, *supra* note 2 (Racial Valuation); Matiangai Sirleaf, *Disposable Lives: COVID-19, Vaccines, and the Uprising*, 121 COLUMBIA L. REV. F. 71 (2021); *see also* Powell, *supra* note 4 (Gender and Color of COVID).

12. For critiques of the WHO’s response to earlier crises and resulting policy prescriptions, *see, e.g.*, WHO, *Rep. of the Ebola Interim Assessment Panel*, U.N. Doc. (Jul. 1, 2015); WHO, *Rep. of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, U.N. Doc. (May 13, 2016); WHO, *Rep. of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009*, U.N. Doc. (May 5, 2011).

13. *See supra* note 12.

provide effective remedies for those harmed by its violation during the COVID pandemic. It argues that governments are already facing COVID-related claims in national courts and in international venues (from human rights committees and courts to investor-State tribunals under international investment agreements) and that, as a result, governments will not be able to ignore for long claims for some forms of COVID accountability. Demands for justice, including for the color of COVID, will only grow as the underlying facts become clearer and as its victims join forces. This part contends that, once the form and function of reparations for the color of COVID are understood as forms of restorative justice—and not necessarily attempts to provide full compensatory damages to all victims—most of the policy and legal objections to them fall away. It argues that there is a strong moral, political and legal case for establishing reparations mechanisms at the national and sub-national levels in advance of litigation for COVID-related claims that could decades to resolve (particularly if raised before international human rights bodies requiring exhaustion of local remedies) and that in any case would be unlikely to have the reach needed to provide a measure of justice to the vast number of persons of color affected. State-wide or even municipal programs to provide “transitional justice” to groups of individuals impacted by the color of COVID could respond more quickly—when remedies are likely to be most meaningful and most needed—than national judges or distant international adjudicators responding to piecemeal claims. To the extent such mechanisms heed lessons from comparable efforts in other contexts, including post-conflict situations, they would engage as meaningful participants from the start the people who are likely to be benefitted. Reparation mechanisms that respond to the distinct, local contexts for the color of COVID have the prospect of according agency to those harmed by discrimination. Such measures could also deter states from taking comparable actions in the future, while affirming the international rule of law.

#### I. THE DATA BEHIND THE COLOR OF COVID

One year into the COVID pandemic in the United States, the *New York Times* published an essay written by Yarna Serkez reporting a change in perception within the United States. Serkez argued that while a year earlier it was possible to argue that COVID was a “great equalizer,” that illusion was shattered by the divide in COVID outcomes based upon “class, race and gender.”<sup>14</sup> Her essay’s accompanying tables indicated that COVID’s harshest effects—whether economic or medical—varied depending on whether one was deemed an “essential worker” or could stay home during the height of the pandemic, became unemployed and suffered the most

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14. Yaryna Serkez, Opinion, *These Charts Show that Your Lockdown Experience Wasn't Just About Luck*, N.Y. TIMES, Mar. 11, 2021. Media reports of COVID’s “racial disparities” in the U.S. and elsewhere have since become routine. See, e.g., Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *Racial Disparity in Cases Stretches All Across Board*, N.Y. TIMES, July 6, 2020, at A1.

drastic percentage declines in income, or was unable to find enough to eat.<sup>15</sup> Those factors among others led to disproportionate rates of COVID infection, hospitalization, and death among Black Americans, Latinx and indigenous communities in the United States.<sup>16</sup> Serkez drew connections between other COVID disparities—such as the percentage of children who were able to continue school coursework during the pandemic—and socioeconomic realities corresponding to racial/ethnic divides and along gender lines.<sup>17</sup> As the pandemic progressed in the United States, other racial/ethnic divides, such as unequal access to medical care, became more prominent, driving disproportional rates of hospitalizations and death. Black, Latinx and indigenous Americans suffered the steepest declines in life expectancy, with Black Americans' life expectancy falling by three years to the lowest in twenty years.<sup>18</sup> Her essay concluded that “[t]he pandemic worsened disparities across society—in unemployment, education, housing, health and even survival. Whatever it felt like last March [2020], Americans are clearly not in this together. Until the country’s deep inequalities are eliminated, we will not be.”<sup>19</sup>

Annex A to this essay, documenting stark racial/ethnic divides within Brazil, the United States, and India during COVID through the end of May 2021, supplements journalistic accounts such as Serkez’s. It shows that COVID’s “color” line extends beyond the United States and is, if anything, likely to be understated given data gaps that can be at least partly explained by discriminatory data collection. Despite differences in the types of groups exposed to the harshest COVID outcomes in each country, the unifying thread to all three case studies is that deep-seated structural inequalities within each society—differing access to remote employment, internet access, less crowded housing, and health care and mitigating treatment (including hospitalization), combined with government policies during the pandemic in all three states that intentionally or not exacerbated these racial/ethnic divides—are more than enough to explain why those who have long suffered second-class citizenship within each nation have been disproportionately victimized anew during COVID. In all three countries, there is considerable evidence that poverty alone does not explain starkly disproportionate COVID outcomes, but that skin color or other social characteristics often do.

The country-specific data in Annex A need only be briefly summarized here. Brazil, which had, as of July 2021, over 18 million confirmed COVID cases and over half a million COVID deaths, the worst rate per capita death rate in the world,

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15. Serkez, *supra* note 14 (indicating that while only 6 percent of Whites in the US were unemployed by March 2021, 10 percent of Blacks and 9 percent of Latinx were).

16. *Id.* (noting that members of the Black and Latinx communities were two or three times as likely to die from COVID as those who identified as White).

17. *Id.* (noting that higher-income families suffered the least, specifically indicating disparities in the pandemic’s effect on property values and childhood education).

18. *Id.*

19. *Id.*

is a case study of ethnically divided (and not merely poverty-driven) outcomes.<sup>20</sup> The data from its northern and northeastern regions provides a strong counter to those who would blame such outcomes on comorbidities or factors such as age. As Annex A indicates, over the first six months of the pandemic those regions—despite having the lowest population over 60 in the country—had an exceptionally high number of infections and COVID deaths.<sup>21</sup> Those harsh consequences are due to other socioeconomic realities: those regions have the fewest adult ICU beds per 100,000 residents in the country, the highest levels of housing vulnerability, a shortage of doctors, poor access to piped water—and yes, the highest percentages of indigenous population in the country.<sup>22</sup> Being black or of mixed race (Pardo) in Brazil was the second most important risk factor for COVID death (after age) in that country—a fact that becomes easier to explain when one examines the differential likelihood of being admitted to an ICU based on pigmentation or the fact that while most Brazilian doctors identify as white, non-medical health staff, who are majority Black or Pardo and who are required to be at work despite the absence of adequate protection, suffered disproportionately from the disease.<sup>23</sup> Despite the Brazilian government’s lack of transparency with respect to much of the data, the Bolsonaro government’s defiant stance against taking measures to mitigate the spread of COVID, particularly among the nation’s most vulnerable populations has been so extreme that, as Annex A indicates, some have branded its actions tantamount to genocide.<sup>24</sup> There is little doubt that the government’s actions and omissions have strongly contributed to that country’s COVID color line.

The data from the United States depicts the differential life expectancy among Whites, Blacks, and members of the Latinx and indigenous communities during the pandemic. By virtually any measure, Black, indigenous, and Latinx communities in the U.S. have been the worst hit by COVID. One in 390 indigenous and one in 555 Black Americans have died from the disease, as compared to one in 665 Whites.<sup>25</sup> This disparity only grows when adjusted for age, with Blacks twice as likely to die as Whites or Asians.<sup>26</sup> Latinx Americans, with the highest number proportion of hospitalization of any ethnic group, when adjusted for age, were 2.4 times more likely to die from COVID than Whites or Asians.<sup>27</sup> As Annex A indicates,

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20. Annex A at 2; Annex B at Table A.

21. Annex A, at 2–3.

22. *Id.* at 2.

23. *Id.* at 4.

24. *Id.* at 6. A charge of intentional discrimination and even perhaps of a crime like genocide or crime against humanity would be particularly strong where it involves a captive population, such as prisoners completely subject to government control. In the case of Brazil, as with a number of other states, there is considerable evidence of state action and inactions leading to disproportionate consequences among those imprisoned. Of course, prisoners in countries like Brazil—as in the United States—tend to be disproportionately persons of color. *Id.* at 5; *see also* Rebecca Griesbach and Libby Seline, *Inmates Died of Covid-19 Behind Bars Across U.S.*, NY Times, May 7, 2021, at A9.

25. Annex A, at 7.

26. *Id.*

27. *Id.*

throughout the country, each percentage increase in the local Black population is associated with a statistically significant increase in positive cases and deaths—rates that also correspond to factors like residential segregation, minority unemployment, and the concentration of the population designated as “essential workers.”<sup>28</sup> Black workers disproportionately comprised all nine occupations found to be the highest risk for contracting the disease.<sup>29</sup> Indeed, only 19.7 percent of Black workers reported being able to work from home, compared to 29.9 percent of Whites.<sup>30</sup> Government policies, at the federal, state, or municipal level—some of which predated the pandemic and others newly minted in the course of it also contributed to these disparities,<sup>31</sup> from refusals to shut down certain businesses employing ‘essential workers’ at the height of the pandemic to refusals to impose social distancing or mask requirements. Revealingly, the few studies that have attempted to trace redlining’s pernicious effects during COVID—conducted in Denver and Washington, DC—reveal hospitalization and incidence rates that correspond to residential divides in both places.<sup>32</sup>

Studies cited in Annex A undercut attempts to blame COVID’s victims for these outcomes. Studies indicate that even when one holds constant variables like comorbidities or willingness to take vaccines, Black and Latinx medical outcomes during COVID have been markedly worse, including with respect to rates of hospitalizations and death.<sup>33</sup> Annex A also provides evidence that the unequal impact of COVID among Black, Latinx, and Indigenous communities in the United States corresponds to differential *access* to health care, medical insurance, and vaccines for all three groups. The data also supports drawing connections between these inequitable outcomes and specific government decisions taken during the pandemic—such as the Trump executive order requiring meat processing plants to remain open, failures to mitigate the spread of COVID among the incarcerated, and racially or ethnically insensitive vaccine rollouts. It is also likely that other government decisions taken during the Trump Administration that resulted in cuts to health care and reductions in access to health insurance only worsened such outcomes.<sup>34</sup>

While India, as of this writing, has been one of the hardest hit nations with respect to COVID, even its relatively high number of confirmed cases and deaths

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28. *Id.* at 8.

29. *Id.*

30. *Id.*

31. For one of many examples, see Marc A. Garcia et al., *The Color of COVID-19: Structural Racism and the Disproportionate Impact of the Pandemic on Older Black and Latinx Adults*, 76 J. GERONTOLOGY B. PSYCH. SCI. SOC. SCI., August 5, 2020 at e75, e75–e80 (documenting structural factors that help account for the fact that among older adults, Blacks and Latinxs have death rates 3 and 2 times higher than Whites respectively).

32. Annex A, at 8–9, 13, 16–17. Redlining is a once common practice by U.S. banks to deny financial credit, including mortgages, within certain zones on a discriminatory basis based on race or ethnicity.

33. *Id.* at 10–16.

34. *Id.*

is likely to be a severe undercount, particularly with respect to the disadvantaged groups for which data collection is sparse or non-existent.<sup>35</sup> As with Brazil and the United States, even India's official (and inadequate) statistics show strong correlations between socially disadvantaged groups and mortality.<sup>36</sup> The lowest caste groups within India have experienced the worse outcomes—a result that is the predictable product of socioeconomic factors such as differential access to basic utilities, decent housing, and, of course, wealth.<sup>37</sup> The lower castes have also suffered the gravest economic effects (including with respect to readiness to survive lockdowns).<sup>38</sup> They were also the most likely group to face the brunt of overt or *de facto* discrimination, including denial of access to testing, hospitalization, or government COVID relief packages.<sup>39</sup> As with respect to Brazil and the United States, Annex A identifies a number of government policies that in all likelihood strongly contributed to India's inequitable COVID outcomes. This includes the Indian government's failure to countermand overt discrimination among India's medical professionals.<sup>40</sup>

Annex B distills COVID data for other countries and regions. Its tables contain statistics corresponding to the WHO's regional divisions (the Americas, Eastern Mediterranean, Africa, Europe, Southeast Asia, and the Western Pacific) by population, confirmed COVID cases, incidence rate (infections per 100,000 people), deaths attributed to COVID, the percentage of COVID cases ending in a fatality, along with other data such as GNI, and inequality-adjusted income.<sup>41</sup> In most cases, Annex B's tables also include the percentage share of a country's population that had been vaccinated as of June 1, 2021.<sup>42</sup>

While these tables over each country in a region, the underlying data comes with many gaps and caveats. With the possible exception of vaccination rates, there is considerable difficulty in verifying many of the figures used in these tables. As is likely true for the United States, India, and Brazil with respect to Annex A, the

35. *Id.* at 18.

36. *Id.* at 18–21.

37. *Id.* at 18–19.

38. *Id.*

39. *Id.* at 19.

40. *Id.* at 20. Some governments' refusal to release COVID data to independent scientists and journalists also inhibited more effective responses to the pandemic.

41. Annex B, at 1, n. 1, quoting U.N. Dev. Programme, *Human Development Report 2020: Technical Notes*, at 5, [http://hdr.undp.org/sites/default/files/hdr2020\\_technical\\_notes.pdf](http://hdr.undp.org/sites/default/files/hdr2020_technical_notes.pdf) (“[t]he inequality-adjusted income index . . . is based on the index of logged income values [within each country] . . . and inequality in income distribution computed using income in levels.”). This formula is used to track income inequality within countries by mapping the distribution of income across the wealthy-indigent spectrum and reflects disparities between the poor and rich more directly than the Human Development Index.

42. Over the period covered by Annex B, the divide between the haves and have-nots in terms of vaccine distribution is cavernous. In the lowest GNI per capita quadrant, the population share which is at least partially vaccinated is just 1.9%, compared to 38.84% of the highest GNI per capita quadrant. See Annex B, Table I. Across regions, the divide is just as stark; while European countries have 27.6% of their population at least partially vaccinated, Africa has just 0.78%. See Annex B, tbls. C, D.

official government-supplied data in Annex B probably understates the extent to which members of disfavored groups in each country have been tested or died from the disease—and there is a strong probability that many deaths among such groups, even if counted, have been attributed to other causes.<sup>43</sup> The evolving, on-going nature of a pandemic that may be entering its gravest phase in many developing countries also needs to be considered in evaluating the preliminary data emerging from the Global South that is reflected in Annex B.

The analysis in Annex B leads to possible conclusions but indicates that one is more reliable than the other. The first, more tentative, inference from the data is that, for now, there does not appear to be a significant correlation between the economic health of nations (as measured by its GNI per capita for example) and its COVID health.<sup>44</sup> This result is likely to reflect the inadequacy of data collection particularly in those developing countries that, given the increase in infection rates and lack of vaccination, seem on the brink of suffering the most severe COVID effects. The more reliable second conclusion is that when income is adjusted based on the UNDP's coefficient for inequality, low scoring countries show a significantly higher case-fatality ratio (2.94 fatalities per 100 cases) than high scoring (less unequal) countries.<sup>45</sup> While the data on inequality-adjusted incomes is not broken down along racial and ethnic lines, it is likely that significant internal income disparities correspond to differences along racial/ethnic lines within each country. The more severe COVID results, in short, appear to correspond to differences in treatment among socio-economic classes.

Annex B also begins to suggest the changing posture of the Global North and South with respect to the pandemic over time. While initially COVID was associated with elevated mortality rates in places like the U.S. and the UK, it has progressively become more of a developing country pandemic. The full scope of the pandemic in the Global South has yet to emerge and awaits documentation. For now, if we go beyond official statistics for fatalities identified with COVID and focus instead on excess mortality rates, it appears that even as of June 2021

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43. Annex B, at 1–2.

44. *Id.* at 1, 19–20.

45. *Id.* The data reveals that the income-inequality measurement may be a better predictor of negative COVID outcomes than GNI or Human Development Index. Countries like Mexico and Brazil, which score highly in Human Development Index and are upper-middle income countries, have large income gaps between the richest and poorest, reflected by their low scores on the inequality-adjusted income index. Annex B, Table A. This dovetails with the devastatingly high COVID fatality rate present in those countries. (9.3 for Mexico and 2.8 for Brazil.) A similar statistical relationship can be seen across the world in South Africa, Kenya, Ecuador, China, and other countries which have high GNI and Human Development Index scores, low inequality-adjusted income index scores, and high COVID fatality ratios. Compare the better case-fatality ration (1.1) of The Netherlands which has a high inequality income index of (.843). Of course, case-fatality ratios are also impacted by the quality of a country's general health or hospital services. Thus, the United States has a case fatality ratio comparable to The Netherlands even though it appears to be a more unequal society (.711 in the inequality adjusted income index). Annex B, tbls. A–F, H.

developing countries accounted for some 86 percent of COVID deaths.<sup>46</sup> Given these countries' on-going struggle to obtain and distribute vaccines—a fact that is starkly presented in Annex B by country, region, and human development tranche—incidence rates of COVID in the Global South, along with its grave economic toll, are likely to rise exponentially. Indeed, economists estimate that the economic impact of the pandemic on the Global South is likely to exceed both the Ebola outbreak of 2014 and the 2008 financial crisis.<sup>47</sup>

Annex B provides an overview of health and economic outcomes through mid-2021 in two regions: Latin America and Africa. The grave impact of COVID on Latin America is evident immediately. That region, which as of July 2021, had one of the highest case-fatality ratios in the world, accounts for nearly 30 percent of world COVID deaths even though it has only 8 percent the world's population.<sup>48</sup> Despite inadequate data collection in Latin America (particularly for those ignored by government officials such as migrants and refugees), it seems clear that unequal health outcomes in the region weigh heavily against those who have long suffered from the lack of adequate access to basic health care.<sup>49</sup> By comparison, Africa seems, on the face of current data, much better off in terms of official numbers of those infected and numbers of fatalities.<sup>50</sup> But the key word is “official.” The explanation for the supposed “African Paradox”—lower COVID rates despite high population density and severe levels of poverty—may not be the region's higher percentage of young people less susceptible to the disease but, less promising, inadequate testing and undocumented deaths.<sup>51</sup> Annex B concludes that the true toll of COVID for many countries in Africa—including the severe economic impact—may not be recognized for some time.<sup>52</sup> That toll, given the region's low access to vaccines and other vital medical supplies and medicines, is certainly likely to rise.

The inequalities demonstrated by COVID within countries as well as among them—particularly with respect to access to vaccines—should not surprise anyone. As Annex A mentions, racial and ethnic inequalities appeared during the 1918 “Spanish” influenza and more recent epidemics such as Ebola and H1N1.<sup>53</sup> Indeed, it is probable that all or most prior epidemics or pandemics have evinced comparable color lines within societies with less than ethnically harmonious populations. The color of COVID as evinced in countries whose histories are closely intertwined with slavery and imperialism, including the United States, Brazil,

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46. Annex B, at 14.

47. *Id.*

48. *Id.* at 15.

49. *Id.* at 15–16.

50. *Id.* at 16–17.

51. *Id.* at 17.

52. *Id.* at 17–18.

53. Annex A, at 9. *See also* Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Structural Violence & International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477 (2018); Matiangai Sirleaf, *We Charge Vaccine Apartheid* (draft paper on file with author).

and India, is also one manifestation of how the vestiges of those practices continue to be visited on the bodies of particular people *within* those nations who find it harder to escape those legacies.<sup>54</sup>

## II. ANTICIPATED COLOR-BLIND GLOBAL HEALTH REFORMS

A global health crisis whose effects were felt most keenly initially in developed countries like the United States was bound to secure the world's attention in ways that prior epidemics with less virulent effects within the Global North (like Ebola) had not. Today, particularly after the election of a U.S. President who has focused on mitigating the effects of COVID, there are signs that governments are finally willing to undertake reforms to the WHO and its IHR proposed in the past in the wake of prior global health threats. Reforms now under serious consideration for the global health regime writ large, and for the WHO in particular, have been discussed elsewhere and require only a brief survey here.<sup>55</sup>

As of this writing, the WHO is engaged in close study of the origins of the COVID pandemic and the leaders of some twenty-five governments have endorsed the need to conclude a “pandemic prevention treaty.”<sup>56</sup> While the contents and structure of a possible pandemic prevention treaty remain speculative, were such an instrument to emerge and be concluded within the auspices of the WHO, most assume the treaty would contain institutional reforms to that organization and its

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54. See, e.g., Sirleaf, (Vaccine Apartheid), *supra* note 53. Tendayi Achiume—as both scholar and UN Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance—has made a powerful case that legacies of slavery and colonialism continue to be reflected in the disadvantaged status of those who are the descendants of former slaves or of those victimized by imperialism. This includes, of course, African-American, Latinx, and indigenous communities in the United States. See generally, Tendayi Achiume (Special Rapporteur), *Rep. on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/74/321 (Aug. 21, 2019) [hereinafter the Achiume Report]; Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019); Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT'L L. 333 (2018). The lingering effects of Brazil's 350 years of slavery—and of de facto discrimination on the basis of pigmentation despite the formal end of slavery there on May 13, 1888—is the subject of a considerable literature. See, e.g., ROBERT W. SLENES, *Brazil in THE OXFORD HANDBOOK OF SLAVERY IN THE AMERICAS* 112 (Mark M Smith and Robert L. Paquette eds.) (2010); Juliana Gonçalves, *Brazil: 130 Years of an Unfinished Abolition of Slavery*, BRASIL DE FATO, (May 14, 2018), <https://www.brasildefato.com.br/2018/05/14/brazil-130-years-of-an-unfinished-abolition-of-slavery>. The impact of the United Kingdom as India's imperial ruler on the latter's caste system has been the subject of recent critical excavation. See SANJOY CHAKRAVOTY, *THE TRUTH ABOUT US: THE POLITICS OF INFORMATION FROM MANU TO MODI* (2019).

55. See generally Gian Luca Burci, Suerie Moon, Alfredo Crosato Neumann, and Anna Bezruki, *Envisioning an International Normative Framework for Pandemic Preparedness and Response: Issues, Instruments and Options*, Report, GRADUATE INST. GENEVA GLOB. HEALTH CTR. (2021), <https://repository.graduateinstitute.ch/record/299175?ln=en>; Adam Kamradt-Scott, *The International Health Regulations (2005) Strengthening Their Effective Implementation and Utilization*, 16 INT'L ORG. L. REV. 242 (2019).

56. See, e.g., WHO Director-General's remarks at the press conference with President of the European Council to discuss the proposal for an international pandemic treaty, WORLD HEALTH ORGANIZATION, (Mar. 30, 2021), <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-press-conference-with-president-of-the-european-council-to-discuss-the-proposal-for-an-international-pandemic-treaty>; Joint-WHO China Study, *Origins of the SARS-CoV-2 Virus: China Part*, (Mar. 30, 2021), <https://www.who.int/health-topics/coronavirus/origins-of-the-virus>.

IHR. Such a treaty, which could take the form of a framework convention comparable to the WHO's Framework Convention on Tobacco Control,<sup>57</sup> would be expected to improve how the organization is notified of potential health threats. It could enhance international cooperation and information sharing within the WHO and possibly among other UN system organizations, commit greater financial and technical resources to enable poorer states to fulfill IHR mandates (as with respect to having in place core medical capacities for detection and treatment and permit global access to countermeasures such as masks and vaccines), put pressure on states to comply with their IHR commitments by incorporating monitoring and other forms of verification/inspection of state reports, and possibly enable some forms of inter-state dispute settlement limited to the same issues.<sup>58</sup> There is also support for reforming the WHO's dichotomous declarations of Public Health Emergencies of International Concern (PHEICs) as well as making changes to enhance the quality of the organization's temporary recommendations in the wake of such declarations.<sup>59</sup>

Global health reformers are aware of the basic facts outlined in Annexes A and B. The WHO's 2020 Annual Report recognized that the pandemic's widespread and destructive social and economic impact "exploited and exacerbated the fissures within societies and among nations" and "exploited inequalities."<sup>60</sup> There is widespread recognition of COVID's destructive and highly unequal path

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57. WHO Framework Convention on Tobacco Control, 2302 U.N.T.S. 166, *opened for signature* Jun. 16, 2003, (entered into force Feb. 27, 2005).

58. *See, e.g.,* DR. KATARINA KUMMER PEIRY, TREATY FEATURES FOR POSSIBLE CONSIDERATION IN A FUTURE PANDEMIC TREATY, Graduate Inst. of Geneva Glob. Health Cr. (2021); BURCI ET AL., *supra* note 55; Aaron Tan Kai Ran, Jacinth Teo Ying En, and Soon Wen Qi Andrea, *The Need for a New International Health Treaty in Uncertain Times*, 9 ASIAN L. STUDENTS' ASS'N L. REV. MAG. NO. 2. 15; European Union, Commission Services Reflection Paper, *Agreement on Pandemic Preparedness and Response: An Initial Blueprint* (Aug. 26, 2021).

59. Beyond enhancing the transparency and accountability of the process for such declarations, some have urged adoption of a more flexible 'traffic-light' system of graduated warnings that would be more accurate about the nature of changing threats over time and less threatening to states that are the subject of such warnings and therefore more willing to be candid about the underlying risks to public health. *But see* Clare Wenham et al., *Problems with Traffic Light Approaches to Public Health Emergencies of International Concern*, 397 THE LANCET 1856 (May 15, 2021) (arguing against the traffic-light alternative). For technocratic reform proposals to improve the quality of the WHO's recommendations with respect to travel restrictions in the wake of a pandemic, see, for example, K.A. Namashya, M. Ratnayake, and K. Tharuka D. Perera, *The Legality of Travel Restrictions During Pandemics*, 9 ASIAN L. STUDENTS' ASS'N L. REV. MAG. NO. 2. 1. Reformers may also need to consider changes to the IHR providing for an official end to PHEICs since ending such a designation may matter with respect to a state's human rights obligations as well as whether its measures are owed deference as a reasonable exercise of its police powers. *See generally*, Federica Paddeu and Michale Waibel, *The Final Act: Exploring the End of Pandemics*, 114 AM. J. INT'L L. 698 (2020).

60. WHO, Global Preparedness Monitoring Board, *A World in Disorder. Global Preparedness Monitoring Board Annual Report*, at 3 (2020). Epidemiologists have long known that pandemics have disparate impact on different communities defined by structural inequalities, social marginality, or intersectional disadvantage. *See* Sirleaf, (Ebola) *supra* note 53, at 516–23 (documenting the WHO's awareness of its "botched response" to Ebola); Sujata Gupta, *Why African-Americans may be especially vulnerable to COVID-19*, ScienceNews (10 Apr 2020).

concerning levels of infection, hospitalization, and death, as well as its devastating ripples with respect to access to education, labor and social protection, freedom of movement, and employment. Global health reformers also know about the highly unequal fiscal responses within nations and among them.<sup>61</sup>

A global pandemic treaty—particularly one that focuses on more than institutional changes to the WHO—could go far to address some of the inequalities exposed by COVID. New international rules that emphasize states' obligations to prevent future pandemics and that provide some means to criticize states that fail to abide by their obligations both to respect and *not discriminate* among their populations with respect to the right to basic health care could ameliorate those inequities in the future. A serious effort to use the pandemic prevention treaty or changes to the IHR to enforce the basic guarantee incorporated in the ICESCR, to respect the right to health care “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” and to apply this rule to all forms of *de jure* or *de facto* discrimination would constitute major progress.<sup>62</sup> Were the envisioned new treaty to include additional obligations among its state parties to provide resources to enable poorer states to satisfy the core medical capacities that they are now expected to have in place under the IHR and to enable vaccines, relevant medicines and other necessary equipment and supplies to be available to all, it would lessen the divide in response and treatment capabilities between countries of the Global North and South. A pandemic prevention treaty that also would reexamine the prioritization of disease and vaccine research to make sure that these respond to conditions, diseases, and comorbidities common to the developing world also further the ambitions of its title.<sup>63</sup>

But even the most optimistic and/or ambitious global health reformers are focusing their attention on technocratic fixes to prevent future pandemics.<sup>64</sup> No one is suggesting that the proposed pandemic treaty or the changes to the IHR should look backward to redress the structural inequities inflicted so acutely on millions of people in the age of COVID. Today's reformers are not considering changes to global health law to make it clear that states are responsible when they undermine the right to health with respect to certain groups of persons within their territory. They are not considering transnational responsibility for the spread of the pandemic or, should prevention fail, with respect to future epidemics or pandemics.

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61. See, e.g., Austin Liu, *The Social and Economic Response to the COVID-19 Pandemic*, GRADUATE INST. OF GENEVA GLOB. HEALTH CTR. (2021), <https://www.graduateinstitute.ch/sites/internet/files/2021-06/noteliuaustin.pdf>.

62. ICESCR, Art. 2 § 2.

63. See, e.g., Benjamin Mueller, *In South Africa Vaccine Trials, Important Lessons about Global Health*, N.Y. TIMES (Mar. 14, 2021), <https://www.nytimes.com/2021/03/13/world/africa/south-africa-vaccine-virus.html> (discussing the risks of testing medicines and vaccines without sufficient attention to the developing world).

64. See, e.g., Jorge Vinales et al, *A Global Pandemic Treaty Should Aim for Deep Prevention*, THE LANCET (Apr. 28, 2021).

Except for a vociferous few urging that the world “sue China for COVID,” no one is seriously proposing multilateral efforts to enable states to seek damages from one another or even apologies for COVID-related missteps. Indeed, insofar as COVID reparations under international law have been the subject of any discussion, as is discussed below, most have advanced the view that such remedies would be impossible, impractical, or unwise.<sup>65</sup> The scholarly consensus to date seems to be that COVID-related lawsuits and remedies merely distract from the pragmatic legal repair work that needs to be done.

Global health reformers are not examining the possibility of establishing national or transnational venues to consider (much less effectuate) remedies for those who have been impacted by discriminatory outcomes during the current pandemic. Outside of a few in academe, no one is suggesting that part of the international response to COVID should be to make sure that states, international organizations, and non-state actors should be held responsible when their actions or inactions produce or contribute to racially or ethnically compromised outcomes, even deaths, in response to transnational health threats.<sup>66</sup>

The inattention or overt hostility to considering the liability of states for their actions during the COVID pandemic is easy to explain. It does not help matters that “responsibility for COVID” was first raised in the context of strident, highly politicized calls to “sue China” for the “China virus” among some in the United States. Calls by some U.S. legislators and state attorney generals to bring China to account for spreading the virus by allegedly failing to tell the truth about the virus’s origins or its characteristics (including the prospect for human to human transmission and the risks of aerial dissemination) have led to predictable rebuttals pointing out the difficulties of doing so in national courts given China’s sovereign immunity, the absence of other venues for adjudicating such claims, and myriad other concerns.<sup>67</sup> Scholars both in and outside the U.S. have pointed out that it is not entirely clear which obligatory primary rules of international law the Chinese government might have violated, that serious ambiguities exist with respect to the

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65. The WHO’s ongoing investigation of the origins of COVID is not seen as seeking to assign liability to any country but as a necessary first step to learning what the organization needs to do to improve timely pandemic prevention.

66. *But see* Institut De Droit International, *Epidemics, Pandemics and International Law*, Art. 15, 12th Commission Resolution (Sept. 4, 2021) [hereinafter the *Institut De Droit Resolution*], [https://www.idi-il.org/app/uploads/2021/09/2021\\_online\\_12\\_en.pdf](https://www.idi-il.org/app/uploads/2021/09/2021_online_12_en.pdf) (indicating that a breach of the obligation under international law of a state or an international organization to prevent, reduce and control epidemics or to provide early information on the outbreak of epidemics to other states shall entail the responsibility of such states or international organizations). But as noted *infra*, the report accompanying this resolution undermines this contention.

67. *See, e.g.*, Luke Moffett, *Why Calls for Reparations from China for Coronavirus are an Unfeasible Distraction*, THE CONVERSATION, (Jun. 9, 2020), <https://theconversation.com/why-calls-for-reparations-from-china-for-coronavirus-are-an-unfeasible-distraction-139684>.

relevant secondary articles of state responsibility, and that reparations for any such breaches would be, in any case, next to impossible to implement.<sup>68</sup>

Skepticism over the lawsuit-responsibility-reparations line of thinking was evident within the 12<sup>th</sup> Commission of the *Institut De Droit*, charged with examining “Epidemics and International Law.” That Commission ultimately produced a path-breaking resolution on “Epidemics, Pandemics and International Law” approved by the full *Institut* at its virtual session in Beijing in August 2021.<sup>69</sup> That Commission’s final Report acknowledged the divisive nature of even discussing the prospect of state or international organization responsibility.<sup>70</sup> For that group, deeply resistant to blaming China or any single country for the disaster, the most plausible primary rules on point—the IHR’s requirements of timely notice with respect to all emerging threat to global health—were, in the words of the Commission “obligatory in form but recommendatory in substance.”<sup>71</sup> Although, as noted, the final Resolution adopted by the Institut De Droit recognized in principle that states and international organizations should be held responsible for relevant breaches of international law committed in the course of an epidemic,<sup>72</sup> the underlying Report for that resolution goes out of its way to undermine the idea that such breaches may have occurred in the case of COVID or that even if they did, this should elicit a legal remedy.

That Report proclaims that “international law is not yet well-developed in terms of States’ obligations within the WHO law,” and supports that contestable proposition by indicating that IHR requirements of notification of grave global

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68. See, e.g., *id.*; Peter Tzeng, *Taking China to the International Court of Justice Over COVID-19*, EJIL TALK (Apr. 2, 2020), [ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/](http://ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/); Chimène Keitner, *Missouri’s Lawsuit Doesn’t Abrogate China’s Sovereign Immunity*, JUST SECURITY (Apr. 22, 2020), <https://www.justsecurity.org/69817/missouris-lawsuit-doesnt-abrogate-chinas-sovereign-immunity/>. But see Daniel Lapres, *The Framework in Public International Law for Determining the Responsibility of the People’s Republic of China in Connection with the Covid-19 Pandemic*, 3 INT’L BUS. L. J. 385 (2021) (arguing that China might be liable for violating specific treaties when COVID first emerged). See generally Sebastián Guidi and Nahuel Maisley, *Who Should Pay for COVID-19? The Inescapable Normativity of International Law*, 96 N.Y.U. L. REV. 375 (2021).

69. *Institut De Droit Resolution*, *supra* note 66 (adopted by a vote of 76 to 3 with one abstention). Such resolutions require a majority of the Institut’s members present at the particular biennial meeting where the resolution is presented to vote in favor. Institut resolutions, like other ‘soft law’ projects by highly regarded international law experts (including the International Law Commission (ILC) do not have, of course, any formal status under international law but the *Institut’s* resolutions, like the work of the ILC, has sometimes been cited as persuasive authority by scholars and international adjudicators.

70. *Institut De Droit International*, 12th Commission, “Epidemics and International Law,” paras. 154–160, Beijing Session, 2021, available at <https://www.idi-iiil.org/app/uploads/2021/05/Report-12th-commission-epidemics-vol-81-yearbook-online-session.pdf> (henceforth “Commission Report”). The author served as a member of the 12<sup>th</sup> Commission but disagreed with its statements on state and international organization responsibility.

71. *Id.*, ¶ 155, n. 313.

72. Compare Commission Report, *supra* note 70, ¶ 156 (indicating divisions within the commission on whether it was wise to include such a provision at all and the need for “caution and prudence” when addressing questions of legal responsibility for global threats to health) to description of *Institut De Droit* Resolution *supra* at text and note 67.

health threats within twenty-four hours of their emergence rely on a state's own "assessment."<sup>73</sup> The implication is that the IHR's notification rules are as self-judging as is the anticipated remedy for their "breach," namely a state's "internal remedies" rather than international state responsibility.<sup>74</sup> The Report further notes that "there are not many substantive international law rules relating specifically to epidemics" outside the WHO context "apart from the general obligation of "due diligence" to prevent transboundary harm."<sup>75</sup>

That Report also emphasizes the difficulties of proving causality and attribution in the context of assigning blame for a pandemic, suggesting that connecting the actions of particular state actors to the emergence of COVID, its spread, or subsequent harms are too great. It notes that "[t]here has been no precedent of States invoking the responsibility of other States for the damage caused by epidemics" and suggests that this because any State could be said to contribute to the spread of disease and could also find itself to be deemed a "country of origin."<sup>76</sup> Apart from such difficulties, attempts to assign responsibility for pandemics like COVID would, the Report implies, encounter insurmountable difficulties in applying the traditional defenses from state responsibility, namely *force majeure*, necessity, and distress.<sup>77</sup> Finally, the Report states that even if all these difficulties were overcome, the applicable remedies in the articles of state responsibility—from cessation to compensation—would be either impossible to impose or "difficult to assess."<sup>78</sup>

The 12<sup>th</sup> Commission Report sees a comparable responsibility gap under international law with respect to international organizations like the WHO. While the final resolution accepts the principle that the WHO, along with its members, might be responsible jointly or severally for the spread of an epidemic after a breach of a relevant rule of international law, the Report undermines the application of this rule by indicating that it would be difficult to attribute acts of wrongfulness to WHO officials like its Director-General who have "broad discretion" and who act on the advice of others.<sup>79</sup> The Report implies that it is preferable (and presumably more consistent with deference to "sovereignty") to get states to accept their moral responsibility to mitigate COVID's harms by rendering humanitarian assistance or donating vaccines to the developing world.

The most thorough assessment of the matter to date in scholarship, by Guidi and Maisley, buttresses the skeptical approach to state responsibility that surfaced

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73. Commission Report, *supra* note 70, ¶ 155, n. 313.

74. *Id.*

75. *Id.* at ¶ 155, fn. 314. Surprisingly, the Report does not address whether the obligation to undertake due diligence might itself ground state responsibility as relating to COVID-related actions.

76. *Id.* Indeed, others have argued that both China and the United States set the stage for the coronavirus pandemic. *See, e.g.,* Laurie Garrett, *Grim Reapers*, THE NEW REPUBLIC (Apr. 2, 2020).

77. Commission Report, *supra* note 70, ¶ 155.

78. *Id.*

79. *Compare Institut De Droit Resolution*, *supra* note 66, Art. 15(3) to Commission Report, *supra* note 70, ¶ 160.

within the *Institut De Droit*.<sup>80</sup> Those authors argue that the relevant international primary and secondary rules are not developed enough to support a “lawsuit approach” leading to trillion-dollar liability for COVID. Guidi and Maisley contend that the most relevant primary obligations that a state like China might have violated—the IHR’s duties to notify the WHO, states’ general duties to prevent transboundary harm, and rules barring licit but hazardous activities in one’s territory that have injurious transnational effects—are either too vague or indeterminate to sustain such a claim.<sup>81</sup> They also see a “lack of normative agreement” with respect to secondary rules (e.g., with respect to rules of causation), amidst a dearth of transnational rules and applicable case law comparable to what national courts apply in tort cases.<sup>82</sup>

Guidi and Maisley argue that a focus on which state is “responsible” for COVID poses “paralyzing complex” dilemmas for which international law has no answers.<sup>83</sup> They argue that going down the road of lawsuits require “non-trivial normative judgments” requiring “thick societal understandings” that exist only at the national level.<sup>84</sup> Determining who “caused” COVID or contributed to its harms requires reaching a normative consensus on who is to blame for distributive inequities far beyond COVID, such as poverty, capitalism’s periodic crises, or climate change. Attempts at “corrective justice” will therefore lead to fraught debates over “distributive justice” which international lawyers are ill equipped to answer.<sup>85</sup>

For some, the “lawsuit approach” is not only legally untenable: it is unwise from a policy standpoint. Blaming states like China antagonizes states at a time when the world needs to draw together in solidarity and cooperation to defeat the current virus and confront the next one.<sup>86</sup> Misguided attempts to “sue” China would lead

80. Guidi & Maisley, *supra* note 68.

81. *Id.* at 409–11 (arguing that the relevant rules do not fully resolve the relevant causal links, the determination of how much of an illicit act results in an injury, or the definition of what is significantly harmful to constitute a violation, or what remedial measures are appropriate for future prevention).

82. *Id.* at 410–19 (arguing that the uneven levels of judicialization and institutionalization of international law accounts for the resulting absence of common understandings of what constitutes either “harm” or “causation”).

83. *Id.* at 423.

84. *Id.* at 423–26.

85. *Id.* at 427–429.

86. See *Institut De Droit* Resolution, *supra* note 66, Article 6. The emphasis on the need to enhance, not undermine, international cooperation to defeat pandemics has long dominated the scene both before and after the emergence of COVID. See, e.g., Burci et al, *supra* note 55; WHO, *A World in Disorder*, *supra* note 59; Mark Eccleston-Turner, Scarlett McArdle & Ross Upshur, *Inter-Institutional Relationships in Global Health: Regulating Coordination and Ensuring Accountability*, XII GLOBAL HEALTH GOVERNANCE (Fall 2018); Commission Report, *supra* note 70, ¶¶ 65–69; Allyn Taylor & Roojin Habibi, *The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, 24 ASIL INSIGHTS, (June 5, 2020); Michale Hateul-Radoshitzkey, *Global Governance and COVID-19: Why International Cooperation Still Matters*, COUNCIL ON FOREIGN REL. (May 2020); Sylvia Mathews Burwell & Frances Fragos Townsend, *Improving Pandemic Preparedness Lessons from COVID-19*, COUNCIL ON FOREIGN REL. (2020); Thomas J. Bollyky & Chad P.

to a never-ending series of attempts to assign blame, and possibly lawsuits, directed at other states (like the U.S.) that failed to contain the virus once it arrived, sub-state entities (and private actors) responsible for the operation of prisons, mental health facilities, hospitals, and nursing homes, and numerous non-state “aiders and abettors” who helped spread the virus. The last could include members of the WHO’s secretariat responsible for dilatory actions or market actors, such as cruise ship operators or businesses who resisted lockdowns.<sup>87</sup> Talk of blame and reparations is also seen as dangerous insofar as it fuels xenophobic attacks on those blamed, such as “the Chinese,” and because it distracts from “more fundamental shifts happening around the world, such as increasing right-wing populism, excessive use of draconian powers and the degradation of the environment that threaten to undermine human rights today and for generations to come.”<sup>88</sup>

As all of this suggests, the delimited, “color-blind” nature of global health reforms under consideration emerge for many reasons—and not only because states are reluctant to concede the possibility of state responsibility. It is not only the colonialist and deeply racial origins of the global health regime and the path dependencies set by those legacies that render global health reformers timid about tackling state responsibility for the color of COVID.<sup>89</sup> Pragmatic reformers are reluctant to open the Pandora’s Box of responsibility,<sup>90</sup> lest it undermine everything else they want to accomplish. If asked, reformers are likely to say that it will be difficult enough to persuade many states, and not only authoritarian regimes like China, that elements of transnational civil society should be given greater power within the WHO that may elicit greater scrutiny over governmental actions (or

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Brown, *The Tragedy of Vaccine Nationalism Only Cooperation Can End the Pandemic*, FOREIGN AFFAIRS (Sept./Oct. 2020) <https://www.foreignaffairs.com/articles/ united-states/2020-07-27/vaccine-nationalism-pandemic>; Elizabeth Goldberg, *Regulatory Cooperation to Combat Public Health Crises*, THE REGULATORY REV. (Apr. 27, 2020).

87. For an analysis of the implications of governments’ actions and inactions during the pandemic on prisoners’ rights, see, for example, Neha Jain, *Pandemics as Rights-Generators*, 114 AJIL 677 (2020).

88. See, e.g., Moffett, *supra* note 67. Moffett argues that “[r]eparations only get us so far. They cannot solve all suffering or structural inequalities. They provide a set of values for claiming accountability in the face of injustices of the past. However, other social movements, protests and cultural shifts such as the Black Lives Matter protests may be a more effective means of social transformation through resistance and the awakening of public consciousness to tackle institutional and social racism as well as health inequalities.” *Id.*

89. On the racist and colonialist origins of the global health regime, see, for example, Sirleaf, (Vaccine Apartheid), *supra* note 53; Sirleaf, *supra* note 2. For a comparable critique, see generally U.N. Human Rights Council, Res. 41/54, *Global extractivism and racial equality, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, UNITED NATIONS (May 14, 2019) (arguing against the historical, “color-blind” approach to reforming the regulation of the extractivism economy). Of course, the racist underpinnings of the global health regime may stem from the racist legacies of the medical profession in places like the United States. See, e.g., Anna Flagg, *Black American Deaths, and a Paper From 1910*, NY TIMES, at D5 (Sept. 7, 2021) (discussing the adverse effects on Black doctors and their Black patients prompted by the 1910 Flexner Report and its embrace by American Medical Association).

90. Compare Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AJIL 711 (2007).

inactions) in the wake of the next disease outbreak.<sup>91</sup> Insistence on state responsibility for failures to notify others of health threats may doom the prospects of imposing new reporting or verification requirements or seeking greater input of non-state whistle-blowers. Attempts to give the WHO greater powers—including the authority to impose something other than a temporary “recommendation”—would be doomed if freighted with the prospect that violations of those edicts could trigger financial liability.

Reformers assume that the prospects for successful negotiation of a pandemic prevention treaty and for securing sufficient level of ratifications would dim if that treaty’s ambit goes beyond “technocratic” reform. A pandemic prevention treaty that would engage in the political conversations that Guidi and Maisley believe would be necessary to resolve international law’s normative gaps would be extraordinarily difficult in the best of times; it seems a step too far in an age characterized by resistance to ambitious treaty-making.<sup>92</sup> If Guidi and Maisley are right that corrective justice requires reaching a global consensus on how to remedy the structural inequities embedded within and among states and even within international law itself, efforts to blame states for what they did or failed to do since January 2019 seems a political non-starter.<sup>93</sup>

Mainstream dismissals of state responsibility or reparations for COVID also result from international law’s fragmented regimes and blind spots. The medical experts focused on improving “scientific and technical” cooperation to improve the WHO are adhering to that organization’s core ethos.<sup>94</sup> For decades, the WHO has seen its function as enabling states to protect themselves from external disease

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91. See generally Steven A. Solomon & Claudia Nannini, *Participation in the World Health Organization*, 17 IO L. REV. 261 (2020). Given estimates that had Chinese authorities listened to whistleblowers like Dr. Wenliang early on, perhaps as many as 95 percent of COVID cases around the world might have been avoided (see, e.g., Shengjie Lai, *Effect of non-pharmaceutical interventions to contain COVID-19 in China*, 584 NATURE 410 (2020), at [92. See, e.g., Joost Pauwelyn, Ramses A. Wessel, & Jan Wouters, \*When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking\*, 25 EJIL 733 \(2014\); Harold Hongju Koh, \*Triptych’s End: A Better Framework to Evaluate 21<sup>st</sup> Century International Lawmaking\*, 126 YALE L.J.F. 338 \(2017\). The U.S.’s long-standing \(and worsening\) resistance to multilateral treaty-making apparently extends to proposals by a pandemic prevention treaty. To date, the U.S. government has responded to COVID by proposing, as an alternative to negotiating a new treaty that would presumably need approval by 2/3 of the Senate, “targeted amendments” to the IHR \(which presumably would need no legislative approval\). See United States of America Proposal on Targeted Amendments to the International Health Regulations \(IHR\) \(copy on file with author\).](https://www.nature.com/articles/s41586-020-2293-x#:~:text=We%20estimate%20that%20early%20detection,strongest%20and%20most%20rapid%20effect), it is not surprising that China is resisting the WHO’s investigation into COVID’s origins.</p>
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93. See also Ntina Tzouvla, *COVID-19 Symposium: The Combined and Uneven Geography of COVID-19, or on Law, Capitalism and Disease*, OPINIO JURIS (2020).

94. The organization’s demarcation of its scientific ethos from the professional concerns of others, such as lawyers, may reflect a felt need to establish such boundaries to enhance the organization’s legitimacy and authority. See generally Thomas F. Gieryn, *Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists*, 48 AM. SOC. REV. 781 (1983).

threats while discouraging trade protectionist measures.<sup>95</sup> Balancing the health of nations with their right to trade has always been the goal of the health regime, even during the pre-WHO era dominated by international sanitary conventions. While the revised IHR of 2005 belatedly acknowledged the need to achieve that balance with an eye to respecting human rights, the WHO embraced human rights only as *limits* on states' responses to global health threats. Its current IHR accept human rights only as constraints on, for example, the kind of prophylactic measures that states can impose on travelers.<sup>96</sup>

Within the organization there has been a collective unwillingness to take the human right to health seriously. Although the WHO's constitution proclaims that "enjoyment of the highest attainable standard of health" is a fundamental right owed to all without discrimination,<sup>97</sup> that organization has never seen advancing such a positive legal right (or related ones like the right to clean water) as its core mission.<sup>98</sup> Its IHR do not impose specific positive obligations to advance the right to health (such as duties on states to ensure access to accurate health information to their populations, to enable those within its jurisdiction to have access at least to primary care, or to progressively diminish infant mortality).<sup>99</sup> Indeed, as has often been noted, the WHO, the site for the negotiation of a single treaty and a single set of ostensibly legally binding regulations (revised once), has generally avoided deploying its considerable delegated powers to make or enforce any legal obligations on its members. It has kept international law at a considerable distance.<sup>100</sup> Despite provisions in its IHR and in the WHO's Constitution anticipating the use of arbitration or the ICJ, the organization has also generally avoided binding dispute settlement.<sup>101</sup>

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95. See generally David P. Fidler, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* (1999).

96. The IHR's human rights limits appear in its Articles 3.1, 23.2, 23.3, 23.4, 23.5, 31.1, 31.2, 32, 42, 43.2, 45.1, 45.2, and 45.3.

97. WHO Constitution, *supra* note 10, preamble. The WHO Constitution was accordingly seen by those present at its creation as the "Magna Carta for health." LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 91 (2014) (quoting Parran and Boudreau).

98. See José E. Alvarez, *The WHO in the Age of the Coronavirus*, 114 *AJIL* 578, 586 (2020).

99. See the ICESCR Committee's General Comment 14, *The Right to the Highest Attainable Standard of Health* (Art. 12), E/C.12/200/4 (11 Aug. 2000). See also John Tobin, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 254-302 (2011) (discussing states obligations under the ICESCR and other human rights treaties to diminish infant and child mortality, provide medical assistance and health care, combat disease and malnutrition, ensure occupational health and safety standards and address environmental threats to health, provide pre-natal and post-natal health care, raise awareness of and ensure access to information concerning health, and develop preventive health care). As illustrated by Part I and Annex A, states' responses to COVID have put all of these obligations into contention.

100. See generally Gian Luca Burci, *The World Health Organization at 70: Challenges and Adaption*, 16 *INT'L ORGS L. REV.* 229, 230-33 (2019).

101. See, e.g., Commission Report, *supra* note 70, at ¶¶163-65 (discussing the IHR's art. 56 addressing the settlement of disputes and the WHO Constitution's articles 75 and 76 addressing the possibility of submitting interpretative disputes to the ICJ).

Some have attributed these human rights blind spots to the particular expertise that dominates the WHO.<sup>102</sup> The medical experts now contemplating a new pandemic prevention treaty may see it as contributing to the successful attainment of a number of the Sustainable Development Goals (SDGs), but they are likely to see the SDG exercise as a distinct “UN” endeavor involving and responding to distinct stakeholders. Similarly, global health reformers may understand that there are deep connections between the limited rights of migrants under international law and COVID’s harsh impact on them, but still regard changes to the rules governing nationality, entry, and asylum as not within their mandate.<sup>103</sup> Global health reformers are not aiming to alter states’ largely unregulated capacity to control their borders, to make changes to the rules protecting migrants, or to get states to see “humanitarian aid” to others to deter migration as a legal obligation—even if all of these would mitigate some of consequences of the next pandemic.<sup>104</sup>

Those pushing for a pandemic prevention treaty simply do not see it as a human rights instrument.<sup>105</sup> Global health reformers may acknowledge the reality that mitigating the effects of COVID and future pandemics would greatly benefit from enhanced efforts to enforce human rights regimes that now purport to protect the right of non-discriminatory access to health care and to its core components (e.g., equal access to clean water, basic health information, and adequate housing) but see such reforms as a task for others apart from the WHO. And while the new pandemic prevention treaty may include some interstate dispute settlement options that may enable clarification of states’ duties under the IHR, no one is suggesting that these would enable states to initiate interstate claims for COVID damages. Serious consideration of reparations for the color of COVID would require, after all, accepting the proposition that under the ICESCR and, for non-ICESCR parties, arguably customary international law: states really do have a duty to respect, protect, and fulfill myriad social welfare commitments and avoid all forms of discrimination (including with respect to the right to health and health care); that state acts of commission and omission may violate these obligations; and that “[a]ny persons or groups that suffer violations should have access to effective judicial or other appropriate remedies at both national and international levels” that include

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102. See Gieryn, *supra* note 94. There is also a more general literature on the expert-driven blind spots of international organizations. For an anthropological account of legal (and often human rights) avoidance by the World Bank, see Galit Sarfaty, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012).

103. International law’s reluctance to limit the discretion of states to refuse admission to “economic” immigrants, to enable states to define who is entitled to welfare benefits by defining who are its nationals, and to permit states to racialize diseases and use that as an excuse to deny entry to certain groups are prominent examples. International law’s deference to sovereigns is so acute that even the CERD’s ban on racial discrimination defers to states when they distinguish between citizens and non-citizens. CERD, Art. 1 (2) and (3). See generally Symposium on Covid-19, Global Mobility and International Law, 114 *AJIL* (2020); Achiume, (*Migration as Decolonization*), *supra* note 54; Achiume, (*Governing Xenophobia*), *supra* note 54.

104. See generally Achiume, (*Migration as Decolonization*) *supra* note 54.

105. See, e.g., EUROPEAN UNION (Reflection Paper), *supra* note 58.

“adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.”<sup>106</sup> While these positive obligations are accepted by human rights experts, incorporating them into a treaty designed to improve the existing system for handling global health emergencies would require a change in mindset for those used to the idea, based on the IHR, that human rights only impose certain limits on states’ emergency or prophylactic actions.

Even if the agenda of global health reformers were to expand to enable greater collaborations between the WHO and international financial institutions, those other organizations face their own human rights blinkers. It is unlikely that “human rights-free zones” such as the World Bank or the IMF will take up the slack left by the WHO’s inaction and require compensating those victimized by COVID, even if limited to those harmed by discriminatory actions.<sup>107</sup> It has been hard enough for those organizations to accept, grudgingly, the idea that they need to avoid actions that violate the human rights of certain groups (such as Indigenous peoples). Convincing the Bank’s or the IMF’s in-house lawyers to accept the premise that their organizations owe positive duties under customary international law or treaties like the ICESCR to advance the right of “everyone” to “enjoyment of the highest attainable standard of physical and mental health” *and that, like states, they need to be accountable* when they fail to do so would require a fundamental reset of the economic mindset that dominates such institutions.<sup>108</sup>

### III. ARGUMENTS OVER REPARATIONS

There are considerable commonalities between the arguments for and against reparations on behalf of African-Americans, on behalf of those who have suffered the legacies of slavery and colonialism, and for COVID’s general victims. They require only a brief summary here.

#### *A. Reparations for African-Americans*

Arguments supporting reparations for African-Americans have been part of the U.S. landscape at least since Lincoln pledged to provide those formerly enslaved with what has been popularized as “forty acres and a mule.”<sup>109</sup> Scholars have

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106. See, e.g., ICESCR General Comment 14, *supra* note 99, at paras. 33, 49-52, and 59.

107. See, e.g., Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/70/274 (Aug. 4, 2015).

108. See Sarfaty, *supra* note 102; Philip Alston, *The World Bank as a Human Rights-Free Zone*, (N.Y. Univ., Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-50) (Nov. 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3079899](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079899). The reluctance to take on the issue of the responsibility of international organizations extends to the WHO itself. Few expect WHO reform efforts to consider suggestions that the organization might be liable for its actions or inactions during the current pandemic. Compare Mark Eccleston-Turner & Scarlett McArdle, *The Law of Responsibility and the World Health Organization: A Case Study on the West African Ebola Outbreak*, in Mark Eccleston-Turner & Iain Brassington, eds., *INFECTIOUS DISEASES IN THE NEW MILLENNIUM: LEGAL AND ETHICAL CHALLENGES*, 89, 89–109 (2020) (arguing that should the WHO issue an untimely PHIEIC declaration it should be held responsible).

109. See, e.g., ALFRED L. BROPHY, *REPARATIONS PRO & CON* (2006); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. WESTERN L. REV. 1 (2007).

characterized the frameworks for such arguments differently, but most agree that the current generation of proponents have focused on a tort or contract breach compensation model.<sup>110</sup> Under this view, the U.S. federal government owes the descendants of those enslaved within the United States financial compensation for the harms inflicted by slavery and its racist legacies.<sup>111</sup> Reparations are owed because the government has breached its promises and inflicted tortious harms resulting in the loss of free will, the destruction of families, and the deprivation of wealth and property. When Ta-Nehisi Coates renewed attention to reparations in 2014, he focused particularly on the last.<sup>112</sup> He did so perhaps because of the incalculable, almost unimaginable nature of the other harms as compared to the more accessible nature of government takings of property. Coates and other reparation proponents relied on the high salience of property in U.S. culture and the familiarity of the concepts of intentional torts and unjust enrichment to make the idea that African-Americans deserve restitution more acceptable. At the risk of vastly simplifying the true nature of the manifold injuries suffered by African-Americans across time, Coates made at least some of the harms suffered by African-Americans more tangible to his target audience: the skeptical but “progressive” White readers of *The Atlantic*, themselves owners of considerable property.

Contemporary reparations proponents have emphasized that slavery and subsequent racially discriminatory actions brought about a tremendous transfer of wealth from Blacks to Whites and that this “theft” was a “debt” owed across time.<sup>113</sup> Thus, Coates repeatedly invokes how U.S. laws enabled state-sanctioned “robbery,” the “plunder” of bodies that continued past the official end of slavery in the United States, the theft of the American Dream of owning one’s home through redlining and racially targeted unscrupulous lending, and de facto racial carve-outs from New Deal and GI bill government benefits.<sup>114</sup> Focusing on the resulting White/Black wealth gap as the core injury also narrows the range of remedies to those under the law of torts and contracts, not to mention international law’s rules on compensation for state-sanctioned expropriations of property. Everyone, including national and international lawyers, knows that property deprivations are cognizable harms to which the law responds.

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110. See, e.g., Yamamoto, Kim, and Holden, *supra* note 109, at 21–24.

111. See, e.g., William Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 656 (2008) (arguing for a program of reparations that acknowledges grievous injustice, provides redress, and enables closure).

112. See, e.g., Coates, *supra* note 1 (referring to Jim Crow Mississippi as a “kleptocracy”).

113. Coates has argued, for example, that white wealth was built through “theft” of black-owned land valued at “tens of millions of dollars” and that enslaved persons were the nation’s largest “financial asset of property” in 1860. Coates, *supra* note 1. This foundation of white wealth, Coates argues, underlies the “ill-gotten” nature of the White/Black wealth gap and requires a national reckoning. *Id.*

114. *Id.* at 28–29 (describing the racial gaps in the GI Bill and other federal programs given redlining).

According to this group of reparations proponents, African-Americans are owed individual cash payments corresponding to the amount that was stolen from them in order to close the United States' contemporary racial wealth gap.<sup>115</sup> The discourse then devolves to addressing not whether money is owed but to whom and how much. To be sure, those ensuing questions still pose considerable difficulties. Is money owed only to direct descendants of enslaved people or to other Blacks in America, including immigrants, who still presumptively suffer the continuing ill effects of discrimination such as Jim Crow laws, "separate but equal" schools, or redlining?<sup>116</sup> Should the compensatory amount be measured by today's equivalent in dollars to the cash value of physical bodies enslaved in 1860 or to the current value of the \$250 million in cotton produced by enslaved Blacks in 1861 or the contemporary equivalent in cash to the promised "forty acres and a mule"?<sup>117</sup> For advocates of reparations as compensation frame, at least these are the more manageable questions lawyers are used to resolving.<sup>118</sup>

By focusing on the continuation of racially discriminatory policies to the present day, these reparation proponents rebut the canard that the harms of slavery ended with the Emancipation Proclamation and are now too late to correct.<sup>119</sup> This responds to the objection that reparations are barred by laches or, if one prefers to stick with property analogies, cannot be pursued at the expense of innocent third parties who should not be held responsible for the sins of former slave-owners. Reparations proponents understand the popular appeal of arguments that it would be unjust to extract wealth from the taxpayers of today for actions taken by long-dead ancestors who once owned slaves. By extending the culpability of the U.S. government (and indirectly of Whites until the present day) and invoking property takings as the rationale, proponents make African-American reparations more comparable to widely accepted government programs that extended some forms of compensation to Native Americans for forced exile from their native lands, to

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115. See, e.g., WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 259–70 (2020); RASHAWN RAY & ANDRE PERRY, BROOKINGS, WHY WE NEED REPARATIONS FOR BLACK AMERICANS (2020), [https://www.brookings.edu/wp-content/uploads/2020/04/BigIdeas\\_Ray\\_Perry\\_Reparations-1.pdf](https://www.brookings.edu/wp-content/uploads/2020/04/BigIdeas_Ray_Perry_Reparations-1.pdf).

116. See, e.g., Darity & Mullen, *supra* note 115, at 258–59 (discussing eligibility criteria).

117. See *id.* at 256–70. Other possibilities proposed for the financial recompense of descendants of those enslaved include college tuition, student loan forgiveness, down payment grants to enable housing purchases, or business grants for startups or the expansion of Black-owned enterprises. See, e.g., Ray & Perry, *supra* note 115.

118. The compensation frame frequently relies on reparations "precedents" whether in the U.S. or elsewhere either as inspiration or by way of warning against programs that fall short by providing only apologies. See, e.g., Yamamoto, Kim, & Holden, *supra* note 109, at 2, note 5 (identifying U.S. states that have apologized for slavery or other racist actions), 18, note 78 (discussing monetary reparations for Japanese American interned during WWII, South Africa's Truth and Reconciliation Commission, and reparations for Japan's involvement in the sexual enslavement of Korean women during WWII).

119. See also Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers, A/HRC/47/53 (1 June 2021); Report of the International Commission of Inquiry on Systemic Racist Police Violence Against People of African Descent in the United States (Mar. 2021).

Japanese-Americans for internment during WWII, or to come victims of the Holocaust.<sup>120</sup> In property terms, reparations to African-Americans are a fair exchange for a country that somehow managed to find it just to require compensation to some slave owners for their “lost property” but not to those victimized by that abominable practice.<sup>121</sup> Under this view, a fair reparations program seeks to make whole its beneficiaries, who have been robbed through repeated government takings of their property.

In a brief article, Eugene Robinson and other medical experts make an explicitly utilitarian case for general reparations to African-Americans as a form of pandemic prevention or mitigation. They present data suggesting that had a program of African-American reparations been in place in the United States at the onset of the COVID pandemic, the incidence of the disease would not only have been significantly reduced for its recipients but for the U.S. population at large.<sup>122</sup> This is consistent with those who have argued in favor of global health reforms, including for equitable distribution of vaccines worldwide, on the basis of national self-interest and not “mere” altruism.<sup>123</sup> It is a forward, not backward-looking, argument for African-American reparations, unlike those made by Coates and other proponents of remedial compensation.

#### *B. Transnational Reparations for Slavery and Colonialism*

Tendayi Achiume, as UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, has made a case

120. For reflections on how these historical examples might be applicable to more contemporary racist struggles, see MIT Program on Human rights and Justice, *Reparations: A dialogue between Human Rights Academics and Activists* 2004. Although a number of prior reparation efforts emerged post-conflict, such mechanisms have been considered more generally. *See, e.g.*, Pablo de Greiff, *The Vernacularization of Transitional Justice: Is transitional justice useful in pre-conflict settings?* (prepared for a forthcoming Festschrift for Sally Merry on file with author).

121. The value that the U.S. has put on compensating property owners for government takings is the subject of a substantial literature and extends to the earliest days of the Republic. *See, e.g.*, José E. Alvarez, *Introduction: The U.S. Contribution to International Investment Law*, in *INTERNATIONAL INVESTMENT LAW* 1 (2017). U.S. government efforts to protect “property” included using treaties to extract compensation for those who owned enslaved persons. *See, e.g.*, Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 *VILL. L. REV.* 1135 (2000). Allison Powers has also documented the phenomenon of “settlement colonialism,” her term for the quiet settlement of claims invoked by property owners in the course of U.S. territorial expansions since 1868. ALLISON POWERS, *COMPENSATORY JUSTICE IN UNITED STATES EXPANSION, 1868-1964* (forthcoming OUP). There is a substantial literature on reparations for what some have called “dignity takings” of property by the state. *See, e.g.*, BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS* (2014).

122. Eugene T. Richardson et al, *Reparations for Black American Descendants of Persons Enslaved in the U.S. and Their Potential Impact on SARS-Cov-2 Transmission*, *SOC. SCI. & MED.* 276 (2021). The study analyzes the effects of monetary payments in the amount of \$250,000 per individual or \$800,000 per household and estimates that the impact of such payments would have reduced the infection transmission rates by anywhere between 31 and 68 percent for every person in the state of Louisiana given the impact on over-crowded housing, reduction in high-risk frontline work, and slight increase in ability to access preventive modalities like masks.

123. *See, e.g.*, James Bacchus, *The Antidote to Vaccine Nationalism*, *CTR. FOR INT’L GOVERNANCE INNOVATION* (Dec. 21, 2020), <https://www.cigionline.org/articles/antidote-vaccine-nationalism/>.

for reparations for the legacies of slavery and colonialism under international law.<sup>124</sup> Like those who argue for reparations for African-Americans, Achiume contends that these historic injustices remain largely unaccounted for and that vestiges of both slavery and colonialism continue to the present day. As continuing wrongful acts under international law, they elicit state responsibility.<sup>125</sup> What Achiume adds is transnational accountability. States that engaged in the slave trade or held colonies owe reparations to states of the Global South whose populations they enslaved or whose economies remain indebted by neo-colonialist policies.<sup>126</sup>

Achiume's lawyerly report identifies the many instances in which the international community has acknowledged the entrenched nature of racial discrimination and its contemporary manifestations.<sup>127</sup> It also identifies the hard primary rules of international obligation and soft norms that would support a legal case for reparations.<sup>128</sup> While her report relies in part on international obligations to prevent and redress international crimes such as crimes against humanity, it emphasizes that states' human rights obligations may in certain cases extend beyond their own populations, including the obligation not to discriminate under the CERD.<sup>129</sup> At the same time, Achiume's report acknowledges that most cases requiring states to provide effective remedies to persons they have harmed because of violations of human rights duties involve duties owed to their own nationals.<sup>130</sup> She recognizes that there are formidable barriers that prevent states from accepting the principle that they may owe in appropriate cases reparations not only to their own nationals but to other countries.<sup>131</sup>

Achiume's endorsement of reparations for the legacies of slavery and colonialism differ from those made by African-American reparations proponents like Coates and Darity. She does not emphasize deprivations of property as the principal harm needing remediation nor remedial cash payments as the principal remedy. Her UN report does not argue that reparations for slavery and colonialism should be designed to fill the presumptive wealth gaps between the Global North

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124. Achiume Report, *supra* note 54.

125. *Id.* at ¶ 32 (arguing that the on-going nature of racist acts overtakes the intertemporal limit on state responsibility). Although Achiume's Report is global, it pays particular attention to the continuing nature of chattel slavery in the United States (*id.* at ¶¶ 22-23) as well as contemporary realities in Brazil (*id.* at ¶ 24).

126. *Id.* at ¶ 6.

127. *Id.* at ¶¶ 19, 21.

128. *Id.* at ¶¶ 26-35.

129. *Id.* at ¶¶ 26-28.

130. *Id.* at ¶¶ 34-35. *But see, id.*, at ¶¶ 42-44, 52 (citing a number of instances where such interstate reparations (from forms of compensation to official apologies) have ensued as a result of bilateral interstate agreements, settlements in the wake of national lawsuits, or regional pacts for reparatory justice). *See also* Sirleaf, *supra* note 11, at 77-79.

131. Achiume Report, *supra* note 54, at ¶¶ 45-51. This makes it more problematic to argue, for example, that inequities with respect to access to health care, medicines, equipment or vaccines evident in the Global North and traceable to actions or inactions of the Global North or specific states violate international human rights treaties. An exploration of states' transnational human rights responsibilities lies outside the scope of this article.

and South, that is, between former colonial masters and their colonies. While Achiume quotes *Chorzow Factory* for the proposition that responsible states need to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed,”<sup>132</sup> her report acknowledges that “[r]eparations alone cannot achieve the eradication of racial discrimination.”<sup>133</sup> and is “closely related to the notion of transitional justice.”<sup>134</sup> Her report accordingly reminds readers that under the principles of state responsibility, reparations may consist of a variety of remedies beyond restitution or compensation, including satisfaction, rehabilitation and guarantees of non-repetition.<sup>135</sup>

*C. General Reparations for Government Malfeasance During the Current Pandemic*

Given the relatively recent emergence of COVID, only a few scholars have made the case for general COVID reparations by governments to those under their jurisdiction in response to government malfeasance. Sara Rosenthal and Arthur Caplan focus on the need to examine the U.S. federal governments’ acts of commission and omission by establishing a COVID-19 commission in the United States, comparable to those undertaken for 9/11, to establish accountability for the over half a million American deaths from COVID.<sup>136</sup> Relying on experts’ conclusions that nearly half of these deaths were preventable and traceable to governmental acts of commission or omission, these authors draw comparisons with other mass atrocities that have prompted subsequent restitution efforts. They argue that, as with respect to mass deaths involving government action or inaction, there is a need to “tell the truth and label the American Covid-19 experience accurately” lest we fail to draw lessons from history. There is a need, as with those other cases, to vow as a nation “Never Again.”<sup>137</sup> To this end, the authors identify some of the governmental actions and inactions that “enabled” the U.S.’s mass death toll. These include government-sanctioned misinformation about the origins of the disease, its likely consequences, and the efficacy of mitigation efforts (such as social distancing and mask wearing) and other “deliberate acts of commission” by the Trump Administration such as pressuring U.S. states to forego science-based mitigation efforts, bullying public health experts, interfering with the independence and efficacy of the CDC, and “seeding the virus” by conducting political rallies on behalf of the President.<sup>138</sup> Under acts of omission, the authors identify the Trump

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132. *Id.* at ¶ 31.

133. *Id.* at ¶ 14.

134. *Id.* at ¶¶ 37, 52, 55–63.

135. *Id.* at ¶¶ 30, 33, 36–41.

136. M. Sara Rosenthal & Arthur Caplan, *Why We Need a Covid-19 Commission*, HASTINGS BIOETHICS FORUM (2021), <https://www.thehastingscenter.org/why-we-need-a-covid-19-commission/>.

137. *Id.*

138. *Id.* The authors could also have added Trump-era policies intended to deny any and all asylum claims which led, predictably, to the return of persons even if such a return, at the height of a pandemic, meant a greater likelihood of infection, hospitalization, or even death.

Administration's failure to deploy the Defense Production Act to its full extent to enable critically needed supplies of equipment and tests and ceding control to U.S. states with predictably grave consequences for the adoption of uniform policies that could have mitigated the spread of the disease.<sup>139</sup>

In other work, the same authors distinguish the need for government-supplied COVID reparations from general economic pandemic relief authorized to date by the U.S. Congress. Remedial reparations, they argue, are nonetheless needed to compensate for long-term health consequences for COVID long-haulers, allow for direct payments to minors who have lost parents or guardians, enable grief counseling to survivors, and provide help to health care providers, including mental health services.<sup>140</sup> Such relief, along with a formal presidential apology, would resemble what the U.S. government ultimately did in response to the Tuskegee study or to victims of the World Trade Center's collapse on 9/11.<sup>141</sup> Their arguments for reparations for all the U.S. victims of COVID-related government malfeasance rests on the ancient Latin principle of *ubi jus ibi remedim*.<sup>142</sup> But Rosenthal and Caplan do not address reparations for the color of COVID specifically nor the relevance of states' international legal obligations to that question. They only briefly mention, as a separate issue needing study, whether the United States should be held accountable for contributing to and possibly worsening some of forms of "systemic racism."<sup>143</sup>

At present there is little prospect that any of these three reparation proposals will be enacted. As discussed in Part II, those focusing on what went wrong with the global health regime during the current pandemic are looking at remedies that do not include Rosenthal and Caplan's accountability proposals. Public resistance to African-American reparations remains strong, except within African-Americans, within the United States and the remedial tort justification for such reparations has not won favor in U.S. courts.<sup>144</sup> Given these polarized Black/White views on the

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139. *Id.*

140. M. Sara Rosenthal & Arthur Caplan, *How to Make It Right: Covid Reparations*, HASTINGS BIOETHICS FORUM (2021), <https://www.thehastingscenter.org/why-we-need-a-covid-19-commission/>.

141. *Id.*

142. Oxford's *Dictionary of Law* attributes the principle that where there is a right under the law there needs to be a remedy to, among other sources, *Ashby v. White*, 14 St. Tr. 695, 92 Eng. Rep. 126 (1703) (judgment of Lord Chief Justice Holt). *Ubi jus ibi remedium*, A Dictionary of Law (9th ed. 2018), <https://www.oxfordreference.com/view/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-4078?rskey=C6xw4u&result=1>. Others find more ancient antecedents. See, e.g., Nora Wittmann, An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations, 68 SOC. & EC. STUD. 19, 2019, at 21–22.

143. Rosenthal & Caplan, *supra* note 140.

144. See Thai Jones, *Slavery Reparations Seem Impossible. In Many Places, They're Already Happening*, THE WASH. POST, Jan. 31, 2020 (noting polls that indicate that while some 74 percent of African Americans support reparations on their behalf, 85 percent of Whites in the United States oppose the idea but also indicate pockets of support below the federal level within some communities in the United States). For a summary of some of the U.S. court cases, see Yamamoto, Kim, and Holden, *supra* note 109, at 24–27. "Equitable considerations," related to, if formally distinct from, laches, have also barred

subject, it is perhaps not a surprise that H.R. 40, a bill in Congress first introduced in 1989 that would merely establish a commission to *study* the question of reparations for African-Americans, has yet to make it to a floor vote.<sup>145</sup> As Achiume's Report acknowledges, opposition by the United States and other governments to interstate or transnational reparations for the legacies of slavery and colonialism remains formidable, notwithstanding some supportive UN General Assembly resolutions.<sup>146</sup>

#### D. Learning from Objections to Reparations

Five common objections to African-American reparations, briefly canvassed below, reveal some of the underlying concerns with most proposals for reparations.<sup>147</sup>

##### 1. Fears of legal consequences.

Reparations, even in non-monetary forms such as government apologies, open the door to further legal claims since they concede responsibility and potential liability. A government apology today is likely to generate a lawsuit tomorrow and such lawsuits may also spill over and prompt claims against those who collaborated with the state (from insurers to banks to real estate agents to educators). Apart from the sheer amount of the monetary reparations that would be commensurate with the types of harms done to African-Americans over more than 200 years—amounts that may be objectionable in of themselves given the impact on public funds—reparations of any kind (even if non-monetary in form) are a recipe for continuous legal and social conflict.

##### 2. Intertemporal objections.

The past is the past. White Americans today are not responsible for the sins of slavery and even if they indirectly benefitted as a group, they owe no debt for something they did not commit. Those living in America today and certainly not recent immigrants to the country did not “steal” the wealth of the formerly enslaved, someone else did. From a legal perspective, neither governments nor individuals should be held responsible for actions that were “legal” when taken.<sup>148</sup> Historical injustices—such as accepting enslaved individuals as legal property and the legality

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claims by indigenous groups based on dispossession of their ancestral lands before a number of U.S. courts. See, e.g., *Oneida Indian Nation v. Country of Oneida*, 617 F.3d 114 (2d Cir. 2010).

145. *Commission to Study and Develop Reparations Proposals for African Americans Act*, H.R. 40, 117th Cong. (2021–22), <https://www.congress.gov/bill/117th-congress/house-bill/40>.

146. Achiume Report, *supra* note 54, ¶¶ 45–46.

147. For discussion of these objections (and refutations to them), see, for example, Darity & Mullen, *supra* note 115, at 239–55; Wittmann *supra* note 142. For a succinct example, see Richard Epstein, *The Case Against Reparations for Slavery, The Libertarian*, at <https://www Hoover.org/research/case-against-reparations-slavery>.

148. *But see* Wittmann, *supra* note 142 (responding to the non-retroactivity or intertemporal challenge to reparations by distinguishing earlier forms of servitude compared to “transatlantic chattel slavery”).

of slave trade—should be the subject of moral crusades, not legal debts owed by contemporary taxpayers.

*3. Compensation has been and is being given.*

“The Debt” has been paid. Some argue “White America” paid the debt by waging a devastating Civil War with emancipation as the result.<sup>149</sup> Others contend that reparation has taken the form of an abundance of welfare monies and other social programs,<sup>150</sup> been accorded in the guise of affirmative action programs, or been provided in more direct and meritorious fashion, namely to individuals who prove they have been harmed by acts of intentional discrimination.<sup>151</sup> All of these, some say, are sufficient to satisfy any legal (or moral) requirements for an effective remedy.<sup>152</sup>

*4. Problematic allocations of responsibility.*

There are many causes for the current White/Black wealth gap or for other “structural” forms of intersectional discrimination such as separate but equal classrooms or racially segregated neighborhoods and housing. All of these can emerge from the voluntary action of individuals unaided by government. It is impossible to allocate state responsibility to (and therefore awards damages based on) specific government actions or inactions such as redlining without accounting for other contributing factors. African-Americans are economically poor, poorly educated, lack sufficient food or housing, or are unhealthy for many reasons, and therefore attributing the cause of any of these conditions to certain government actions ignores the more complex underlying explanations, lacks plausibility, and will generate opposition and backlash.

*5. Reparations are not likely to provide closure.*

The vision that a one-time cash award, no matter the size, will close the Black/White wealth gap, end demands for further reparations, or deter future forms of governmental discrimination is a myth. Blaming Whites for the injustices suffered by Blacks has no end point. If reparations had been granted before George Floyd had been killed, there would be renewed demands for them in light of continued biased policing and what some see as de facto government-sanctioned modern-day lynchings. New forms of racial discrimination are ever possible and ever likely, even

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149. Darity & Mullen, *supra* note 115, at 245–46.

150. *Id.* at 246–48.

151. *Id.* at 248–49.

152. While the U.S. Supreme Court has justified affirmative action on diversity, not remedial, grounds, such formal legal arguments have not persuaded those who regard affirmative action, including some of its critics, as “remedial” in purpose. *See* Coates, *supra* note 1, at 36–37. But arguments for remedial corrective action—whether in the form of affirmative action or anti-discrimination laws—fail to persuade opponents of reparations like Richard Epstein, who discount slavery’s impact on contemporary black/white wealth or income disparities. Epstein argues against affirmative action and anti-discrimination laws (along with minimum wage laws) on the basis that these interferences with the market make it more difficult for African Americans to get jobs. Epstein argues that deregulation and “libertarian” initiatives like charter schools, not reparations or “progressive” legislation, are the best route for “undoing the sins of the American past.” Epstein, *supra* note 147.

if reparations are accorded for prior bad acts. Moreover, reparations for one discriminated group are likely to inspire demands by others, including those who suffered harm deep into the nation's past.<sup>153</sup> There will be no end to efforts to readdress un-remedied harms done by the state to indigenous groups or distinct ethnicities who have faced discriminatory practices, including with respect to immigration status or access to asylum procedures. Reparations provide no closure. They are only likely to inspire new forms of victimization and renewed demands to remedy them. Apart from generating perennial legal claims (see (i) above), they are likely to foster or perpetuate divides in civil society (including among ethnic minorities and not only on White/Black lines), not heal them.

Variations of these objections have arisen in response to proposals for reparations for the legacies of slavery and colonialism.<sup>154</sup> Accordingly, Achiume's report attempts to answer objections that reparations violate the intertemporal rule and entail problematic assertions of causation and attribution essential to ground state responsibility.<sup>155</sup> As do proponents of reparations for African-Americans who point to continuing racial injustices, Achiume points to the on-going legacies of slavery and colonial rule.<sup>156</sup> She argues that former slave holding and imperial states owe reparations to those they victimized notwithstanding the intertemporal rule because slave-holding and colonial rulers and certain states of the Global South continue to be economically and politically interconnected. The past, she argues, is not just in the past. It accounts for continuing North/South inequities. Moreover, she contends that existing international rules (including the intertemporal rule itself), written to benefit yesterday's slaveholding and colonialist states, should be revisited if these stand in the way of recognizing the debts owed to those who were enslaved or colonized.<sup>157</sup>

Comparable objections arise with respect to COVID-related reparations. As noted in Part II, global health reformers, along with commentators like Guidi and Maisley, resist questions of state responsibility for fear of never-ending claims demanding "trillions" in damages. Raising the prospect of state responsibility for COVID's rise and spread is also seen as setting nation against nation, thereby undermining the essential need for interstate cooperation to enable successful pandemic prevention. Borrowing a page from opponents of general African-American reparations, some argue that there are too many intervening "causes" of COVID harms and deaths to attribute blame to any one state or to any particular government action. The absence of primary or secondary rules to address such questions is another reason Guidi and Maisley argue that claims for COVID

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153. See, e.g., Darity & Mullen, *supra* note 115, at 245.

154. For Darity's & Mullen's responses, see *id.*, at 239–55.

155. Achiume Report, *supra* note 54, at ¶¶ 48–49, 51.

156. *Id.* at ¶¶ 49–50.

157. *Id.* at ¶ 51. See also *id.* at ¶ 50 (noting the need to redress the application of "neocolonial" forms of international law).

damages would lead to politically treacherous slippery slopes requiring answers to distributive injustices that international legal rules fail to supply.

The message is clear: beware reparations for COVID, including targeted ones in response to the color of COVID. Like general reparations for African-Americans or interstate remedies in response to the legacies of slavery or colonialism, a focus on remedies and state responsibility for harms done to racially or ethnically defined persons will generate political backlash and displace support for more traditional but beleaguered voluntary efforts such as the move by enlightened governments to provide, *ex gratia*, vaccines to the Global South, encourage interstate cooperation to empower the IMF and national development agencies to distribute billions in emergency rescue funds or adopt COVID rescue plans akin to that provided by the U.S. government to its nationals.<sup>158</sup> COVID reparations, like other reparations schemes, will not generate civility within or among nations. They will not provide the touted “closure.” To paraphrase Richard Epstein, remedies that stress “collective guilt and national apologies”<sup>159</sup>—that divide groups of people and nations—are doomed to fail.

#### IV. MAKING THE CASE FOR REPARATIONS FOR THE COLOR OF COVID UNDER INTERNATIONAL LAW

Most of the specific objections to state responsibility for COVID, such as those made by Guidi and Maisley, respond to those who urged that the United States or other countries should “sue China.” International lawyers who have addressed the question, focus, like those authors, on the prospects of COVID-related claims between states and the prospects for successfully adjudicating such inter-state claims in national courts or established international courts such as the International Court of Justice (ICJ). As noted, both Guidi and Maisley and the Institut De Droit’s 12<sup>th</sup> Commission are skeptical that international law has either the substantive rules or the forums to plausibly respond to such claims.

But neither Guidi and Maisley’s dim view of the ostensibly rudimentary international primary or secondary rules nor the 12<sup>th</sup> Commission Report’s skeptical view of state responsibility for pandemics address states’ international human rights obligations to their own nationals. Neither addresses the prospect or viability of reparations for the color of COVID based on each state’s human rights obligations to those within its own jurisdiction either in judicial venues or in specially designed commissions for such purposes. Skeptics of COVID-related reparations are correct that there is little likelihood that the few venues with potential jurisdiction to address inter-state claims, such as the International Court of Justice (ICJ), will get to opine on them. Apart from the formidable legal constraints or gaps it is unlikely that any claimantstate will run the risk of filing such a claim, as in the ICJ, given the probable

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158. See, e.g., Alan Rappeport, *I.M.F. Sends Billions to Poor Countries*, N.Y. TIMES, at B3 (Aug. 24, 2021).

159. Epstein, *supra* note 147.

“*tu quoque*” response by the respondent—namely the embarrassingly riposte that the claimant also contributed to COVID’s spread.<sup>160</sup>

The unlikely prospect of interstate COVID claims are, however, only part of the story. International and national laws enable a number of COVID-related claims against governments by non-state actors, including a state’s own nationals or others in its territory. There is a much greater likelihood that such demands for justice will be made by a government’s own nationals or by others (including foreign investors) within a state’s jurisdiction. Such claims could be based on allegations of government malfeasance as permitted under national law, including national law barring discrimination, but they could also be based on allegations that a state has breached its international obligations, such as those under human rights or international investment treaties, to those within its jurisdiction.

Such claims need not be imagined into being. Claims directed at governments for their actions and inactions during COVID by persons within their jurisdiction are now underway in national and international adjudicative venues, including regional human rights courts.<sup>161</sup> At the international level, these can be expected to include individual or group claims in regional human rights courts in the Americas, Europe, and Africa as well as investor-state arbitral claims directed at host states all over the world under hundreds of international investment agreements. Some COVID-related claims in national courts may invoke international law where national law incorporates such obligations and local courts are authorized to consider them.<sup>162</sup> Individuals are also likely to claim human rights violations resulting from COVID-related actions (or inactions) by their own states before myriad human rights committees under global human rights treaties—from the ICCPR to CERD. To be sure, claims before international bodies that are subject to exhaustion of local remedies requirements will take considerable time to be heard.

160. Commission Report, *supra* note 70, ¶ 155.

161. *See, e.g.*, European Court of Human Rights, Factsheet – COVID -19 health crisis, (Oct. 2021) (containing summaries of claims directed at governments under the European Convention on Human Rights resulting from government actions during the pandemic); Raphael Minder, *Spain’s Courts, Already Strained, Face Crisis as Lockdown Lifts*, N.Y. TIMES (May 26, 2020) <https://www.nytimes.com/2020/05/25/world/europe/spain-courts-coronavirus.html>. Enterprising lawyers could easily build claims based on the many failures of governments’ executive branches and agencies to act during the pandemic. *See, for example*, David E. Posen and Kim Lane Scheppelle, *Executive Underreach in Pandemics and Otherwise*, 114 AM. J. INT’L L. 608 (2020); Dimitrios Katsikis, *‘Necessity’ due to COVID-19 as a Defence to International Investment Claims*, ICSID Rev. 1 (2021).

162. Indeed, at least some human rights instruments would appear to require such domestic incorporation. *See, e.g.*, ICCPR, art. 2; CERD, art. 2. Consistent with the principles of state responsibility, such instruments commonly anticipate reparations remedies in response to breach. *See, e.g.*, CERD, art. 6 (ensuring that those within a state’s jurisdiction has access to remedies “through the competent national tribunals and other State institutions” to “just and adequate reparation or satisfaction for any damage suffered as a result” of racial discrimination in violation of the Convention). Were national courts inclined to draw inspiration on how to handle such claims and provide suitable remedies there is a considerable CERD jurisprudence to draw from. *See, e.g.*, Patrick Thornberry, *Article 5*, in *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016).

But the prospect of such delays is a reason for governments to consider alternatives to such suits—such as reparations commissions to respond to predictable COVID-related claims by their own nationals—rather than sticking their heads in the sand waiting for the threat of liability to subside.

As even Guidi and Maisley acknowledge in passing, the human rights obligations that states owe to their own nationals have been the subject of considerable adjudicative development.<sup>163</sup> The judicialization of such claims, while still uneven as between regions of the world, is nonetheless occurring. Those interested in providing justice to those harmed during the current pandemic because of violations of international human rights law have a considerable body of jurisprudence to draw from. Among the many potential COVID related claims that will probably be directed at governments around the world by those within their respective jurisdictions, those that draw plausible links between government actions during the pandemic to the discriminatory outcomes described in Part I will be on exceptionally solid legal ground. The most directly relevant international primary obligations implicated by the color of COVID are states' duties not to discriminate based on race and color or other status with respect to respecting or ensuring human rights owed to persons within their jurisdiction. While the ban on racial discrimination contained in CERD is perhaps the most well-known, states' duty not to discriminate through *de facto* or *de jure* actions or omissions is fundamental to all human rights treaties, including those that apply to women, children, Indigenous peoples, and refugees as well as influential "soft law" instruments like the Standard Minimum Rules on the Treatment of Prisoners and the Draft Articles on the Protection of Persons in the Event of Disasters.<sup>164</sup> The duty not to discriminate, recognized even in the UN Charter, which, of course, applies to the right to life, is widely accepted as a *jus cogens* obligation.<sup>165</sup> All these instruments, as well as customary international law, impose an obligation on states to provide an effective remedy for any acts resulting in *de jure* or *de facto* discrimination.<sup>166</sup>

These facts undoubtedly influenced the Institut De Droit when it affirmed, as the first paragraph to the preamble of its resolution on "Epidemics, Pandemics and International Law," that "protection of persons from epidemics without

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163. Guidi & Maisley, *supra* note 69, at 409.

164. *See supra* note 7.

165. U.N. Charter art. 1, ¶ 3; Universal Declaration of Human Rights, art. 2. Indeed, even the conservative Restatement of the Foreign Relations Law of the United States indicated that "systematic racial discrimination" constituted a violation of *jus cogens*. Restatement (Third) of Foreign Relations §702 cmt. n (Am. L. Inst. 1986).

166. *See, e.g.*, CERD, art. 6. *See also generally*, Articles of State Responsibility, Articles 28–31 (indicating the consequences of an internationally wrongful act, including reparation), Articles 34–38 (defining the forms of reparation to include restitution, compensation, satisfaction, and interest). The duty to provide an effective remedy encompasses both access to a legal forum and the prospect of legal remedies such as damages. *See* Claudio Grossman Guiloff, *Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law*, UN Doc A/74/10 (2019).

discrimination of any kind” is a “common concern of humankind.”<sup>167</sup> Further, the cumulative nature of the bar on discrimination across human rights treaties provides strong support for states’ obligation to protect individuals from the *intersectional* forms of *de facto* or *de jure* discrimination documented in Annex A. States have an obligation to prevent actions that discriminate against persons because, for example, they are Black or “colored” and are female, or because they are an indigenous child, a member of a disfavored social caste or a Latina who is also a refugee or a prisoner. (At the same time, these instruments provide considerably weaker support for the types of reparations that Achiume has principally in mind: namely, transnational remedies for the victims of the legacies of slavery and colonialism across nations and time. As Sirleaf indicates, even the leading treaty on point, CERD, prioritizes “groups or individuals *belonging*” to states and this may “curtail the ability to raise transnational or global racial justice claims.”<sup>168</sup>)

To the extent color of COVID complaints against states by individuals subject to their jurisdictions are justiciable, the relevant venues (such as human rights committees or courts) may need to consider the legality of challenged government actions under other regimes, including the IHR or other international “due diligence” obligations. In such proceedings, contrary to the suggestions made in the 12<sup>th</sup> Commission’s Report on “Epidemics and International Law,” states’ obligations under the IHR or “general” due diligence duties will probably not be treated as too ambiguous or “self-judging” to apply.<sup>169</sup> The IHR are, after all, legally binding on the WHO’s 194 member states. The duties they impose appear to be in principle as justiciable as other international legal duties to exercise due diligence or to notify.<sup>170</sup> Whether members of the Institut de Droit like it or not, a number of those forums also will be confronted with governmental defenses, including the application of *force majeure*, necessity, and distress—as well as any defenses states may make in reliance on their obligations under the IHR to protect public health.<sup>171</sup> It is not likely that human rights committees or courts, national courts or arbitral tribunals examining such claims will avoid rendering a decision in such cases either in favor of states or against them by simply proclaiming a “non-liquet” because interstate claims based on “the damage caused by epidemics” are lacking.<sup>172</sup> And, contrary to suggestions in the Commission’s Report, tribunals may indeed need to

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167. Institut de Droit Resolution, *supra* note 66, preamble.

168. Sirleaf, (Disposable Lives) *supra* note 11, at 78 (citing CERD art. 2 (2)).

169. See *supra* text at notes 71–76.

170. See, e.g., Roojin Habibi, et al., *Do not violate the International Health Regulations during the COVID-19 outbreak*, THE LANCET (Feb. 29, 2020) [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30373-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30373-1/fulltext); Armin von Bogdandy & Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, MAX PLANCK INST. for COMP. PUB. L. & INT’L L., No. 2020-07.

171. See, e.g., Katsikis, *supra* note 161.

172. Compare Commission Report, *supra* note 70, at ¶ 155 with G. A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

apply the rule that states owe forms of reparation for all internationally wrongful acts, including those arising under COVID. If so, adjudicators will then determine, as best they can, what the general principle that successful claimants need to be restored to the *status quo ante* would mean in this context.

Fears that COVID claims based on discriminatory actions taken by a state to individuals or groups within its jurisdiction are likely to face insurmountable difficulties under the intertemporal principle, rules of attribution and causality, or other parts of the articles of state responsibility (such as the defense of necessity) are overstated.<sup>173</sup> Such claims, arising from acts that occurred since COVID was first detected to the present, are hardly ancient claims involving long-deceased government actors or their victims. Claimants will be blaming governments for recent acts, not actions taken by prior generations. The basis for liability will be alleged violations of obligations imposed under existing treaties and the possible beneficiaries are those who are alive today or their immediate family members.<sup>174</sup> While there may be, in particular cases, challenging questions raised about harm and causation (including about potential joint, concurrent, or several liability), this will depend on the facts alleged.<sup>175</sup> Suits based on, for example, discriminatory actions by a governments that prevent access to life-saving equipment or hospitalization will probably not raise unresolvable legal difficulties, particularly if reliable factual evidence exists with respect to the extent such actions resulted in a higher portion of COVID-related health effects, hospitalizations, or deaths within the disadvantaged group. There may also be challenging questions presented in such suits about whether states can avoid liability or are owed deference based on the exercise of their police powers during a health emergency.<sup>176</sup> But while it is true that there are few precedents for *interstate* claims for liability based on access to medical care or pandemics, human rights bodies are by now accustomed to making determinations of what constitutes an emergency sufficient to avoid state

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173. As noted, Guidi and Maisley's discussion of international law's normative gaps, *supra* note 68, at 400–05 and 417–19, do not address the considerable human rights (or investment law) jurisprudence on point.

174. See Epstein's objections to African-American reparations on the basis that "[n]o fund of wealth survives the demise of slavery and Jim Crow." Epstein, *supra* note 147.

175. Difficult issues of shared responsibility, discussed, for example, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* (André Nollakemper & Ilias Plakokefalos eds. 2014), including analysis of instances of cumulative responsibility where, for example, market and state actors share responsibility for a single wrongful act, are, as these authors suggest, "unsettled." *Id.*, at 11. Analysis of such issues are outside the purview of this article. Like other human rights claims, COVID-related claims brought against a government by those subject to its jurisdiction may raise questions of shared responsibility to which international law has no clear answers. To the extent that is the case this is one more reason to privilege efforts to legislate into being in advance of such suits COVID reparations schemes that may address how to deal with such instances rather than rely on ad hoc judicial law-making in the course of adjudicating claims in court.

176. See, e.g., Bishoff case, German-Venezuelan Commission, Reports of International Arbitral Awards, Volume X, at 420 (1903) (opining that Venezuela's seizure of a carriage was not wrongful because "during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power").

responsibility.<sup>177</sup> They are also well aware that under, for example, the ICCPR, public emergencies do not permit states to derogate from their responsibility not to discriminate.<sup>178</sup>

Guidi and Maisley are correct that international law generally accords adjudicators considerable discretion with respect to the scope or amount of reparation. They are correct that even with respect to awarding monetary damages in lieu of restitution, the level of compensation international law demands for many internationally wrongful acts is often indeterminate.<sup>179</sup> Indeed, even with respect to regimes where questions of compensation have arisen most often—such as international investment law—the extent of damages is subject to considerable arbitral discretion. At the same time, any suggestion that international law is too rudimentary to handle human rights claims relating to the color of COVID ignores the ever rising “case law” under UN human rights committees and regional human rights courts.<sup>180</sup> An adjudicator charged with looking into complaints that a government has caused a disproportionately high number of Black or Latinx employee deaths because of a refusal to close down certain businesses at the height of the pandemic despite the predictable consequences on its segregated “essential” workforce (e.g., meat processing plants in the U.S.) or because it discriminated with respect to the distribution of personal protective gear across neighborhoods, does not face a legal black hole. States accused of such acts and adjudicators charged with addressing them may find guidance in the particular forum’s comparable cases involving discrimination—even if that guidance may not be identical across all human rights bodies and may differ considerably from remedial precedents set by

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177. The ICESCR committee has addressed claims in the context of health, as has the Inter-American Court for Human Rights. Indeed, the Institut de Droit’s Commission Report cites extensively that Court’s ruling in *Cascul Pivaral et al. v. Guatemala* of Aug. 23, 2018. That ruling found Guatemala in violation of the right to non-discrimination in failing to provide public medical care to those diagnosed with HIV/AIDs for a period of time, thereby violating the state’s duties with respect to health, integrity, and life. The Inter-American Court directed the state to guarantee free medical treatment to the victims and families affected, take other steps to improve the healthcare benefits of others similarly situated, and provide compensation for material and moral damages to the victims and their families, including free education and coverage of legal fees. *See also* ICESCR General Comment 14, *supra* note 99; G.A. Res. 60/147, *supra* note 172.

178. ICCPR, art. 4(2) (permitting derogation from other ICCPR articles).

179. Guidi & Maisley, *supra* note 68, at 404–409.

180. There is now at least a decade of scholarship devoted to human rights “case law” on remedies, including but not only, compensation. *See, e.g.*, Albrecht Randelzhofer & Christian Tomuschat, eds., *STATE RESPONSIBILITY AND THE INDIVIDUAL REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* (1999); Tom Allen, *Compensation for Property under the European Convention on Human Rights*, 28 MICH. J. INT’L L. 287 (2007); Dinah Shelton, *Remedies in International Human Rights Law* (3<sup>rd</sup> ed. 2015); JASON N. E. VARUHAS, *DAMAGES AND HUMAN RIGHTS* (2016). Even if human rights committees and courts have not generated consistent or harmonious precedents with respect to remedies and each forum has developed its own *lex specialis* on point, that is a distinct problem. A COVID-related human rights claim brought within, for example, the European Court of Human Rights would presumably draw on the precedents on suitable remedies produced by that court.

investor-State arbitrators in the course of finding that a foreign investor has been subject to governmental discrimination.<sup>181</sup>

The discretion accorded adjudicators under international law with respect to remedy and the absence of a single set of harmonious precedents among human rights forums with respect to suitable remedy may be a net positive—at least with respect to finding ways to make states accountable for the color of COVID. International law’s remedial flexibility enables bespoke responses to bottom-up demands for justice. Whether COVID injustices merit financial recompense and if so, how much, may vary by country or region, depending on the underlying acts taken by various governments and their effects, as well as what constitutes in a particular contest the “highest *attainable* standard of physical and mental health” demanded by the ICESCR’s article 12.<sup>182</sup> The absence of a single agreed set of international law rules with respect to remedy—other than the general ones in the Articles of State Responsibility—is hardly the same as a normative vacuum rendering consideration of COVID-related claims impossible.

Color of COVID claims pursued in national courts or international adjudicative venues need not impose “trillion dollar” dilemmas. Despite the broad dicta of *Chorzow Factory*, international law damages usually do *not* attempt to provide victims with full and complete reimbursement for their injuries, including for lost property, even in cases involving very serious human rights violations.<sup>183</sup> The openness of international law remedies, including the choices it offers among demands for cessation, restitution, or compensation, is hardly unique to COVID claims. Particularly when the state obligation is reasonably clear—as it is with respect to the duty not to discriminate with respect to fundamental human rights

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181. Indeed, even under international investment agreements the required compensation for breaches of such treaties (including for discriminatory actions) apart from direct expropriation, remains oblique. For a thoughtful exploration of the discretion left to adjudicators with respect to awarding compensation even in well-established regimes like international investment law. *See, e.g.*, Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020). Questions about who causes the harm and who ought to pay for it are hardly unique to COVID cases. *See, e.g.*, *Urbaser v. Argentina*, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016) [https://www.italaw.com/sites/default/files/case-documents/italaw8136\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf) (discussing the merits of Argentina’s counterclaim and awarding zero damages despite a finding of treaty breach by Argentina); *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion by Prof. Philippe Sands (Nov. 30, 2017) (dissenting on what really “caused” Peru’s expropriatory action).

182. *See, e.g.*, *Thiagraj Soobramoney v. Minister of Health, Constitutional Court of South Africa*, Case CCT 32/97 (Nov. 27, 1997) (upholding denial of life-saving dialysis treatment to an individual due to insufficient resources). Like the right to health care in South African law, ICESCR’s art. 12 is limited to rights that are “attainable” given a government’s “available resources.” *See also* ICESCR, art. 2(1).

183. Human rights remedies, even in regional human rights courts, do not commonly include substantial monetary damages to victims even in the case of serious human rights violations. Indeed, even for the most serious violations known to international law, international crimes, the most common form of court-ordered reparations do not attempt fully compensatory damages to victims. For an argument that even the regime most known for “full and complete” compensation, the international investment regime, does not attempt complete compensation even with respect to the victims of state-sanctioned expropriations, *see* Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002).

like the right to health care under relevant human rights jurisprudence—such uncertainties should not be seen as an obstacle to provide justice.<sup>184</sup> As all this suggests, international law need not be an obstacle to providing justice for the color of COVID but on the contrary could provide valuable input in terms of clarifying and enabling government accountability.

Skeptics of allocating responsibility for COVID, including Guidi and Maisley and critics of reparations generally are on stronger ground, however, with respect to troubling policy issues raised by such claims. But, as the rest of this section addresses, most of the problems raised apply to the prospect of adjudicating such claims on a piecemeal basis in traditional courts or tribunals. Such concerns are easier to address were states inclined to anticipate such suits by designing reparations commissions or other mechanisms to handle color of COVID injustices to respond to demands for justice arising from persons within their jurisdiction.

Guidi and Maisley are correct that state responsibility for COVID will raise profound questions that evade “closure.” Reparations efforts in response to COVID injustices suffered by only some racial or ethnic groups within states may be unsettling and divisive.<sup>185</sup> Attempts to single out one group of meritorious claimants—or to provide distinct monetary awards among them—usually are.<sup>186</sup> This may be true irrespective of how such reparation occurs. Individual claims by well-heeled claimants that attain success in court may raise questions among comparably situated others without the resources to pursue such claims. Questions of selectivity have also dodged specially designed commissions established to benefit one group (e.g., delimited groups of defined “victims of 9/11” but not others). At the same time, suggestions that efforts to provide (or even to discuss the possibility of) reparations *causes* politically troublesome demands for justice by injured parties or that such difficult demands would not emerge if reparations were

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184. In addition, should such claims arise before national courts, national laws and traditional tort remedies may be used to fill in any gaps or uncertainties in international law. Thus, even when U.S. courts were entertaining a considerable number of international human rights claims under the Alien Torts Statute, there was a considerable debate about whether international law needed to be used to address all aspects of such claims, including rules for determining compensation. *See, e.g.,* *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (resorting, in part, to the law where the international tort occurred (Paraguay) to determine appropriate compensation for the family of a person tortured to death under color of Paraguayan law).

185. Indeed, all reparations schemes raise controversies about intended beneficiaries and scope of remedies, including among their intended beneficiaries as well as between them and the general public. *See, e.g.,* Deborah R. Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417 (2003) (discussing such differences of view and relating these to instrumental and expressive theories of compensation).

186. *See, e.g.,* Hensler, *supra* note 185; Atuahene, *supra* note 121. In the case of COVID, were the United States, for example, to attempt to devise a color of COVID reparations scheme, its designers would need to address comparable questions to those faced by the designers and implementers of the 9/11 Commission. Which Black Americans merit financial recompense, only descendants of those enslaved or any Black immigrant who was exposed to the legacies of Jim Crow? Should all members of the Latinx community, including those with lighter skins and higher family incomes, be included as beneficiaries? Should indigenous claimants be restricted to those residing in Indian reservations or subject to particular health care facilities or should it include anyone who identifies as indigenous?

not seriously considered is absurdist victim-blaming. U.S. history is replete with reparation demands by various groups, including by African-Americans, and the federal government and some actors below the federal level have opted to respond to some of these but not others. The same has occurred around the world in response to those who have sought some recompense for the legacies of slavery and colonialism or have been affected by mass atrocity.<sup>187</sup> The selectivity with which legitimate reparations claims have been addressed and the prospect that those efforts will not result in “closure” ignore the consequences of failing to act. As students of transitional justice can attest, countries that do not come to terms with their own histories, pretend that socially constructed disasters are “natural” ones that could not have been prevented, allow claims of racialized injustice to fester in silence, or insist that “oblivion” is the best answer may face grim reckonings later down the line.<sup>188</sup> As students of transitional justice would affirm, government efforts to come to terms with its prior acts of racial injustice are often the necessary first step to restoring governmental credibility or legitimacy.

The more relevant question is not whether or not to attempt to redress the racialized injustices of the past but how best to do so. It is possible that, as Guidi and Maisley argue, for some things and in some contexts it is better to establish forms of collective deliberation involving lawmakers rather than rely solely on litigation and ad hoc responses to claims by judges.<sup>189</sup> With respect to the handling the color of COVID, one way to engage such collective deliberation is to establish reparations mechanisms akin to truth and reconciliation commissions, either in lieu of permitting claims in court or alongside them. As those who proposed H.R. 40 in the U.S. Congress understood, even a decision to study how best to further reparations may prompt useful collective deliberations among legislators and between legislators and the public. Fears that attempting to provide remedies for government wrongs as through a reparation commission to handle color of COVID claims may trigger backlash, resentment, and additional demands from other “victims” presumes that preventing such possible outcomes is more important than remedying the wrong. Apart from the questionable morality of such policy decisions, such fears suggest a fundamental misunderstanding of what restorative justice is about. Such accountability efforts rarely, if ever, elicit “closure.”

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187. Even when states have responded as by establishing truth commissions, the diverse reach and design of these have generated controversy. See, e.g., P.B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUMAN RIGHTS Q. 597 (1994); M. FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006).

188. See, e.g., Upendra Baxi, *Disasters, Catastrophes and Oblivion: a TWAIL Perspective*, Yrbk International Disaster Law; Atuahene, *supra* note 121. See also de Grief, *supra* note 120 (noting that importance of transitional justice efforts to restoring social or civic trust). The Black Lives Protests in the U.S. are one sign of the consequences when institutional racism is ignored over time, particularly when the result has been loss of life.

189. Compare Guidi & Maisley, *supra* note 68, at 425 (urging collective deliberation in a law-making body to shape state practice when normative gaps in the law exist).

Closure is not what one gets from criminal trials in *ad hoc* war crimes tribunals or the ICC. It is not what has emerged in the wake of serious efforts to name perpetrators and victims in truth commissions or extra confessions of culpability in their shadow. It is not what happens when statutes of disgraced leaders (whether of Soviet inspired purges or U.S. confederate generals) are removed. It is not what litigants who bring cases in local courts for acts committed during a prior authoritarian regime secure or can reasonably expect. The point of such processes is not to shut down talk of who was complicit. Such remedies rarely put an end to debates about who was “to blame” or to rival accounts of history. Proponents of the Nuremberg trials who argued that those trials would “absolve” those *not* in the dock—would exonerate all other Germans from complicity in the Holocaust—have surely learned better given what has happened since.<sup>190</sup> For many years thereafter and continuing to the present day, Germany has felt pressure to tend to the ripples of the Holocaust and undertaken other forms of reparation. Even today, that country faces questions about why it has failed to consider comparable actions with respect to its prior crimes against humanity.<sup>191</sup>

Coates and others who suggest that “closure” is the goal of African-American reparations are driven to this by their opponents. The emphasis that reparations target “property” deprivations that have a predetermined price tag that, once paid, are settled once and for all attempts to answer the objection that once talk of reparations starts, it will never end. But the response—that once a proper monetary figure is found and individual African-Americans are awarded proportionate cash payments, the “debt” owed to them will have been fully repaid—is as simplistic as the contention that a one-time cash payment will wipe out Black/White wealth and income differentials in America or “end” all forms of racial discrimination.<sup>192</sup> The criticism that reparations of any kind will provoke perennial lawsuits that can never be satisfied and the response given by believers in “closure” ignores history and reality. No cash payment, at least not one within political reach, can possibly achieve the goal of “wiping out” White privilege or redistributing the wealth held by its beneficiaries across time. No financial recompense today can make the

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190. *See generally* DAVID LUBAN, LEGAL MODERNISM 365-74 (The University of Michigan Press, 1994) (arguing that the major Nuremberg trials downplayed how the Nazis were able to “bureaucratize” the Final Solution); ANNE SA’ADAH, GERMANY’S SECOND CHANCE: TRUST, JUSTICE, AND DEMOCRATIZATION 143–88 (Harvard University Press, 1998) (arguing that a more balanced and historically accurate portrayal of the nature of the Holocaust only emerged in the wake of post-Nuremberg developments); José E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2086–89 (1998) (arguing that the ICTY trials should not be expected to put an end to evolving definitions of complicity over time). *See also* Daniel Johan Goldhagen’s controversial rival account to the perpetrator-driven narrative presented at Nuremberg: HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (Alfred A. Knopf, Inc., 1st ed. 1996).

191. Kavena Hambira & Miriam Gleckman-Krut, *Germany Apologized for a Genocide. It’s Nowhere Near Enough*, N.Y. TIMES, July 8, 2021, at A21 (discussing Germany’s failures to fully atone for its massacre of Herero and Nama people in Namibia from 1904–1908).

192. *See, e.g.*, Darity, *supra* note 111, at 657 (arguing that reparations would eliminate racial disparities in the United States and, via closure, would ensure that no further claims for past racial discrimination would be forthcoming).

racial/ethnic/caste victims of COVID or their families “whole.” In such cases, reparations—which extend far beyond financial recompense—can provide only rough justice. Like a number of countries’ Truth and Reconciliation Commissions, efforts at restoration justice can ameliorate but never “wipe out” the underlying injustices—at least not when these are at the scale of those suffered generally by persons of color during COVID. But the incompleteness of such remedies is no reason to avoid them.

A better response is to embrace the absence of closure. Reparations of whatever sort are not likely to fully end debates about relative fault or smother these over with soothing emotional balm. Attempts to do justice on behalf of persons of color in the U.S. and elsewhere in the age of the coronavirus need to be justified on the same grounds some have suggested with respect to reparations for African-Americans: because they enable continuing conversations to appraise how far we have come and need to go to overcome structural racism and intolerance.<sup>193</sup> The resulting dialogues between government actor and intended beneficiaries may best be described as Mark Osiel’s “civil dissensus”—that is, civil discourse between generally unwilling interlocutors or antagonists channeled by rule of law that nonetheless seek, over the long run, to achieve some mutual recognition of respect—even if never closure.<sup>194</sup> Reparations are an essential component of continuing a dialogue within societies, not an end point. To the extent they are about generating civil dissensus—and only sometimes about repaying financial debts due—they can be undertaken at the municipal, state, or federal level or all of these at once or piecemeal, as has sometimes happened.<sup>195</sup> International law and its basic principle of non-discrimination can serve to supplement all such efforts, including in states like the U.S. whose national laws raise formidable hurdles to discrimination claims based on disparate treatment.<sup>196</sup>

Color of COVID reparations, like reparations for African-Americans or for the legacies of slavery and colonialism, are also needed to trigger continuing re-evaluations of how intolerance and discrimination emerge and reemerge.<sup>197</sup> Color

193. As suggested by Achiume with respect to reparations for the legacies of colonialism. Achiume Report, *supra* note 54, at ¶ 14.

194. See, e.g., Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 486-97 (1995) (arguing that criminal trials foster “social solidarity” by encouraging discourse “with an initially unwilling interlocutor”); Alvarez, *supra* note 190, at 2082–2108.

195. See, e.g., Jones, *supra* note 144; Giulia Heyward, *Reparations for Black Residents Are Becoming a Local Issue as Well as a National One*, N.Y. TIMES, Sept. 25, 2021, at A13.

196. Some of the shortcomings of U.S. anti-discrimination laws are suggested by moves to, for example, “adopt CEDAW” by some U.S. municipalities. See BERKELEY, CAL., MUNICIPAL CODE, Ordinance No. 7,224–N.S., Chapter 13.20 (2012) (adopting the principles of CEDAW), available at [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level\\_3\\_-\\_City\\_Council/2012/02Feb/2012-02-14\\_Item\\_01\\_Ordinance\\_7224.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_City_Council/2012/02Feb/2012-02-14_Item_01_Ordinance_7224.pdf).

197. The need for vigilance with respect to continuing forms of state-sanctioned racism and neo-colonialism is suggested by the on-going challenges to reproductive rights in the United States—even when the harshest impact of decreased access to such rights fall, as always, on poor women of color. See generally Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009).

of COVID truth commissions would enable a better understanding of the underlying facts—to indicate that disproportionate deaths among persons of color, for instance, are acts for which certain actors are responsible, not “facts of nature.”<sup>198</sup> They enable the “memorialization” or truth-telling that is essential to undertaking preventive measures.<sup>199</sup> They can serve to clarify the law and underscore a government’s understanding of its obligations under relevant treaties, such as CERD or the IESCR.

Such mechanisms are justified *because they do not elicit closure*. It is true that international law does not provide clear answers to many distributional justice questions raised by the COVID data outlined in Part I and may be particularly handicapped with respect, ironically, to handling its transnational aspects (such as vaccine nationalism among nations). That is not a reason to resist addressing their intrastate aspects through commissions to redress the underlying injustices within nations. Such efforts may, by forcing states (and provincial governments and even municipalities within them) to fill distributional justice blind spots, “re-politicize” both national and international law.<sup>200</sup>

If we adhere to best practices applicable in the context of transitional justice efforts, the creation of COVID reparations mechanisms or commissions directed at COVID’s color line must involve the affected persons of color at all stages, from planning to execution. The process of consultation from the outset is not just a means to an end. It is itself essential to restoring agency to, and empowering, those that have treated as disposable.<sup>201</sup> The participation of reparations’ presumptive beneficiaries will help ensure that any mechanism put in place will probably not be an isolated one-time endeavor but an essential part of the never-ending (and ideally, democratic) work to build more tolerant and inclusive societies over time. Such participation is essential to respond to the dehumanization, the “radical othering” that the color of COVID reveals.<sup>202</sup> The intended beneficiaries need to be involved at every stage—from planning to execution—since a critical goal is to transform them from perceived “victims” to fellow citizens and rights-holders whose rights have been violated.<sup>203</sup>

Since the color of COVID harms to which reparations mechanisms respond differ, remedies should differ accordingly. Some government actions, such as U.S.

198. See, e.g., de Grief, *supra* note 120, at 17; see generally, Sirleaf (Ebola does not fall from the sky), *supra* note 53.

199. de Grief, *supra* note 120, at 16 (noting that this could eventually include official commemorations, from days of remembrance to museum exhibitions).

200. Politicization means, in this context, provoking government actors and other stakeholders to re-examine “settled law” and consider change. For a similar argument, see Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AJIL 687 (2020). Reparations designed to respond to the inequities described in Part I are also likely to generate or progressively develop human rights. See generally Jain, *supra* note 87; Karima Bennoune, “*Lest We Should Sleep*”: *COVID-19 and Human Rights*, 114 AJIL 666 (2020).

201. See, e.g., de Grief, *supra* note 120, at 26–27.

202. Atuahene, *supra* note 121, at 13.

203. See, e.g., de Grief, *supra* note 120, at 16.

federal government orders to keep meat plants open even if the predictable result are serious health consequences for a number of essential workers unable to socially distance, may require corrective tort-like damages issued by courts in response to the particular harms done to individuals, whether or not they are persons of color, even while recognizing the special harm the element of discrimination adds.<sup>204</sup> Other harms to vulnerable groups during COVID, such as disproportionate rates of infection or death exacerbated by decades of segregated housing or because of structural racism embedded into access to medical care, may trigger distributive justice measures distinct from tort-like damages. While providing solace to victims is always a key goal, providing COVID victims or their families with full financial recompense may be difficult or given available resources impossible, particularly when lives have been lost, certain harms can never be remediated by money, or where what is most wanted by those directly impacted is government acknowledgement of responsibility.<sup>205</sup> Reparations from the state—including apologies—may be particularly important to convey respect for victims and to formally recognize, belatedly, their worth as human beings.<sup>206</sup> They are important markers that governments have breached the law, violated the dignity of those they serve, and undermined expectations for decent behavior. More generally, reparations mechanisms should make it possible for intended beneficiaries to tell their stories and correct the historical record. If done well, such mechanisms can also help restore a measure of civic trust in a government that respects all its citizens.

Distinct reparations schemes by different states, by subdivisions of federal states, or even by municipalities may best respond to bottom-up pressures by those who have experienced firsthand the harsh consequences of the color of COVID at various levels of government.<sup>207</sup> Reparations mechanisms for the color of COVID need not take a single form and may adopt different combinations of “corrective” or “distributive” remedies. As noted, they may anticipate tort-like damages to some beneficiaries but more public-facing responses to others, such as commission-authorized changes to the law to mitigate the possibility of comparable harm in the future. A reparations commission might recommend, as a remedial response,

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204. As this suggests, even in such cases, to the extent some of the tort victims were the subject of internationally wrongful discrimination, as under CERD, that specific injury should be recognized and acknowledged under principles of state responsibility for internationally wrongful acts. That may be the function of a reparations commission that addresses such cases even while a general tort suit on behalf of all essential employees harmed proceeds in court.

205. See, e.g., Hensler, *supra* note 185.

206. See, e.g., *id.* at 428 (noting the desire of some reparation beneficiaries to seek a government acknowledgement of guilt and not monetary damages). For the significance of “speech acts,” including apologies, as enabling offers of repair and not only as a performance of penance, see de Grief, *supra* note 120, at 22–24.

207. For one example, consider the Resolution of the NYC Board of Health Declaring Racism a Public Health Crisis (adopted Oct. 18, 2021) (recommending that, given the documented racial inequities in health both before and after the current pandemic and the structural racism underpinning them, the NYC Health Department “participate in a truth and reconciliation process with communities harmed by these actions”).

changes in the powers of the executive branch to close, unilaterally, its borders to migrants merely by proclaiming a threat to public health, for example.

The complexities of COVID reparations arising from the complexities that the forms of color of COVID have taken are no reason to forego them, hoping that the injustices suffered by people of color will be forgotten if we just get the technocratic mechanisms of global health governance to work better. A serious look at how international law might be deployed to address such claims is warranted today, before governments are put under pressure by adjudicative rulings to respond. Establishing color of COVID commissions on the model proposed more generally by Rosenthal and Caplan in the United States and in other countries will not make legal claims for the same harms more likely than they now are. Anticipating such claims by establishing such commissions seems wiser than hoping that the absence of judicial disputes arising from prior pandemics means none will be coming soon, even in the wake of over 847,000 deaths and billions in economic damage in the U.S. alone.<sup>208</sup>

Countries that set in place some mechanisms to respond to predictable claims for COVID reparations through legislation (or even interstate agreement) are likely to be in a better posture than those that find themselves battling away piecemeal lawsuits or complaints over many years as these make their way through their own courts, human rights venues, or arbitral forums.<sup>209</sup> States that set up some scheme to address color of COVID claims for reparation—even if limited to forms of truth commissions—can anticipate and try to set limits in advance on what type of actions will be examined as well as in court; that is, setting out the applicable rules for attribution, casuality, defenses from wrongfulness, and remedy provided these remain consistent with international law.<sup>210</sup> Of course, such mechanisms can forestall intertemporal difficulties by limiting claims to those stemming from government actions that have occurred only since January 2020.

Fears that efforts to redress COVID's racial/ethnic inequities by establishing mechanisms for restorative justice will detract from voluntary humanitarian relief among nations (including the distribution of vaccines) or will undermine a government's internal measures to provide general pandemic economic relief seem misplaced. Moffett's concerns along such lines are inspired by talk of suing China in U.S. courts—as if reparations for COVID can only involve highly unlikely claims for trillion-dollar awards by one state against another. The reparation mechanisms urged here seek to honor the preferences of individuals vis-à-vis their own

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208. Updated as of Jan. 14, 2022.

209. In places like the United States where discrimination claims grounded on disparate impact have traditionally faced considerable hurdles, it is far from clear that courts will be capable, even over the long term, of addressing the righteous demands for justice made by COVID's ethnic/racial victims.

210. Such efforts could also tackle the (shared?) responsibility under international or national law of non-state actors, including business and social media conglomerates like Facebook whose actions may have exacerbated COVID's impact on vulnerable minorities during the pandemic. Such questions are outside the scope of this essay.

governments. They aspire to data collection and a collective response that is highly unlikely if the only outlet for such claims is the occasional successful lawsuit in court or the prospect of an eventual response by an international adjudicative after all other remedies are exhausted. In this context, given the scale of the harm and the numbers of possible claimants, justice delayed is very likely to be justice denied. As Achiume emphasizes, reparations under international law need not bankrupt nations and have often involved compromises, amid formal or informal settlements undertaken in the shadow of other possibilities (including claims in court).<sup>211</sup> Prior reparations undertaken even in the wake of mass atrocities have encompassed everything from commemorative plaques to “lustrations” that remove certain persons from ever holding public office, to government apologies and monetary awards that do not attempt to replicate the “market value” of lives lost.<sup>212</sup>

Reparation mechanisms for the color of COVID, like truth commissions around the world, may take a variety of forms. Hybridization of methods—whereby some claims of justice are left to civil or even criminal courts while others are subject to testimonials before expert assessors—may best respond to states’ differing economic resources and the distinct expectations of particular groups of beneficiaries. To the extent reparations for the color of COVID involve, as Achiume suggests, applying the lessons offered by transitional justice efforts undertaken in response to very different cases not involving civil or international conflict, applying the best practices of truth commissions does not mean copying them.<sup>213</sup> The end result should not be isomorphic mimicry.<sup>214</sup> The goal should be to respond to local context; to engage in what Atuahene calls “dignity restoration” by listening to the particular persons seeking justice.<sup>215</sup>

COVID has been a life-changing event for millions around the world. It has been an especially traumatic one for those who experienced its gravest effects because of governmental discrimination. Those persons need to see efforts by their own governments to transition to something better—a world where access to life and health are treated as real rights that are not determined by the color of one’s skin.<sup>216</sup>

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211. Achiume Report, *supra* note 54, at ¶¶ 42–54.

212. For an enumeration of alternatives to international criminal liability in such cases, see, for example, José E. Alvarez, *Alternatives to International Criminal Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 25–38 (Antonio Cassese, ed.) (2009) (discussing a variety of options from truth commissions to lustrations).

213. Pablo de Grief sees this as the “vernacularization” of transitional justice. *See, e.g.*, de Grief, *supra* note 121.

214. *Id.* at 23.

215. *See, e.g.*, Atuahene, *supra* note 121, at 4.

216. *See* Tobin, *supra* note 100, at 123 (discussing the reasons why the ICESCR Committee’s efforts to explain and apply the meaning of the “right to the highest attainable right to health” have yet to be widely accepted among states).

## CONCLUSION

Attributing the vast gaps among COVID outcomes for victims of intolerance in the United States and beyond to “poverty,” “karma,” or distinct characteristics shared by historically vulnerable groups would be as facile as efforts to attribute the vast disparities in wealth or educational outcomes between White and Black Americans to such factors. Those with access to the facts and objective enough to accept them need to acknowledge that the stark racial/ethnic differences among COVID’s victims in rich countries like the United States or poorer ones like Brazil or India are the product of structural realities that have long been evident to proponents of reparations—whether on behalf of African-Americans specifically or for others victimized by the legacies of slavery and colonialism. COVID’s color line emerges from the fact that certain groups, all too often persons of color, have far less access to health care, are more likely to be subject to discrimination when they get sick, are less able to socially distance given where they live or work, and are far more likely to be “essential workers” unable to work remotely or avoid public transit.

COVID’s racial divide in places like the United States is, in short, the predictable consequence of factors cited by proponents of reparations for African-Americans: the legacy of slavery, Jim Crow, racist separate-but-equal housing, and other discriminatory practices embedded in U.S. law and practice that continue to the current day.<sup>217</sup> The shocking injustice of COVID’s outcomes to date should be sufficient to put color of COVID reparations on the table. Such reparations are needed and merited, above and beyond the general “stimulus” monies provided by the U.S. Congress to date precisely because persons of color in the United States suffered (and continue to suffer) disproportionately from COVID and its harshest consequences, because government policies at the state and federal level have contributed to these harms, and yes, because the United States, is committed under international law to avoid such actions.

Reparations mechanisms for the color of COVID are not a substitute for the other reparations efforts discussed in Part III. Indeed, to the extent color of COVID reparations are a tool for civil dissensus, they may provide a base on which to make the general case for African-American reparations in the United States and for the transnational reparations envisioned by Achiume to atone for the legacies of slavery and colonialism. Intrastate reparations between a government and its polity are not a substitute for the kind of transnational remedies urged by Achiume for slavery and colonialism’s present-day victims. Pursuing these other forms of reparations may be useful complements to those proposed here. Former imperial powers may indeed owe color of COVID reparations to their former colonies since the legacies of slavery/colonialism are surely implicated in the global inequities of

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217. See, e.g., Coates, *supra* note 1; see generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

COVID documented in Annex B.<sup>218</sup> The legacies of colonialism are particularly strong both within and among countries with respect to COVID's outcomes among Indigenous peoples in countries as otherwise different as Brazil and the United States. Indeed, Indigenous groups around the world—in rich or poor countries—are likely to have the strongest basis to claim transnational reparations. Moreover, the case for transnational reparations for the color of COVID may become even stronger should COVID proceed to wreak social and economic havoc across the countries of the Global South. And if vaccine nationalism devolves into a species of vaccine apartheid, we can expect renewed demands for interstate reparations from such countries and possibly for specially established forums to consider such interstate claims forums comparable to those made during the heyday of the New International Economic Order.<sup>219</sup>

Those who try to account for racially disparate COVID results in the United States by, for example, attributing them to African-Americans' comorbidities or to their greater reluctance to get vaccinated, ignore facts that indicate that neither factor explains the stark White/Black differentials seen during the COVID crisis. Suggestions that genetic differences or fear of state-sanctioned vaccination programs explain COVID's color divide also conveniently ignore the racist structures and histories that help to explain why African-Americans disproportionately suffer from certain diseases or entertain doubts about state-run vaccine initiatives.

Facile and ahistorical efforts to blame the victims of the color of COVID in the United States or elsewhere need to be resisted. Governmental actions that have contributed to differential health outcomes on racial or ethnic lines—the blocking or hindering of entry for immigrants; the imposition of discriminatory travel plans; unequal enforcement of health regulations for the incarcerated, for those working certain essential industries, or for migrant workers; discriminatory treatment in state-run hospitals; unequal access to vaccines, ameliorative medicines, life-saving equipment, or protective gear like masks—are hard to explain except in terms of conscious or unconscious bias against those whom certain governments have long chosen to label as “the other” among their own populations and would-be entrants. Nor should the plight of persons of color in any country during the current pandemic be explained away on the premise that such nations are “poor”—not when those who are lighter skinned or belong to a higher caste enjoy considerably

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218. Such concerns underpin repeated calls for debt relief for developing countries during COVID on the basis of human rights. *See, e.g.*, Yuefen Li (Independent Expert on Foreign Debt and Human Rights), *Addressing, from a human perspective, the debt-related problems of developing countries caused by the coronavirus disease (COVID-19) pandemic*, U.N. Doc A/75/164 (Aug. 20, 2020).

219. Transnational demands between states for COVID justice will only grow if the North/South vaccine gap continues, particularly as its adverse impacts on other common concerns become clear. *See, e.g.*, Somini Sengupta, *Global Vaccine Crisis Sends Ominous Signal for Fighting Climate Change*, N.Y. TIMES, May 4, 2021, at A4; Jan Hoffman and Ruth Maclean, *Slowing the Coronavirus is Speeding the Spread of Other Diseases*, N.Y. TIMES, June 14, 2020, at A1; *see also* Sirleaf, (Vaccine Apartheid), *supra* note 53.

better COVID outcomes even within those poor states. Of course, should fuller and more complete data eventually show a strong correlation between COVID outcomes and GDP, that would not answer questions about why some nations are so poor that they cannot afford even the basic core medical capacities demanded (but not funded by) the WHO's IHR.

Governments, including those in the developing world, cannot merely point to the legacies of colonialism to excuse actions or omissions that contribute to the COVID color line within their respective populations. Many states, apart from the United States, Brazil, and India, need to explain why those most gravely impacted by COVID within their territories can be defined along racial lines or disfavored ethnic or comparable status. When the global data is all in, it is likely to support the conclusion that the global color of COVID is as much the product of intentional or *de facto* discriminatory practices by governments outside the United States as it is in the United States. Discriminatory denials of the right to life or the basic right to health care, as shocking today as they were to Martin Luther King, are now reverberating around the world. They will generate demands for color of COVID reparations that governments would be wise to anticipate.

Those designing reparations mechanisms could usefully draw from international law. While individual states may have reached a normative consensus with respect to which claims of discriminatory treatment merit legal remedy and to what extent these require financial recompense as compared to other remedies, that consensus and the national laws, procedures, and judicial rulings that reflect it may fall short of international law's demands.<sup>220</sup> That national consensus may, even in a democracy, fail to consider its effects on certain targets of intolerance. International law's requirements of non-discriminatory respect for fundamental human rights for persons subject to a state's jurisdiction are intended to backstop national laws and ensure equality of treatment notwithstanding them.

Intrastate reparations for the color of COVID are a way for states to comply with their international obligations not to discriminate, respect international law's open-ended remedies for breach, and heed the broader lessons of transitional justice. To be sure, invocation of international law principles or obligations may not be politically useful in all contexts. But even in the United States, resistance to the use of international law at the federal level has not precluded its use or appeal elsewhere where reparations schemes might be suitable, as by states of the U.S. or by municipalities.<sup>221</sup>

Reparations for the color of COVID are justified under widely accepted principles of private and public law. Governments owe reparations to persons subject to their jurisdiction to the extent they inflict harm on persons within their

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220. See Guidi & Maisley, *supra* note 68, at 420–23 (noting that domestic legal systems, unlike the international legal system, attained communitarian norms that settle questions over causation and what constitutes harm).

221. See *supra* note 196.

jurisdiction through actions or omissions comparable to those torts or breaches of promise that would ordinarily merit compensation under private law. Such reparations are also justified on numerous public law grounds: to affirm the national and international rule of law, to enforce fundamental rights to life, to health care, and to an effective remedy under international human rights law, and to help ensure a return to legality. As do some forms of transitional justice, reparations mechanisms may help preserve valuable evidence of governmental missteps and their consequences. In so doing, they will help preserve facts that educate the public about not only the current pandemic but about the structural racism embedded in societies that consider themselves just.

Reparations also have more explicit utilitarian rationales. Their existence, at the national, provincial, or municipal levels, may deter particular government actors from taking actions that harm the public health of all. To this extent, they are as proper a subject for a pandemic *prevention* treaty as the more technocratic reforms now anticipated for such a pact. Establishing precedents that reparations are due when global health efforts discriminate among persons and that such efforts are part and parcel of legitimate responses to global health threats would encourage a more profound paradigm shift in international law: from protecting the rights of states above all else to protecting the rights of people. They would, in addition, affirm the need for government accountability and demonstrate that the existence of a shared responsibility to promote global health does not preclude individual state responsibility. Reparations for the color of COVID would, finally, advance a principal goal of the WHO and the ICESCR: they would help to make real the promise of a global human right to health.<sup>222</sup>

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222. Annex A and Annex B are available on the U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. website at <https://scholarship.law.uci.edu/ucijil/>.