NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 96 MAY 2021 NUMBER 2

ARTICLES

WHO SHOULD PAY FOR COVID-19? THE INESCAPABLE NORMATIVITY OF INTERNATIONAL LAW

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Who should bear the costs of the COVID-19 pandemic? While multilateral institutions are beginning to consider how to distribute them, former U.S. President Trump and others have suggested suing China for damages. This "lawsuit approach" draws on a deep-seated conception of international law: States have a sovereign "right to be left alone"; the only limit to this right is a correlative duty to avoid harming others. Those harmed can, then, sue for damages. In this view, who should pay for the costs of the pandemic (and how much) is not a normative question about justice, but rather one about factual causes and actuarial calculations.

In this Article, we explore this lawsuit approach—not for its legal viability, but for its conceptual implications. We exhaustively and critically assess the doctrinal discussion on China's international liability for the pandemic while also pointing at

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deep theoretical implications that this novel crisis has for international law more broadly.

Specifically, we make three novel claims. The first is that the arguments made using the lawsuit approach (based on the International Health Regulations and the no-harm principle), when meticulously analyzed under existing international norms, run into unexpected obstacles. On top of the jurisdictional and evidentiary hurdles noted by many, we argue that the lawsuit approach faces difficulties stemming from the lack of deep normative agreement in international law on how to deal with unprecedented challenges such as COVID-19.

Our second claim draws on the first. Given the need to fill these normative voids, the lawsuit approach leads back to the global conversation about the allocation of losses that it carefully tries to avoid. This normative dependence cannot be spared by analogy with domestic law. Domestic law builds upon thick cultural understandings that fill empty legal concepts (such as "harm" or "causation"), making them readily operative. International law, however, lacks an equivalent thick culture to fill these voids and therefore requires complex reconstructions of what states owe to one another.

Our third claim further extends the foregoing reasoning. The lawsuit approach relies on international law as a means to achieve corrective justice while denying its implications for distributive justice. We argue that this is conceptually impossible. Allocating responsibility for the pandemic implicates inherently distributive concepts: To decide, an adjudicator would need to rely on a pretorian rule detailing how much effort and expense countries should dedicate to avoiding harm to other countries. That rule is conceptually distributive, independent of its content. The misfortunes derived from the pandemic are not conceptually different from the misfortunes of poverty, financial breakdowns, or climate change. Those going down the road of the lawsuit approach might be unpleasantly surprised by where that road leads them.

INTRODUCTION

According to one estimation, the COVID-19 pandemic will cost the world somewhere between $8.1 and $15.8 trillion.[1] Who should pay for this catastrophe? What does international law have to say about the distribution of these costs? The international community seems to have hinted at two distinct approaches to these questions. One, currently entertained at multilateral forums, speaks of "unity and solidarity"[2] and urges for a "cooperative, global and human rights-based approach to the crisis."[3] This is an ambitious proposal; it requires a deep, substantive conversation about our life in common and about what we owe to each other. Call it the "roundtable approach." But it is not the only approach available. Then-U.S. President Donald Trump and many others have suggested a blunter alternative: suing China for damages.[4] This "lawsuit approach" whatever its merits, has the advantage of conveying a straightforward answer to the question of who should bear the burdens of the pandemic: those who caused them.[5]

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[1] Jeremy Schwab, *Fighting COVID-19 Could Cost 500 Times as Much as Pandemic Prevention Measures*, WORLD ECON. F. (Aug. 3, 2020), https://www.weforum.org/agenda/2020/08/pandemic-fight-costs-500x-more-than-preventing-one-futurity.

[2] António Guterres, Sec'y Gen., United Nations, Secretary-General's Remarks to High-Level Event on Financing for Development (May 28, 2020) [hereinafter *Secretary-General's Remarks*], https://www.un.org/sg/en/content/sg/statement/2020-05-28/secretary-generals-remarks-high-level-event-financing-for-development-scroll-down-for-french-version.

[3] Michelle Bachelet, U.N. High Comm'r for Hum. Rts., Informal Briefing to the Human Rights Council: COVID Is "a Colossal Test of Leadership" Requiring Coordinated Action (Apr. 9, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25785&LangID=E.

[4] *See, e.g.*, President Donald Trump, Remarks to the 75th Session of the United Nations General Assembly (Sept. 22, 2020), https://mr.usembassy.gov/remarks-by-president-trump-to-the-75th-session-of-the-united-nations-general-assembly ("[W]e must hold accountable the nation which unleashed this plague onto the world: China."); Jessica Chen Weiss, *Can the U.S. Sue China for Covid-19 Damages? Not Really.*, WASH. POST (Apr. 29, 2020, 10:58 AM), https://www.washingtonpost.com/politics/2020/04/29/can-us-sue-china-covid-19-damages-not-really-this-could-quickly-backfire (providing several expert opinions on the viability of this approach). Trump is not alone in imagining a compensation lawsuit. *See infra* notes 24–41 and accompanying text.

[5] As will be clear from the reconstruction below, these approaches are not a perfect binary, nor mutually exclusive pathways. Negotiations can fall into irrelevance without the threat of a lawsuit, and lawsuits can be brought to enforce an otherwise successful

The intuition behind such lawsuit rhetoric is familiar; its utter commonsensicality has been with us for centuries. Under a classic approach to international law, heir of our Westphalian past, states have a sovereign "right to be left alone."[6] Absent specific agreement, the only limit to this right is a correlative duty to avoid harming other states.[7] When this harmony is disrupted, states can claim compensation from those who harmed them. Once they are made even, equilibrium is restored. The lawsuit approach is therefore not flustered with uncomfortable normative discussions: Who should pay for the costs of the pandemic (and how much) is a question of factual causes and actuarial calculations.

In this Article, we explore this lawsuit approach to the distribution of the costs of the pandemic—not because of its chances of success, but for its conceptual implications. Specifically, we make three claims.

The first is that the arguments made using the lawsuit approach, when analyzed under the existing rules of international law, run into unexpected obstacles. On top of the jurisdictional and evidentiary hurdles noted by many,[8] we argue that the lawsuit approach faces difficulties stemming from the lack of normative agreement in international law on how to deal with unprecedented situations such as the COVID-19 pandemic. The International Health Regulations, the main source of law in this realm, do not clarify the substantive obligations bearing upon states to prevent pandemics.[9] Thus, the lawsuit approach has two options. First, it can force a causal link between the breach of a modest procedural guideline and a trillion-dollar compensation claim. In other words, it can argue that China's alleged breach of its obligation to notify the emergence of an outbreak is what caused not just an acceleration in the spread of the virus, but the entire pandemic. Second, it can resort to foundational principles of international law, such as the obligation not to harm other states. In other words, it can claim, for example, that China's failure to adopt policies preventing zoonotic diseases caused transboundary harm. Both strategies, we claim, are tainted by the same genetic challenge: They have to rely on

agreement. However, they remain rhetorically distinct: actors constantly emphasize one or the other, and this Article is devoted precisely to the institutional and conceptual implications of these intuitions. *See infra* Part IV.

[6] Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 LAW & CONTEMP. PROBS. 239, 239 (2016) [hereinafter Kumm, *The Right to Be Left Alone*].

[7] *See infra* notes 43–48 and accompanying text.

[8] *See infra* notes 62–64 and accompanying text.

[9] *See infra* Section II.B.1.

profound, normative assessments that international law cannot easily provide. Both the notion of "causation" and the notion of "harm," seemingly value-neutral formalities in the lawsuit approach, are inevitably normative—and, thus, much more complex to apply than it seems at first sight.

Our second claim relies upon the findings of the first. Given the need to fill these normative voids, the lawsuit approach is led back to the global, normative conversation about the allocation of losses that it carefully tried to avoid. In other words, the lawsuit approach also needs a roundtable. This normative discussion cannot be avoided by an analogy with tort law, sometimes all too automatically espoused by exponents of the lawsuit approach.[10] Domestic tort law builds upon thick cultural understandings to fill the empty conceptual vessels of "harm" and "causation," making them readily operative. International law, lacking an equivalent thick culture to fill these voids, requires complex reconstructions of what states owe to one another—precisely those that the supporters of the lawsuit approach deem unnecessary.[11]

Our third and final claim further extends the foregoing reasoning. The lawsuit approach relies on international law as a means to achieve corrective justice while denying that it has nonconsensual implications for distributive justice.[12] We argue that this is conceptually impossible: The general understandings we need in order to allocate responsibility for the pandemic are inherently distributive. To decide, for example, whether China violated its duty to prevent transboundary harm, and therefore caused the pandemic, an adjudicator would need to rely on a specific pretorian rule detailing how much effort and resources countries should divert from their national interests into avoiding harm to other countries. That rule is conceptually distributive, independent of its content. The misfortunes derived from the pandemic are not obviously different, conceptually, from the misfortunes of poverty, financial breakdowns, or the perilous consequences of climate change. Those going down the road of the lawsuit approach may be unpleasantly surprised by where that road leads them.

Our arguments in this Article are not necessarily pessimistic. International law has faced these hurdles before. Normative indeter-

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[10] *See* discussion *infra* Part IV.

[11] See *infra* Part I for the conceptual reconstruction of the lawsuit approach, and Part II for an examination of the normative voids faced by international law regarding this problem.

[12] According to Finnis, distributive justice is concerned with "*distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens" among members of a community, while corrective justice is "the justice that rectifies or remedies inequalities which arise in dealings . . . between individuals." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 166, 178 (1980).

minations in international law are not necessarily an insurmountable barrier—arguably, they have not been a critical impediment to its operation for centuries.[13] But perhaps something is changing. These indeterminacies—while still ultimately solvable—have become more frequent and more visible. When interactions were scant and sporadic, states had the time and resources to progressively develop the specific, idiosyncratic rules required to cut the Gordian knot. This is perhaps why, in the past, problems of this kind went unproblematized. But the COVID-19 pandemic has shown that our world is much more interdependent than the lawsuit approach imagines and that problems may appear before the rules apt to solve them are agreed upon. To recall Eyal Benvenisti's famous metaphor, sovereignty is no longer like owning a large, isolated estate but rather an apartment in a densely occupied high-rise.[14] In apartment buildings, shared losses occur more frequently and unexpectedly than in large estates: Pipes get clogged, elevators get stuck, maintenance is needed. Deeper and denser rules to apportion these losses among tenants are crucial not only to build a prosperous community but also to secure their peaceful coexistence.

The Article is divided into five parts. In Part I, we reconstruct the logical structure of the lawsuit approach. We argue that despite the political fanfare, the lawsuit approach builds upon a classic, commonsensical notion of international law built around persistent Westphalian intuitions. Under this approach, states are free to exert their sovereignty in any way they see fit as long they do not harm other countries; if they do, they must compensate them.

In Part II, we exhaustively review the legal claims available to the lawsuit approach proponents and explored by international lawyers in the aftermath of the COVID-19 outbreak. We then show how each of these claims fatally encounters a number of legal voids left by a set of norms that are ill equipped for this challenge. Absent specific consensual rules governing substantive obligations in the prevention of transnational infectious diseases, lawsuit approach proponents need to rely on the broad rules of our Westphalian past, which lack the density and detail needed to solve this kind of question.

In Part III, we claim that the voids left by these vague rules should not be mistaken for poor craft; rather, they reflect a fundamental legal condition. Giving concrete meaning to terms like "harm" and "causation"—seemingly empty, value-neutral concepts—neces-

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[13] Some areas in international law (like investor-state arbitration or human rights law) have managed to deal with these problems in more workable ways than others. *See infra* Section II.C.

[14] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 295 (2013).

sarily demands deep normative judgments on the social value of goods and activities. Determining who "caused" the pandemic, and to what extent we are "harmed" by it, requires dense normative agreements not reflected in the existing rules of international law.

In Part IV, we explore how to fill these voids. We claim that the disappointing vagueness of existing international law arises from the fact that international law, unlike domestic legal systems, cannot draw these agreements from culturally informed social rules. Therefore, not finding these normative evaluations ready to use, the lawsuit approach has no alternative but to promote a global conversation about them. The need for this kind of global conversation becomes a practical necessity that even the lawsuit approach cannot escape.

In Part V, we argue that the shared understandings needed by the lawsuit approach, whatever their shape, would have significant, necessary implications upon the discussion on global distributive justice: In the end, both conversations hinge on how to make people bear the costs of their own activities rather than impose them on others. Blaming someone for the pandemic assumes we know what it takes to prevent one. The kind of sacrifices required to do so inevitably have global distributive implications, and the lawsuit approach cannot do without taking a stand on them.

One cautionary note before proceeding with the argument. Some may object that entertaining former President Trump's stretched recourse to an impossible lawsuit is not worth anyone's time. Many may have joined him in a chorus of delusion,[15] but the lawsuit approach remains a bad faith dog-whistle meant to ignite nativist sentiment against a perfect enemy.[16] This may be true. Still, we believe rhetorical appeals to law ought generally to be taken seriously. A leader's appeal to the "mythic resonances"[17] of law might very well be

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[15] *See infra* Part I.

[16] This seems to be, in any event, the position of the Chinese government: "[Calling for a lawsuit] is in fact inciting nationalism and hatred against the Chinese." COMUNICADO DE LA EMBAJADA DE LA REPÚBLICA POPULAR CHINA EN LA REPÚBLICA DE ECUADOR (May 1, 2020), http://ec.china-embassy.org/esp/zegx/t1775663.htm (translation by author); *see also* Owen Bowcott & Angela Giuffrida, *From Italian Hotel to a US State, Coronavirus 'Lawfare' Takes Hold*, GUARDIAN (Apr. 23, 2020, 12:21 PM), https://www.theguardian.com/world/2020/apr/23/from-italian-hotel-to-us-state-coronavirus-lawfare-takes-hold (noting Professor Luis Eslava's suggestion that proponents of the lawsuit approach are attempting to use China as a scapegoat); DAVID P. FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE 31–32 (2004) [hereinafter FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE] (suggesting that this is not a new phenomenon in international health law, but that "Westphalian public health targeted germ threats considered external to Europe, hence the emphasis on 'Asiatic diseases' seen in the development of international governance on infectious diseases").

[17] Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1984) ("The struggle over what is 'law' is then a struggle over which social

hypocritical, but hypocrisy has a "civilizing force."[18] Once we make an argument or endorse a norm, sincerely or otherwise, our audiences have incentives to hold us accountable to them in our successive public actions. When law is involved, this mechanism is further reinforced by the "inner morality of law"[19]—law's inherent pull towards legitimacy and fairness. In what follows, then, we take the lawsuit approach seriously.

I
Reconstructing the Lawsuit Approach

Former President Trump's suggestion to sue China for the COVID-19 pandemic has been met with skepticism by most international legal scholars.[20] However, rushing to dismiss his statement as yet another of his eccentricities would miss a broader theme in the international scenario. Whatever the practical viability of such a claim,[21] the idea that China (and perhaps other nations) should be made responsible for the costs of the pandemic has gained traction in many quarters. As one goes through the world's newspapers, variations of this idea keep surfacing. French President Emmanuel Macron voiced doubts about China's responsibility for the pandemic,[22] while

patterns can plausibly be coated with a veneer which changes the very nature of that which it covers up.").

[18] *See, e.g.*, Jon Elster, *Deliberation and Constitution Making*, *in* Deliberative Democracy 97, 104, 111 (Jon Elster ed., 1998) ("[P]ublic speaking is subject to a consistency constraint. Once a speaker has adopted an impartial argument because it corresponds to his interest or prejudice, he will be seen as opportunistic if he deviates from it when it ceases to serve his needs." (emphasis omitted)). For one account of the "'civilizing' effect" of hypocrisy in the international public sphere, see Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 Int'l Org. 1, 22 (2000).

[19] For an overview of this concept, see generally Lon L. Fuller, The Morality of Law 42–46 (1964).

[20] For a legal review of the sentiment, see David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, Just Sec. (Mar. 27, 2020) [hereinafter Fidler, *COVID-19 and International Law*], https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations ("The case for Chinese liability for COVID-19's consequences seems less about international law than how the geopolitical rivalry between the United States and China has shaped the politics of this pandemic."). For an "exercise of disciplinary self-examination," see Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 Am. J. Int'l L. 687 (2020) ("[D]ominant approaches to both international legal thought and practice have . . . conceal[ed] the role of international law in the production of the conditions that led to the pandemic and the allocation of the suffering that this crisis has caused.").

[21] *See infra* Part II.

[22] *See* Victor Mallet & Roula Khalaf, *FT Interview: Emmanuel Macron Says It Is Time to Think the Unthinkable*, Fin. Times (Apr. 16, 2020), https://www.ft.com/content/3ea8d790-7fd1-11ea-8fdb-7ec06edeef84 ("Given these differences, the choices made and

the Australian government asked for a WHO investigation about the origin of the virus.[23] Individuals around the world have already started to seek relief before domestic[24] and international[25] courts. In the United States, state governments have filed suits against the Chinese government in federal courts,[26] and various members of Congress have taken concrete steps to remove China's sovereign immunity under U.S. law.[27] According to opinion surveys collected at the begin-

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what China is today, which I respect, let's not be so naive as to say it's been much better at handling this . . . . We don't know. There are clearly things that have happened that we don't know about.").

[23] *See* Paul Karp & Helen Davidson, *China Bristles at Australia's Call for Investigation into Coronavirus Origin*, GUARDIAN (Apr. 29, 2020, 1:37 AM), https://www.theguardian.com/world/2020/apr/29/australia-defends-plan-to-investigate-china-over-covid-19-outbreak-as-row-deepens.

[24] *See* Bowcott & Giuffrida, *supra* note 16 (providing examples of domestic lawsuits issued against China); *see also* Mohamed El-Shamaa, *Egyptian Lawyer Demands China Pay $10 Trillion in Coronavirus Damages*, ARAB NEWS (Apr. 7, 2020), https://arab.news/z9kfm.

[25] Lawyers in Argentina and India, for example, have tried to report Chinese officials before the International Criminal Court over their responsibility for the pandemic. *See* José María Costa, *Coronavirus: un abogado argentino denunció a la OMS y a China por "genocidio virósico" y la Justicia pidió informes a Suiza* [*Coronavirus: An Argentine Lawyer Files Complaint Against China and the WHO for 'Viral Genocide' and the Judiciary Requests a Report from Switzerland*], LA NACIÓN (July 2, 2020, 4:26 PM), https://www.lanacion.com.ar/politica/coronavirus-argentino-denuncio-oms-al-china-genocidio-nid2389715; Vijay Tagore, *Andheri Lawyer Moves Intl Court Against China over Coronavirus*, MUMBAI MIRROR (Apr. 18, 2020, 6:00 AM), https://mumbaimirror.indiatimes.com/coronavirus/news/andheri-lawyer-moves-intl-court-against-china-over-coronavirus/articleshow/75211989.cms. Not only Chinese officials were reported. A group claiming to represent over one million Brazilian medical professionals issued a complaint centered on Brazilian President Jair Bolsonaro and his handling of the pandemic. *See* Tobias Ackermann, *COVID-19 at the International Criminal Court*, VÖLKERRECHTSBLOG (Aug. 14, 2020), https://voelkerrechtsblog.org/covid-19-at-the-international-criminal-court.

[26] Missouri's Attorney General filed a suit against various entities of the Chinese government seeking "recovery for the enormous loss of life, human suffering, and economic turmoil experienced by all Missourians from the COVID-19 pandemic that has disrupted the entire world." Complaint at 2, Missouri *ex rel.* Schmitt v. China, No. 20-cv-00099, 2020 WL 1931343 (E.D. Mo. Apr. 21, 2020). Mississippi joined Missouri a few days later. *See The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020) (testimony of Lynn Fitch, Att'y Gen.), https://www.judiciary.senate.gov/imo/media/doc/Fitch%20Testimony.pdf ("The Coronavirus has killed, caused serious medical harm, destroyed businesses, and functionally altered the American way of life. We must hold China accountable now so that they and all other nation-states will know that we will not allow them to act with impunity . . . .").

[27] Five U.S. members of Congress introduced a bill (the "Stop China-Originated Viral Infectious Diseases Act of 2020" or the "Stop COVID Act of 2020"), proposing to reform the Foreign Sovereign Immunities Act to try to force U.S. courts to obviate the international legal requirement of upholding the sovereign immunity of China. Stop COVID Act of 2020, H.R. 6444, 116th Cong. (2020), https://www.congress.gov/116/bills/hr6444/BILLS-116hr6444ih.pdf. The bill has not yet been discussed. The Senate Committee on the Judiciary held a hearing on "The Foreign Sovereign Immunities Act, Coronavirus,

ning of the pandemic, more than half of the people in France,[28] the United States,[29] and the United Kingdom[30] favor pursuing some form of accountability from China. In Europe, conservative think-tanks[31] and newspapers[32] have even calculated the amount to be demanded. A former Nigerian Cabinet Minister and Vice President of the World Bank has insisted that China pay reparations to Africa for the damages caused by the pandemic.[33] The Ecuadorian Socialist Party announced that they would bring China to domestic and international courts to seek reparation.[34] Academics from countries such as

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and Addressing China's Culpability," where similar intentions were voiced. *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability: Hearing Before the S. Comm. on the Judiciary*, 116th Cong., at 12:44 (2020), https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability (statement of Sen. Lindsey Graham) ("I cannot think of a more compelling idea than to allow individual Americans or groups of Americans to bring lawsuits against the culprit [of the pandemic], the Chinese government, for the damage done to their family, to our economy and to the psyche of the nation.").

[28] According to a poll collected in May 2020, 62% of French people would favor an investigation into the origins of the virus. Thomas Seymat, *Sondage?: les Français favorables à une enquête en Chine sur l'origine du coronavirus* [*Poll: The French Favor an Inquiry into China About the Origin of Coronavirus*], EURONEWS (Jan. 6, 2020), https://fr.euronews.com/2020/06/01/sondage-les-francais-favorables-a-une-enquete-en-chine-sur-l-origine-du-coronavirus.

[29] According to a poll conducted in April 2020, 54% of Americans wanted China to pay for the costs of the pandemic. THE HARRIS POLL, HARRIS POLL COVID-19 SURVEY (WAVE 6), https://theharrispoll.com/wp-content/uploads/2020/04/j17063-QCovid-PropWtd-Tables-Wave6-6-05-Apr-2020v2.pdf (last visited Jan. 19, 2021).

[30] According to a poll conducted in April 2020, 71% of Britons wanted their government to sue China over the damages caused by the pandemic "if it became evident that the Chinese government breached international law in responding to the initial outbreak and spread of COVID-19." Alan Mendoza, *Public Attitudes on the Response to Coronavirus*, HENRY JACKSON SOC'Y, https://henryjacksonsociety.org/news/public-attitudes-on-coronavirus (last visited Jan. 9, 2021).

[31] *See, e.g.*, Matthew Henderson, Alan Mendoza, Andrew Foxall, James Rogers & Sam Armstrong, *Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response*, HENRY JACKSON SOC'Y (Apr. 5, 2020), https://henryjacksonsociety.org/publications/coronaviruscompensation.

[32] *See, e.g.*, *The Day: German Tabloid Bild Demands China Pay Billions in Coronavirus Damages*, DEUTSCHE WELLE (Apr. 17, 2020), https://www.dw.com/en/the-day-german-tabloid-bild-demands-china-pay-billions-in-coronavirus-damages/av-53169999.

[33] Obiageli Ezekwesili, *China Must Pay Reparations to Africa for Its Coronavirus Failures*, WASH. POST (Apr. 16, 2020, 3:15 PM), https://www.washingtonpost.com/opinions/2020/04/16/china-must-pay-reparations-africa-its-coronavirus-failures ("[Africa] must be accorded damages and liability compensation from China, the rich and powerful country that failed to transparently and effectively manage this global catastrophe.").

[34] Enrique Ayala Mora & Marcela Arellano Villa, *Enjuiciamos a China por daños causados por la COVID19* [*We Sue China for the Damages Caused by COVID-19*], PARTIDO SOCIALISTA ECUATORIANO (Apr. 28, 2020), https://psocialista.ec/boletin-abril-28-de-2020 ("We will issue a lawsuit [against China] aimed at obtaining compensation for the loss of lives, illness, economic collapse, social and psychological impact of the plague.") (translation by author).

Canada,[35] Colombia,[36] France,[37] India,[38] Finland,[39] and the United States[40] have argued that seeking legal redress from China may bring

[35] *E.g.,* Errol Patrick Mendes, Marcus Kolga, Sarah Teich, Opinion, *China Was in Violation of International Health Regulations. What Do We Do Now?*, MACLEANS (May 3, 2020), https://www.macleans.ca/opinion/china-was-in-violation-of-international-health-regulations-what-do-we-do-now ("[N]ow is also the critical time to put in place plans to eventually hold [the Chinese government] to account for the global spread of COVID-19.").

[36] *E.g.*, Luis Guillermo Vélez Álvarez, *Why China Should Compensate Countries for the Coronavirus Pandemic*, PANAM POST (Apr. 28, 2020), https://en.panampost.com/luis-guillermo-velez/2020/04/28/china-compensate-coronavirus ("[China's international responsibility] results from the production of damage as a consequence of a dangerous legal activity . . . . China has the means to pay . . . .").

[37] *E.g.*, Marie Holzman, Vincent Brossel & Alain Bouc, *Covid-19: Qui osera demander des comptes au régime chinois?* [*Who Will Dare to Hold the Chinese Regime Accountable?*], LE FIGARO (Apr. 2, 2020, 9:46 AM), https://www.lefigaro.fr/vox/monde/covid-19-qui-osera-demander-des-comptes-au-regime-chinois-20200401 ("This pandemic has already posed an astronomic cost for our societies and our economies. Will the French government, and the affected countries in general, have the courage to demand that Beijing owns a part of this cost? . . . We hope so . . . .") (translation by author); Sandra Szurek, *Coronavirus: ‹‹Il est légitime de poser la question de la responsabilité juridique de la Chine››* [*Coronavirus: It Is Legitimate to Pose the Question About China's Legal Liability*], LE MONDE (May 13, 2020, 6:39 PM), https://www.lemonde.fr/idees/article/2020/05/13/coronavirus-il-est-legitime-de-poser-la-question-de-la-responsabilite-juridique-de-la-chine_6039482_3232.html ("There are legal bases for the eventual liability of China. Among others, one of the first customary rules in international law . . . is the duty to not cause harm to other states and their nationals . . . .") (translation by author).

[38] *E.g.*, Vanshaj Jain, Opinion, *Can China Be Brought Before an International Court over Covid Pandemic? Yes*, THEPRINT (Apr. 9, 2020), https://theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218 ("[China] must be held to account. . . . [A]n international court would be permitted not only to award compensation for the economic harm . . . but also to compel China to enact legislation banning [wet] markets to prevent future pandemics.").

[39] *E.g.*, Katja Creutz, *China's Responsibility for the COVID-19 Pandemic: An International Law Perspective* 4 (Finnish Inst. Int'l Affs. Working Paper No. 115, 2020) (emphasizing the importance of "long term[] discussions on legal responsibility" for China because, while legal claims are unlikely to succeed, "allegations about wrongful conduct surely impact China, and will hopefully impel the country to further improve its capacity to respond to infectious diseases").

[40] *E.g.*, *Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 9 (2020) [hereinafter *Hearing*, Miller] (statement of Russell A. Miller), https://www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony1.pdf ("I endorse Congressional and Executive Branch efforts to consider and seek to account for the Chinese government's potential international law responsibility for the substantial transboundary harm its acts and omissions may have caused in connection with the global coronavirus pandemic."); E. Donald Elliott, *How to Make China Pay and Prevent the Next Pandemic*, AM. SPECTATOR (May 2, 2020, 12:06 AM), https://spectator.org/how-to-make-china-pay-and-prevent-the-next-pandemic ("Compensating victims for their injuries and financial losses would be a good thing to do if we can find a way to get the Chinese to do it."); John Yoo & Robert J. Delahunty, *How to Make China Pay for COVID-19*, HOOVER INST. (Apr. 26, 2020), https://www.hoover.org/research/how-make-china-pay-covid-19 ("The world must make China pay in order to create incentives that will force it to improve its behavior.").

about benefits. International law blogs and forums all over the world entertained the idea for months, although in the end most of their members dismissed it.[41]

This short survey suggests that the idea that some states should be compensated by those responsible for the outbreak of the pandemic relies on deep-seated intuitions about international law. Indeed, we argue that Trump's (and all others') lawsuit approach to the pandemic is a plausible reflection of a series of mainstream ideas about the existing international legal order.[42] Under this approach, states have a "right to be left alone"[43] from interference by other states, as long as they also refrain from interfering with other states.[44] If they do—that is, if they impose "externalities"[45] on other states, if they commit a "wrong" affecting them,[46] or if they "injure" them[47]—they must compensate them.[48] A lawsuit, on this account, is an all but natural means to obtain this compensation; jurisdictional and eviden-

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[41] *See infra* notes 128, 174 and accompanying text.

[42] Although "[i]t is no easy task to articulate precisely what 'mainstream' international legal theory consists of," Andrea Bianchi suggests that "it is possible—short of any epistemological ambition—to point to a certain way of looking at, and thinking about, international law, which many would easily recognize, if not readily identify themselves with." ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 20 (2016). To paraphrase Louis Henkin's famous quote, this idea of the "mainstream" thus refers, rather generally, to "international law as it is taught in most law schools, in most countries, most of the time." *Id.* at 22 (citing LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979)).

[43] Kumm, *The Right to Be Left Alone*, *supra* note 6, at 239.

[44] In the words of James Crawford, echoing Vattel, "sovereign states are to be considered as so many free persons living together in the state of nature, that is to say, without a common civil law or common institutions; in such a situation they are 'naturally equal,' and inequality of power does not affect this equality." James Crawford, *Sovereignty as a Legal Value*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117, 117 (James Crawford & Martti Koskenniemi eds., 2012) (citing EMER DE VATTEL, THE LAW OF NATIONS 35 (Béla Kapossy & Richard Whatmore eds., 2008)).

[45] *See infra* notes 54–59 and accompanying text.

[46] In the seminal *Chorzów Factory* case, the Permanent Court of International Justice explained that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered." Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 27 (Sept. 13).

[47] *See* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 54–60 (2013) ("As to the basic distinction between 'injury' and 'damage,' it is clear that 'injury' involves the concept of *iniuria*—that is, infringement of rights or legally protected interests—whereas the term 'damage' refers to material or other loss suffered by the injured state.").

[48] As explained in the oft-cited passage from the PCIJ's decision in the *Chorzów Factory* case, "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Factory at Chorzów, 1928 P.C.I.J. at 47; *see also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 163 (Cambridge Univ. Press 2006) ("In so far as injury results to others, it means that the

tiary impediments such as the ones wielded against COVID-19 threats are but contingent inconveniences waiting to be overcome.

This framework of interstate relations, which constitutes the background of the lawsuit approach's reasoning, is logically anterior to the emergence of obligations via the traditional sources of international law, such as treaties or custom. "The legal status of the basic obligation to avoid significant transboundary harm," Günther Handl explains, "is directly related to the sovereign equality of states as the most axiomatic premise of the international legal order."[49] As an "offspring of conceptual reasoning"[50] derived from sovereign equality, rather than a proper source in itself, its validity "does not depend on confirmation through the usual inductive process of proving customary international law."[51] States can then enter into international agreements to specify their understanding of what is harmful, and they can commit themselves to other courses of action. But the principle that states must not harm each other is "the other face of the coin of sovereignty,"[52] and thus a bedrock of the existing international legal order.[53]

Mattias Kumm has recently advanced a theoretically sophisticated reconstruction of such a conception, one that permits both the "interpretation and progressive development of international law."[54] According to Kumm, "[i]t is the point and purpose of international law to authoritatively resolve" issues that involve "externalities"

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author of the act should himself bear the injurious consequences, i.e., take them over by making reparation.").

[49] Günther Handl, Trail Smelter *in Contemporary International Environmental Law: Its Relevance in the Nuclear Energy Context*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION 125, 128 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

[50] Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 COLLECTED COURSES HAGUE ACAD. INT'L L. 195, 295 (1993) ("The proposition that no State may disregard the rights and interests of its neighbours is an offspring of conceptual reasoning. It could not be invalidated by evidence pointing to manifold departures from the conduct required.").

[51] Handl, *supra* note 49, at 128; *see also* JUTTA BRUNNÉE, *Sic Utere Tuo Ut Alienum Non Laedas*, MAX PLANCK ENCYCLOPEDIAS INT'L L. (Mar. 2010), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607 ("[T]he basic idea underpinning the maxim is that of a balancing of conflicting sovereign rights. This balancing requirement arguably inheres in the very notion of sovereign equality, and the practical as well as conceptual impossibility of absolute territorial sovereignty and territorial integrity.").

[52] Robert Q. Quentin-Baxter, *Preliminary Rep. on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, [1980] 2 Y.B. Int'l L. Comm'n 247, 258, U.N. Doc. A/CN.4/334 (1982).

[53] *See also* BRUNNÉE, *supra* note 51, ¶ 17 (describing the obligation as a "foundational principle of international law").

[54] Kumm, *The Right to Be Left Alone*, *supra* note 6, at 242.

posed by a state upon another.[55] International law enshrines the principle of sovereignty insofar as states do not impose these externalities on other states.[56] Examples of externalities are intuitive: carbon-dioxide emissions, direct military action, failure to prevent transnational crime, and dangerous nuclear plants close to state borders.[57] At the same time, unless states specifically agree upon it, international law has no bearing on state policies that, while affecting other countries, do not constitute externalities, such as raising trade tariffs.[58] International law has the authority to prevent states from imposing externalities, regardless of whether those states have consented to a particular international norm. When one state nevertheless imposes an externality on another, it raises the question of compensatory claims.[59]

It is easy to see how the lawsuit approach suits the pandemic. The behemothian and unexpected costs brought about by COVID-19 across the world are (rightly or wrongly) perceived to be "externalities" imposed by China, by act or omission.[60] The harm done to the rest of the world, the lawsuit approach would put it, might be quantitatively imprecise, but obviously gigantic.[61] The responsibility of

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[55] Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOB. LEGAL STUD. 605, 613 (2013) [hereinafter Kumm, *Cosmopolitan Turn*].

[56] *See* Kumm, *The Right to Be Left Alone*, *supra* note 6, at 245 ("The range of questions over which a state can plausibly claim legitimate authority is limited to questions that do not raise issues of justice-sensitive externalities."). Throughout his article, Kumm uses the expression "justice-sensitive externalities," clarifying that "externalities" that do not "raise justice concerns" are of no business of non-consensual international law. *Id.* at 253–54. We will refer to Kumm's "justice-sensitive externalities" simply as "externalities" since, as we hope our discussion will make clear, all negative externalities raise justice concerns by definition. *See infra* Part III.

[57] Kumm, *Cosmopolitan Turn*, *supra* note 55, at 613.

[58] Kumm, *The Right to Be Left Alone*, *supra* note 6, at 254.

[59] Although Kumm does not generally discuss the idea of compensation in this article, he does point at the possibility of "compensatory claims" for particular instances of externalities such as colonial impositions. *Id.* at 255. Nevertheless, under international law, it is common sense that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby." G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 36(1) (Dec. 12, 2001) [hereinafter ARSIWA].

[60] Some academics have explicitly used the "externalities" framework to analyze the impact of the COVID-19 pandemic. *See, e.g.*, Elliott, *supra* note 40 (arguing that if China does not bear the costs of the harm caused by their activities, they would be imposing an "externality" on the rest of the world); Yoo & Delahunty, *supra* note 40 ("The coronavirus pandemic represents the deadliest form so far of Beijing's externalization of its economic and political system.").

[61] For an attempt at a calculation, see Henderson et al., *supra* note 31. Then-President Trump talked about "very substantial" damages, and he reportedly expressed interest in the amount of ten million dollars for every American death caused by the virus. Mark Mazzetti, Julian E. Barnes, Edward Wong & Adam Goldman, *Trump Officials Are Said to*

China might be hard to prove, but this is only a practical concern.[62] Once those factual questions have been solved, the answer is clear: China should make the world even, whatever the costs[63]—after all, once we do our math, those are the same costs it imposed on the rest of the world.

Legal commentators routinely noted that finding a suitable jurisdiction for these potential claims would be hard, if not impossible.[64] But in our reconstruction, the lawsuit approach is not necessarily a

Press Spies to Link Virus and Wuhan Labs, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/2020/04/30/us/politics/trump-administration-intelligence-coronavirus-china.html.

62 *See Hearing*, Miller, *supra* note 40 (generally supporting seeking compensation from China but warning that "[s]everal elements must be proven by clear and convincing evidence" before establishing a violation to the no-harm principle).

63 That is, even if paying full compensation comes at the cost of bankruptcy for the Chinese government. *See* Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020) (reviewing the current international norms permitting "crippling compensation" and calling for their modification).

64 As a result of the principle of sovereign equality, local courts cannot entertain claims which have other states as defendants unless they have their consent; the other states have "sovereign immunity." For an explanation of the notion of sovereign immunities, see, for example, JAN KLABBERS, INTERNATIONAL LAW 98–102 (2013). Thus, unless China accepts the jurisdiction of U.S. federal courts, U.S. judges will not be allowed, under international law, to take the cases. *See* CHIMÈNE KEITNER, *Don't Bother Suing China for Coronavirus*, JUST SEC. (Apr. 8, 2020), https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus. International courts and tribunals also need the consent of states to have jurisdiction to entertain a case. *See* Christian Tomuschat, *International Courts and Tribunals*, MAX PLANCK ENCYCLOPEDIAS INT'L L. (Apr. 2019), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e35. China, however, has not presented a unilateral declaration under Article 36.2 of the International Court of Justice, see *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST., https://www.icj-cij.org/en/declarations (last visited Dec. 17, 2020), and the International Health Regulations do not have a mandatory compromissory clause, see World Health Organization [WHO], *International Health Regulations (1969)* (3d ed. 1983) [hereinafter WHO, *1969 Regulations*]. Some commentators have nevertheless attempted to find a suitable jurisdiction suggesting states to present claims against China under the World Health Organization (WHO) Constitution, see Peter Tzeng, *Taking China to the International Court of Justice over COVID-19*, EJIL:TALK! (Apr. 2, 2020), https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19, under the Convention on International Civil Aviation, see Haris Huremagic & Fritz Kainz, *COVID-19, China and International Aviation Law: A Ticket to The Hague?*, EJIL:TALK! (July 13, 2020), https://www.ejiltalk.org/covid-19-china-and-international-aviation-law-a-ticket-to-the-hague, and even under the ICJ's advisory jurisdiction, see Sandrine De Herdt, *A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic*, EJIL:TALK! (May 20, 2020), https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic. Many of these claims have been received with skepticism by the international legal community. For a discussion, see Dapo Akande, Gian Luca Burci, Sarah Nouwen, Marko Milanovic & Philippa Webb, *EJIL: The Podcast! WHO Let the Bats Out?*, EJIL:TALK! (May 6, 2020), https://www.ejiltalk.org/ejil-the-podcast-who-let-the-bats-out.

practical solution, but rather an intellectual framework.[65] Even in the absence of the realistic possibility of a lawsuit, the lawsuit approach shapes the arguments that pertain to China's responsibility in the pandemic and the amount and forms of compensation to be sought or, eventually, negotiated.[66] John Yoo and Robert Delahunty, for example, follow an approach based on "externalities"[67] but at the same time mistrust China's engagement with international law and courts. Therefore, they suggest, countries should "engage in self-help" and "deploy their sovereign powers to secure compensation and deter future wrongdoing."[68] In the absence of a trustworthy forum, Yoo and Delahunty refrain from advocating for a lawsuit. Yet, they are lawyers. Their arguments follow a lawsuit logic: Countries should reclaim from China what China took from them.

The lawsuit approach, however, need not be the only contribution of international law to the handling of the costs of the pandemic. There is another way of going about the allocation of costs of COVID-19—the "roundtable approach."[69] Under the roundtable approach,

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[65] The conceptual connection between a legal claim and a court adjudicating it runs very deep: When one can imagine a conflict, one quickly imagines a neutral third party adjudicating on it; if the conflict can be described in legal terms, one imagines that third party as a court of law. In fact, according to one leading expert, the "political legitimacy of courts everywhere" comes from the "overwhelming appeal to common sense" that, whenever there is a dispute among two parties, there should be a neutral third party to resolve it. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1 (1981). When it comes to international law, one also arguably thinks of one's arguments as if one were to defend them before an imaginary international court. Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFFS. 1, 13–14 (2013) (proposing a mental experiment of an international court in which cases can be easily adjudicated and enforced as a condition for "fram[ing] tractable question[s] of [international] political morality").

[66] Legal discourse can shape the arguments brought to the table of political negotiation, both through the threat of a potentially successful lawsuit and through the legitimizing language of law. *See* Omar M. Dajani, *Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT'L L. 61, 64–65 (2007) ("[T]he influence of legal rules does not turn solely on the possibility of third-party enforcement; international law's influence also derives from the normative force of the ideas it embodies and its capacity to legitimize negotiated outcomes in the eyes of other international actors and domestic constituencies."). For a version of this mechanism applied to the COVID-19 pandemic by a supporter of the lawsuit approach, see *Hearing*, Miller, *supra* note 40, at 10 ("[C]reating the possibility for civil law remedies against foreign sovereigns in relation to the global coronavirus pandemic [can work as] a means . . . for leveraging interstate negotiations concerned with establishing the Chinese government's responsibility and settling on potential remedies.").

[67] Yoo & Delahunty, *supra* note 40 ("The coronavirus pandemic represents the deadliest form so far of Beijing's externalization of its economic and political system.").

[68] *Id*.

[69] Our "lawsuit approach" and "roundtable approach" parallel, to some extent, Francisco-José Quintana and Justina Uriburu's "modest" and "counterpoint" approaches to international law. *See* Quintana & Uriburu, *supra* note 20, at 694–95. The former

countries openly discuss the best way to distribute the burdens of the pandemic, looking not only at responsibility for bringing it about but also, and most importantly, at how the pandemic affects each of them.[70] In the lawsuit approach, rich countries arguably lose more than developing countries (that is, they have more to lose in the first place) and are therefore entitled to larger compensation sums. The roundtable approach would acknowledge that rich countries lose more, but it would also be sensitive to the complexity of the situation—for example, that they are also better prepared to secure the basic needs of their populations. The roundtable approach is not necessarily bound by either the deeds nor the acts of the past.[71] Thus, it allows for innovative proposals to deal with the effects of the pandemic, from "linking the fight against the virus to questions such as the abolition of 'Third World' debt"[72] to the replacement of voluntary (state and private) contributions with the "collective and mandatory

attempts to depoliticize the discussion and to secure the application of the existing legal framework, while the latter attempts innovative ideas to try to come out from the pandemic with an international legal order which is less unjust than the one which previously existed. *See id.* at 695. Similarly, David Fidler has proposed leaving aside discussions about state responsibility and rather advocating for a "review approach" which "considers matters important to substantive justice by identifying changes to improve future health outcomes (e.g., strengthening surveillance and response capacities) and distribute more equitably the resources needed for achieving better health outcomes (e.g., increasing health assistance to low-income countries)." David P. Fidler, *Pandemic Reparations and Justice in Global Health Governance*, THINK GLOB. HEALTH (May 7, 2020), https://www.thinkglobalhealth.org/article/pandemic-reparations-and-justice-global-health-governance.

[70] One prominent example of this approach was an event convened at the United Nations by the governments of Canada and Jamaica, as well as the U.N. itself, entitled the "High-Level Event on Financing for Development in the Era of COVID-19 and Beyond." There, the Secretary-General, Antonio Guterres, stated, "We need to respond with unity and solidarity. A key aspect of solidarity is financial support. I welcome the swift actions that have already been taken . . . . But many developing countries lack the means to fight the pandemic, and to invest in recovery." *Secretary-General's Remarks*, *supra* note 2; *see also The High-Level Event on Financing for Development in the Era of COVID-19 and Beyond*, UNITED NATIONS, https://www.un.org/en/coronavirus/financing-development-statements (last visited Dec. 17, 2020) (providing statements from various world leaders advocating for what we would consider a roundtable approach).

[71] For a good example of the contrast between the lawsuit and the roundtable approaches, see Johanna Aleria P. Lorenzo, *To Sue or Not to Sue: Enforcing the Obligation to Notify Under the International Health Regulations*, VÖLKERRECHTSBLOG (June 4, 2020), https://voelkerrechtsblog.org/articles/to-sue-or-not-to-sue ("Rules-based dispute settlement systems . . . depoliticize the implementation of international legal obligations. . . . [Instead], global health governance requires an international organization with reinforced independence, expertise, and credibility and more clearly-delineated functions that include serving as an 'information clearinghouse,' i.e. facilitating international cooperation . . . .").

[72] Adam Hanieh, *This Is a Global Pandemic – Let's Treat It as Such*, VERSO (Mar. 27, 2020), https://www.versobooks.com/blogs/4623-this-is-a-global-pandemic-let-s-treat-it-as-such.

pooling of funds."[73] In sum, the roundtable approach leads to a dense, global conversation about the costs and rewards of our life in common.

The lawsuit approach does not necessarily reject these conversations, but it does not regard them as a matter of legal obligation. It contends that international law in its existing form does not impose distributive-justice obligations beyond those entailed by the reparation of wrongful harms.[74] The lawsuit approach fits well with the political sensitivities of unilateralists. A lawsuit appears to be prophylactic; it requires neither uncomfortable conversations about value nor promiscuous distributive reproaches.[75] It is, perhaps, the approach most compatible with Trump's "instincts and impulses" towards the international agenda: "Wherever possible, disengage from globalism. Undermine international institutions and resign from global leadership."[76]

II
The Lawsuit Approach, International Law, and the COVID-19 Pandemic: Old Tools for New Problems

From the perspective of international law, the lawsuit approach looks prima facie plausible, at least if the apparent jurisdictional and evidentiary obstacles are overcome. According to the narrative, the acts and omissions of some states—most prominently, China—have generated immense, unjustifiable burdens upon some other states. These states have suffered an "injury," and they are thus entitled to request that these damages are compensated.

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[73] Celine Tan, *International Public Finance and COVID-19: A New Architecture Is Urgently Needed*, Medium (Apr. 17, 2020), https://medium.com/iel-collective/international-public-finance-and-covid-19-a-new-architecture-is-urgently-needed-6a364c43141e. For a review of measures that could fit a "roundtable approach" to COVID-19 in international law, see, for example, the description of "counterpoint international law" in Quintana & Uriburu, *supra* note 20, at 695–96.

[74] *See* Kumm, *The Right to Be Left Alone*, *supra* note 6, at 255 ("Strong cosmopolitan redistributive theories of social justice that place no significance on the fact that the world is divided up into states are difficult to square with the premises of the argument presented here."). For a review and critical discussion of these views, see John Linarelli, Margot E. Salomon & Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy 38–77 (2018).

[75] The ideal type we label as the "lawsuit approach" reconstructs a widely shared intuition (applicable to international law and to daily life): "you break it, you fix it." This, of course, is not common to all lawsuits (neither in international law, nor beyond), which might point to a wider range of goals: punishment, retribution, vindication, distribution, etc.

[76] Harold Hongju Koh, The Trump Administration and International Law 5 (2019).

The problem, however, is that international law does not have a clear regulation of what constitutes an "injury" in the context of a pandemic, or of how much compensation is due in these kinds of scenarios. In the following sections, we first explore the evolution of the international legal tools developed to deal with infectious diseases. We show that even though international law has long regulated state responses to transboundary pathogens, it has not specified which obligations placed upon states in order to prevent pandemics such as COVID-19 are binding. Thus, we argue second that the proponents of the lawsuit approach have had to structure their legal claims by reference to either broad, vague principles of international law, or to specific rules with complicated causal connections to the damage alleged. Finally, we explain that these problems are quite systemic in international law but emerge unevenly across different regimes, thanks to states' incentives to resolve certain issues and not others.

A. International Law and Infectious Diseases

Unfortunately for the inter-state system, pathogens do not recognize borders.[77] This is not really a new phenomenon, as it "applies to the spread of infectious diseases in every time period of human history."[78] Pathogens travelled transnationally during the Black Death of the fourteenth century, the Spanish flu pandemic of 1918, and in recent times, the "Severe Acute Respiratory Syndrome" (SARS), H1N1, and ebola epidemics.[79] It should not be surprising, then, that international law has long been concerned with the pernicious effects of transnational infectious diseases, despite some neglect toward the topic in the specialized literature.[80]

The first International Sanitary Conference, which took place in Paris in 1851, was followed by a series of bilateral and multilateral treaties dealing with the transnational dimensions of diseases such as

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[77] *See* FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 13 ("The 'germs do not recognize borders' mantra of public health is a mantra for good reasons.").

[78] *Id.*

[79] *See id.*

[80] *See* David P. Fidler, *Public Health and International Law: The Impact of Infectious Diseases on the Formation of International Legal Regimes, 1800–2000*, *in* PLAGUES AND POLITICS: INFECTIOUS DISEASE AND INTERNATIONAL POLICY 262, 262 (Andrew T. Price-Smith ed., 2001) [hereinafter Fidler, *Public Health and International Law*] ("Prior to the 1990s, the role of international law in efforts by states to control and prevent infectious diseases has not been frequently analysed by international lawyers or international relations scholars. International lawyers and international relations specialists historically generated a persistent lack of interest in public health issues.").

cholera, yellow fever, diphtheria, and dengue.[81] These agreements, however, were not designed to force states to take preventive measures to avoid the spread of these maladies. Instead, they were meant to "mitigate the frictions infectious diseases caused for state interactions, primarily trade and travel."[82] The core preoccupation of Westphalian international law in relation to these illnesses was the transnational disruptions caused by governmental responses, not the damage caused by the diseases themselves. The system tacitly assumed, first, that the spread of disease should not halt globalization (it could only tame it, temporarily) and, second, that each state was responsible for taking its own measures to protect its population.[83]

The creation of the World Health Organization (WHO), in 1948, and the adoption of the International Health Regulations (IHR) (called, until 1967, "International Sanitary Regulations") did not radically change this outlook.[84] The WHO Constitution did acknowledge the human right to health[85] and the need for international cooperation in relation to health issues.[86] But until 2005, the IHR, the binding instrument dealing with these matters,[87] held that its purpose con-

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[81] *See* FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 26–32 (providing a review of such treaties); *see also* Fidler, *Public Health and International Law*, *supra* note 80, at 263–69.

[82] FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 28–29 ("Historians of these efforts stress that a driving force behind the development of an international governance framework for infectious diseases was the increasing drag that national quarantine measures were creating for international trade.").

[83] *See id.* at 29–30 (arguing that the development of international law on the subject followed the "non-intervention principle of the Westphalian system," focusing on trade and travel rather than public health, even where governments understood the economic benefits that such public health regulation would bring).

[84] *See id.* at 32 ("The structure, principles, and politics of Westphalian public health governance all appear in the IHR . . . [and] are the direct progeny of the approach to infectious disease cooperation developed since the mid-nineteenth century.").

[85] "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 186, 186 [hereinafter WHO Constitution].

[86] "The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States." *Id.* The WHO Constitution imposes no duty "to control infectious diseases or to cooperate with the Organization on infectious disease problems. The only concrete duties WHO member states have agreed to undertake in accepting the WHO Constitution are to pay their financial assessments and submit certain general reports to WHO . . . ." FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 110.

[87] One of the functions of the WHO, according to Article 2(k) of its Constitution, is "to propose conventions, agreements and regulations, and make recommendations with respect to international health matters . . . ." WHO Constitution, *supra* note 85, at 188. Article 21 of the same instrument specifies that the Health Assembly, the main organ of the Organization, has the "authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international

sisted in ensuring "the maximum security against the international spread of disease with minimal interference with world traffic."[88] For this purpose, it imposed two kinds of obligations upon member states: first, an obligation to notify the WHO of outbreaks taking place within their territories;[89] and second, a number of obligations relating to the public health capabilities states should have at airports and ports, "the gateways of Westphalian state interaction through trade and travel."[90] This focus on airports and ports contrasted "with the absence of any other rules on national public health capabilities . . . consistent with the principles of sovereignty and non-intervention."[91]

There is widespread agreement in the literature that the IHR system failed comprehensively during the twentieth century.[92] States did not comply with their notification obligations "out of fear of the economic costs they would suffer when countries learned of and reacted to the outbreaks."[93] The rules on trade and travel measures

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spread of disease . . . ." *Id.* at 192. According to Article 22, these regulations "shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members . . . as may notify the Director-General of rejection or reservations within the period stated in the notice." *Id.* at 193. The International Health Regulations were explicitly adopted under the authority given by these articles to the Health Assembly. WHO, *1969 Regulations*, *supra* 64, at 5. Thus, they are binding upon member states.

88 WHO, *1969 Regulations*, *supra* 64, at 5; *see also* FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 33 (explaining how this objective reflects Westphalian tenets of governance); Chiara Giorgetti, *International Health Emergencies in Failed and Failing States*, 44 GEO. J. INT'L L. 1347, 1363–67 (2013) (discussing the consolidation of previous agreements into the IHR to make it more binding, the several revisions meant to improve knowledge on epidemic diseases, and still the inability of the IHR to prove effective). The new wording goes in a similar direction, but it is more subtle: "The purpose and scope of [these Regulations] are 'to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.'" World Health Organization [WHO], *International Health Regulations (2005)*, at 1 (3d ed. 2016) [hereinafter WHO, *2005 Regulations*].

89 FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 33–34.

90 *Id.* at 34.

91 *Id.*

92 *See, e.g.*, *id.* at 35 (claiming that "[t]he IHR constitute . . . a significant failure for Westphalian public health"); David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 34 J.L. MED. & ETHICS 85, 85 (2006) ("[T]he Regulations did not provide an effective framework for addressing the international spread of disease."); Giorgetti, *supra* note 88, at 1366 ("[D]espite its great potential, IHR failed to provide a general effective mechanism to assist the international community in addressing global health emergencies and controlling the spread of disease."); SARA E. DAVIES, CONTAINING CONTAGION: THE POLITICS OF DISEASE OUTBREAKS IN SOUTHEAST ASIA 14–15 (2019).

93 FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 35.

were not observed, either.[94] But perhaps the most significant failure was embedded in the design of the IHR themselves: The regulations focused on a number of specific diseases, instead of providing an open definition of the kind of threats they were meant to assess.[95] Frequently, this rendered them irrelevant, or even an obstacle, to the handling of the most severe crises such as HIV/AIDS.[96]

In 2005, after the global difficulties in handling the SARS epidemic, the IHR were significantly refurbished.[97] Of those reforms, three are particularly relevant. First, the IHR now apply to any disease, "irrespective of origin or source, that presents or could present significant harm to humans."[98] It is no longer the case that if a disease is not in the list, the Regulations do not apply to it. Second, the new IHR expand the obligation to notify to include "all events which may constitute a public health emergency of international concern within its territory."[99] Such a public health emergency is in turn defined as "an extraordinary event which is determined . . . (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response."[100] This expansion in the obligation to notify reflects, as one commentator put it, a "growing recognition that sovereigns have responsibilities to protect persons . . . and contain the risk of disaster hazards spreading beyond territorial borders."[101] Third, and finally, the IHR now require states to "develop, strengthen and maintain" surveillance and response capacities, not just in ports of entry and exit, but throughout their territory.[102] The Regulations provide some specifications in relation to these capacities, which are mostly procedural: States must be able to "detect,"[103] "report,"[104] "confirm the status,"[105]

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94 *See id.*

95 *See id.* at 36.

96 *See id.* at 36–39.

97 Fidler & Gostin, *supra* note 92, at 85.

98 WHO, *2005 Regulations*, *supra* note 88, at 7; s*ee also* Fidler & Gostin, *supra* note 92, at 87 ("This 'all risks' approach embodies an important conceptual shift concerning public health's role in the IHR. Trade calculations determined the old IHR's scope, but risks to human health define the new IHR's scope. The result is a set of rules with more public health legitimacy, flexibility, and adaptability.").

99 WHO, *2005 Regulations*, *supra* note 88, at 12.

100 *Id.* at 9.

101 Sara E. Davies, *A Responsibility to Protect Persons in the Event of Natural Disasters*, *in* PROTECTING THE DISPLACED: DEEPENING THE RESPONSIBILITY TO PROTECT 163, 180 (Sara E. Davies & Luke Glanville eds., 2010).

102 WHO, *2005 Regulations*, *supra* note 88, at 11.

103 *Id.* at 40 ("[T]o detect events involving disease or death above expected levels for the particular time and place in all areas within the territory of the State Party.").

104 *Id.* ("[T]o report all available essential information immediately to the appropriate level of healthcare response . . . [including] clinical descriptions, laboratory results, sources

"assess,"[106] "determine,"[107] etc. The only substantive ability mentioned within these "core capacity requirements"[108] is that needed "to implement preliminary control measures immediately"[109] upon an outbreak being detected.

The new IHR say nothing, then, of the kinds of sacrifices states must make in order to prevent the emergence of infectious diseases and their expansion to other states. Despite their "transformational nature,"[110] the new Regulations did not "cut through the tangled knot of very hard political, economic, scientific, and public health choices governments must make to address this public health emergency of international concern."[111] The new IHR did impose some further obligations upon states in relation to what happens in their territories (and not just in their ports of entry), but their main goal was *preparedness*, not *prevention*.[112] The Regulations failed "to adopt an anticipatory approach,"[113] and they do not "require States [to] go on the offensive against the factors that lead to disease emergence and spread. The new IHR are rules for global disease triage rather than global disease prevention."[114]

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and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed.").

105 *Id.* ("[T]o confirm the status of reported events and to support or implement additional control measures.").

106 *Id.* at 41 ("[T]o assess all reports of urgent events within 48 hours.").

107 *Id.* ("[T]o determine rapidly the control measures required to prevent domestic and international spread.").

108 *Id.* at 40–42.

109 *Id.* at 40.

110 Fidler & Gostin, *supra* note 92, at 93. According to Fidler and Gostin, "[t]he new IHR contain an international legal regime unprecedented in the history of the relationship between international law and public health." *Id.* The Regulations now "provide a framework that supports not only improved international cooperation on health but also the strengthening of national health systems, producing more robust health governance horizontally among states and vertically within them." *Id.*

111 Fidler & Gostin, *supra* note 92, at 93; *see also* Patricia L. Farnese, *The Prevention Imperative: International Health and Environmental Governance Responses to Emerging Zoonotic Diseases*, 3 TRANSNAT'L ENV'T L. 285, 287 (2014) (emphasizing the complexity of disease outbreaks and of their prevention). Some prominent zoonotic diseases are HIV, Ebola, and SARS. *See id.* at 287.

112 *See* David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT'L L. 325, 389 (2005) [hereinafter Fidler, *Global Health Security*] (suggesting that "[t]he strategy of global health security is essentially a defensive, reactive strategy").

113 Farnese, *supra* note 111, at 303.

114 Fidler, *Global Health Security*, *supra* note 112, at 389. The 2005 version of the Regulations did not take any further steps to enhance compliance, either. They do not include mandatory dispute-settlement provisions, or even review mechanisms. All that the IHR establish is that, in the event of a dispute, states have an obligation to negotiate and that they may agree to submit it to the WHO Director-General, to arbitration, or to any other means of their choice. *See* WHO, *2005 Regulations*, *supra* note 88, at 34–35.

There may be several reasons why states opted not to specify the courses of action needed to prevent future pandemics and instead decided to focus on being prepared in case they arrived. Most prominently, this decision may be related to the significant costs associated with an effective strategy of prevention.[115] Zoonotic diseases, which account for approximately seventy percent of emerging infectious diseases, are usually the result of "human alteration of the natural world,"[116] including activities as prominent and widespread as deforestation, urbanization, irrigation, industrial stockbreeding, and excessive use of antibiotics.[117] Reaching a specific agreement on reforms to these practices would have been very difficult; reaching a general agreement on being ready in case something happened was much easier. As explained by Martti Koskenniemi in a different context, states sometimes resort to these solutions because "[a]greement on substantive law requires more of a consensus about political value than agreeing upon procedure. Procedural solutions, combined with generally formulated calls for equitable balancing, do not prejudice any State's substantive policy or its view about the limits of its own freedom of action."[118] The problem, of course, is that avoiding the discussion of these issues is very different from finding a solution. The world would learn this lesson very soon.

B. Three Attempts at Distributing the Costs of the Pandemic by Way of International Law

Not surprisingly, given the lack of specific agreements on the question of prevention and the continued increase in international trade and travel, the new IHR were quickly put to test by a new pan-

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Although formally binding, the Regulations are, therefore, "a comparatively weak international instrument." DAVIES, *supra* note 92, at 32. The lack of an "external review process for state compliance . . . permits states to take it less seriously compared to other instruments that have periodic reporting requirements." *Id*.

115 According to one estimate, for example, "significantly reducing transmission of new diseases from tropical forests would cost, globally, between $22.2 and $30.7 billion each year." Schwab, *supra* note 1.

116 Farnese, *supra* note 111, at 287. The Regulations have been specifically criticized for their lack of attention to zoonotic diseases: "The contribution of wildlife to disease emergence is widely acknowledged, yet the international response is overwhelmingly concentrated on detecting and responding to diseases despite repeated calls to address the root cause of [emerging zoonotic diseases]." *Id.* at 303; *see also* Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264, 290 (2016) (claiming that "the regulations fail to govern multisectoral engagement and coordination on zoonotic diseases or the laboratory and surveillance capacities required to identify disease in animals").

117 *See* Farnese, *supra* note 111, at 287–88.

118 Martti Koskenniemi, *Peaceful Settlement of Environmental Disputes*, 60 NORDIC J. INT'L L. 73, 74 (1991).

demic. In 2009, the H1N1 "swine flu" was the first disease declared to be a "Public Health Emergency of International Concern," according to the new Regulations.[119] It is unclear where the disease originated, but the virus was first detected in the United States in the spring of 2009, and it quickly spread throughout the world.[120] After the pandemic ended, the WHO set up a committee to review the organization's role in the fight against the virus. The body noted the positive impact of some of the revisions to the IHR but also pointed to its many shortcomings, the most important of which was "the lack of enforceable sanctions."[121] The idea of suing states for their responsibility in the pandemic was not entertained back then, probably thanks to the rapid discovery of effective antivirals and the limited death toll of the disease (only 18,500 confirmed deaths globally).[122] "We were lucky this time," the chair of the WHO committee stated, "but, as the report concludes, the world is ill-prepared for a severe pandemic or for any similarly global, sustained and threatening public-health emergency."[123]

Such an emergency came sooner than expected and with a scope, depth, and duration that was not comparable to the H1N1 pandemic—or to any other recent disease, for that matter.[124] This pandemic, as we all sadly know, is in many ways unprecedented. COVID-19 was not limited to a specific region: It reached all corners of the world, causing loss of life, economic devastation, and pervasive disruption. COVID-19 did not finish after a few months; its real end date is not even in sight. Finally, another significant difference between COVID-19 and most of its predecessors, one which may explain the attractiveness of the lawsuit approach, is that it appears to have a clear geographical origin, one that happens to touch on an already delicate political tension between the world's two largest economies.

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119 World Health Org. [WHO] Rev. Comm'n on the Functioning of the Int'l Health Reguls. (2005) and on Pandemic Influenza A (H1N1) 2009, *Implementation of the International Health Regulations (2005)*, at 8, WHO Doc. A64/10 (2011) [hereinafter *Implementation of the IHR (2005)*].

120 *See 2009 H1N1 Pandemic (H1N1pdm09 virus)*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html (last visited June 11, 2019).

121 *Implementation of the IHR (2005)*, *supra* note 119, at 13.

122 *See id.* at 49.

123 *Id.* at 7.

124 "The SARS outbreak was the first infectious disease epidemic since HIV/AIDS to pose a truly global threat." Fidler, SARS, Governance and the Globalization of Disease, *supra*, note 16, at 15. Yet the 2002–04 SARS outbreak only infected about 8,000 people and killed fewer than 1,000. *See Summary of Probable SARS Cases with Onset of Illness from 1 November 2002 to 31 July 2003*, World Health Org. (July 24, 2015), https://www.who.int/csr/sars/country/table2004_04_21/en.

These differences may explain why, in this scenario, international lawyers did thoroughly explore the potential claims that could be made if a lawsuit approach were to be taken[125]—something most of them had not done in previous pandemics.[126] Specifically, three claims were put forward: first, that China committed an internationally wrongful act by omitting to notify the WHO of the outbreak in accordance with the IHR; second, that China and others violated their general obligation to prevent transboundary harm; and third, that China and other states could be liable for licit but hazardous activities occurring within their territories.

1. Violation of the International Health Regulations

Most of the arguments for holding China responsible for the pandemic point to an alleged breach of its obligation to promptly notify of "all events which may constitute a public health emergency of international concern" under Article 6 of the IHR.[127] Since this body of rules is binding upon members of the WHO, including China, their viola-

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[125] Indeed, some have argued that the international law profession has paid excessive attention to questions of state responsibility in relation to COVID-19, leaving aside more important, and systemic, concerns that better explain the emergence of this crisis (and others). *See* Quintana & Uriburu, *supra* note 20, at 694–96.

[126] The notable exception was a Student Note. Joshua D. Reader, Note, *The Case Against China: Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic*, 19 COLUM. J. ASIAN L. 519 (2005). However, his claim was met with some skepticism by mainstream scholarship, which concluded that "[i]n the absence of an international legal obligation that applie[d] to its actions directly on SARS, China's behavior [could not] be considered legally wrongful . . . given the configuration of international law in place at the time . . . ." FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 110.

[127] WHO, *2005 Regulations*, *supra* note 88, at 12; *see, e.g.*, James Kraska, *China Is Legally Responsible for COVID-19 Damage and Claims Could Be in the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions ("China's failure to provide open and transparent information to WHO is . . . [a] breach of a legal duty that China owed to other states under international law, and for which injured states—now numbering some 150 nations—may seek a legal remedy."); Antonio Coco & Talita de Souza Dias, *Prevent, Respond, Cooperate: States' Due Diligence Duties Vis-à-Vis the COVID-19 Pandemic*, 11 J. INT'L HUMANITARIAN LEGAL STUD. 218, 229–30 (2020) ("[T]here are reports that local doctors had warned public authorities of a surge of unknown 'viral pneumonia' cases in mid-December 2019 . . . . Yet China only notified the local WHO Country Office . . . on 31 December 2019."); Romel Regalado Bagares, *China, International Law, and COVID-19*, INQUIRER (Mar. 22, 2020, 4:20 AM), https://opinion.inquirer.net/128226/china-international-law-and-covid-19 ("Under the law on state responsibility, China's suppression of crucial information about COVID-19 is a violation of its international obligations under the 2005 International Health Regulations (IHR) . . . ."); Lorenzo, *supra* note 71 ("[B]elated notification and/or omission of critical information constitute a breach of the obligation to notify under Article 6 of the [IHR]. This breach obliges China to repair the harms . . . .").

tion gives rise to state responsibility[128] and, thus, to an obligation to "wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[129] This can be done in a number of ways. One way consists of compensating "any financially assessable damage including loss of profits" to those injured,[130] a claim which in the case of COVID-19 "could be in the trillions."[131]

Leaving complex evidentiary issues aside, one prominent problem of this argument, as David Fidler notes, lies in the question of *causation*—that is, the difficult task of "separating what damage is attributable to China's delayed reporting and what harms arose because other governments botched their responses to COVID-19."[132] As we explored in the previous section, there are no specific, consent-based rules of international law governing causation of harm in the context of pandemics. The IHR only establish procedural obligations (aiming at preparedness, not even at prevention) and provide no guidance on causation.[133]

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128 For this position, see, for example, Valerio Mazzuoli, *State Responsibility and COVID-19: Bringing China to the International Court of Justice?*, INT'L L. BLOG (May 15, 2020), https://internationallaw.blog/2020/05/15/state-responsibility-and-covid-19-bringing-china-to-the-international-court-of-justice (arguing that the wording of the IHR obligations "in the best style [of] hard law . . . is direct and imperative") (emphasis omitted); Lorenzo, *supra* note 71 ("[ARSIWA] support the hypothetical plaintiffs' theory."). For a contrary position, see, for example, Rebecca Bratspies, *Trail Smelter Arbitration Offers Little Guidance for COVID-19 Suits Against China*, JUST SEC. (July 14, 2020), https://www.justsecurity.org/71363/the-trail-smelter-arbitration-offers-little-guidance-for-the-covid-19-world-on-attempts-to-sue-china ("The WHO regulations themselves provide no remedy for State breach. More fundamentally, it is not clear that they constitute law for purposes of creating a state duty under the Draft Articles, which generally focus on treaty obligations.").

129 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13); *see also* ARSIWA, *supra* note 59, art. 31, ¶ 1 ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.").

130 ARSIWA, *supra* note 59, art. 36, ¶ 1. However, the ICJ has been quite modest in its calls for compensation for procedural obligations of this kind, preferring the much more symbolic option of satisfaction, i.e. "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality." *Id.* art. 37; *see* Lorenzo, *supra* note 71 (explaining that two-thirds of the Court's awards are non-compensatory).

131 Kraska, *supra* note 127.

132 Fidler, *COVID-19 and International Law*, *supra* note 20; *see also* Lorenzo, *supra* note 71 ("The duty to compensate, however, is contingent on the demonstration of a violation-injury causation. . . . If it can be shown that China's purported concealment . . . necessitated the restrictive measures presently causing adverse socioeconomic effects, then one can plausibly argue that its failure to notify triggered the obligation to pay compensation.").

133 *See supra* Section II.A; *see also* Fidler, *COVID-19 and International Law*, *supra* note 20 ("None of the treaties addressing the international spread of infectious diseases dating back to the nineteenth century have rules requiring payment of compensation for damage

The general rules on state responsibility are also notably vague on the matter.[134] The International Law Commission's (ILC) Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) hold that "[t]he responsible State is under an obligation to make full reparation for the injury *caused* by the internationally wrongful act."[135] However, the Commission explicitly evaded a precise definition of causation: It noted that "[i]n international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula.'"[136] Indeed, the caselaw on this matter has been "haphazard and unprincipled."[137] International tribunals have solved questions of causation referring "rather randomly"[138] to standards as varied as "direct cause,"[139] "proximate cause,"[140] "certain cause,"[141] or "foreseeable

in other countries associated with violations of treaty rules. The leading contemporary treaty, the [IHR], has no provisions on this issue."). The problem of causation was also tricky for those arguing for China's responsibility in the context of SARS: "It is impossible to assert that if China had honestly and promptly reported the Guangdong SARS outbreak to WHO then the global outbreak would not have occurred. However, . . . China's cover-up actively prevented other nations from taking adequate precautions at their borders . . . [and] was a proximate cause of the global outbreak." Reader, *supra* note 126, at 562.

134 *See* Vitalius Tumonis, *The Complications of Conciliatory Judicial Reasoning: Causation Standards and Underlying Policies of State Responsibility*, 11 BALTIC Y.B. INT'L L. 135, 137 (2011) ("Scholarly literature on the causation standards is scant. . . . By and large, the International Law Commission also neglected causation in its codification of State responsibility. Overall, causation is at the vanishing point of the literature on State responsibility."); Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 EUR. J. INT'L L. 471, 471–73 (2015) (arguing that "the concept of causation in international law is unclear, especially in relation to overdetermination, and it must be clarified" and that "the treatment of causal concepts in international law is mostly rudimentary").

135 ARSIWA, *supra* note 59, art. 31, ¶ 1 (emphasis added). Article 36, paragraph 1, in turn, holds that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage *caused* thereby . . . ." *Id.* art. 36(a) (emphasis added).

136 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, [2001] 2(2) Y.B. Int'l L. Comm'n 93, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on Transboundary Harm* 2001] (quoting P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 466 (5th ed. 1995)); *see also* Tumonis, *supra* note 134, at 142 (explaining the meaning of this phrase, and holding that as a result of it, "different causation tests might be applicable to different causes of action").

137 Plakokefalos, *supra* note 134, at 473.

138 *Id.* at 491 ("[I]nternational adjudicatory bodies follow different approaches in dealing with similar issues. They employ causal tests rather randomly . . . . Even when they have the benefit of being guided by specific procedural rules . . . they often stray and make general proclamations on international causal standards that are not supported in practice.").

139 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 14, ¶ 462 (Feb. 26) (describing the necessity of a "sufficiently direct . . . causal nexus"); *see also* Tumonis, *supra* note 134, at 138–39 (discussing the direct cause standard).

cause,"[142] often being "remarkably evasive as to the details of their analysis."[143]

The question is particularly complex in cases of overdetermination—that is, those in which there may be concomitant or concurrent causation, such as with COVID-19.[144] In its commentary to the ARSIWA, the ILC attempted to find a middle ground between the divergent positions held by the two special rapporteurs that worked on the project.[145] For Gaetano Arangio-Ruiz, in cases of concurrent causation, the liability of the state should be proportionally reduced.[146] For James Crawford, there should be no partial reduction of a state's liability in cases of causal concurrence.[147] The commentary explains that "unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct."[148]

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[140] Mixed Claims Comm'n, U.S. & Ger., *Administrative Decision No. II: Dealing with the Functions of the Commission and Announcing Fundamental Rules of Decision*, 18 AM. J. INT'L L. 177, 183 (1924) (emphasis omitted) (discussing the concept of proximate cause); Provident Mut. Life Ins. Co. and Others (U.S. v. Ger.) (Life-Ins. Claims), 7 R.I.A.A. 91, 113 (1924) (applying "proximate cause" doctrine).

[141] *See Application of the Convention*, Judgment, 2007 I.C.J. 14, ¶ 462 (describing the need for a "certain causal nexus" between the wrongful act and resulting harm).

[142] See, for example, the U.S. and British commissioners' joint report submitted in 1904 regarding the Samoan dispute, cited in Tumonis, *supra* note 134, at 141 ("[A] wrongdoer is liable [for] the damages which are both, in fact, caused by his action, and cannot be attributed to any other cause, and which a reasonable man in a position of the wrongdoer at the time would have foreseen as likely to ensue from his action.").

[143] Plakokefalos, *supra* note 134, at 483.

[144] *Id.* at 472 (noting also that "[o]verdetermination, broadly defined, is the existence of multiple causes . . . contributing towards a harmful outcome," which becomes more likely as the complexity of State relations and "potentially harmful outcomes" increase).

[145] *See* Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 EUR. J. INT'L L. 695, 710–11 (2007) ("The commentary on Article 31 of the ILC Articles on State Responsibility reflects Crawford's view, although the ILC tried to compose both opinions . . . .").

[146] Gaetano Arangio-Ruiz, *Second Report on State Responsibility*, [1989] 2(1) Y.B. Int'l L. Comm'n 1, 14, U.N. Doc. A/CN.4/SER.A/1989/Add.I (arguing that "to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion"); *see also* Plakokefalos, *supra* note 134, at 481 (discussing Arangio-Ruiz's report); Gattini, *supra* note 145, at 710–11 (contrasting Arangio-Ruiz's and Crawford's positions).

[147] *See* James Crawford, *Third Report on State Responsibility*, [2000] 2(1) Y.B. Int'l L. Comm'n 34, U.N. Doc. A/CN.4/SER.A/2000/Add.I (claiming that Arangio-Ruiz's position "is not consistent with international practice and the decisions of international tribunals").

[148] *Draft Articles on Transboundary Harm* 2001, *supra* note 136, at 98.

The International Court of Justice has been somewhat ambivalent about this matter as well.[149] In the early *Corfu Channel* case, the Court imputed to Albania "damage and loss of human life" resulting from an explosion of mines in Albanian waters, even if it had been Yugoslavia who had placed the mines in its territory in the first place.[150] In the 2007 *Bosnian Genocide* case, however, the Court found that Serbia had breached its obligation to prevent the commission of a genocide, but it refused to grant compensation for lack of a "sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered . . . ."[151] Commentators have noted that "there is no compelling legal rationale whatsoever" to the causation standard applied by the Court in this case,[152] and that, "[c]ontrary to what the ICJ claims, [this] test is not accepted, at least not unequivocally, in international law."[153]

Emerging from this discussion, there is yet another problem relating to causation, this time not related to the determination of the breach but to the determination of the kind and amount of reparation owed. According to the ILC, "the subject matter of reparation is, globally, the *injury* resulting from and ascribable to the wrongful act, rather than any and all *consequences* flowing from an internationally wrongful act."[154] This formulation is simple—but perhaps too simple. What distinguishes in this context an "injury" deriving from a certain act, from mere "consequences" flowing from it? Again, there is no

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149 *See, e.g.*, Plakokefalos, *supra* note 134, at 490 ("It is interesting to note at this point the discrepancy between the approach of the Court in *Corfu Channel* and *Bosnian Genocide*.").

150 Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 6 (Apr. 9); *see also* Plakokefalos, *supra* note 134, at 484–85 (arguing that the ICJ "did not engage in any meaningful causal analysis," leaving open the question of if Albania must compensate for the entire damages or if the damage "can be divisible").

151 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 14, ¶ 462 (Feb. 26).

152 *See* Tumonis, *supra* note 134, at 142–43 (arguing also that a proper explanation to this decision "relates to the conciliatory justice and judicial politics: the Court's desire to satisfy both parties by splitting their differences"); *see also* Gattini, *supra* note 145, at 711 (arguing that, despite the court's apparent motivation of encouraging reconciliation between the parties, "on the whole the Court's decision to dispose of the matter of reparation by means of a simple declaration in the judgment as a form of satisfaction seems to have been quite rushed, and unfortunately gives the whole judgment a flavour of half-heartedness").

153 Plakokefalos, *supra* note 134, at 490. Plakokefalos further notes that, as evidenced by the *Bosnian Genocide* case, courts do not explain their causal analysis in detail even when they do apply some test: "They do not explain why they use a particular test, they do not apply a test consistently and, especially in cases of overdetermination, they simply apply unhelpful tests, such as the but-for test." *Id.*

154 *Draft Articles on Transboundary Harm* 2001, *supra* note 136, at 92 (emphasis added).

simple answer to this question, and states have not specifically regulated upon it.

2. *Violation of the General Duty to Prevent Transboundary Harm*

The second claim that proponents of the lawsuit approach have advanced is that China—and other states—may have breached their duty to prevent (or at least to minimize) the risk of emergence and spread of the virus.[155] Zoonotic diseases like the SARS-CoV-2 are widely believed to be the result of "human alteration of the natural world."[156] Scientists have pointed to "anthropogenic disturbance of forest ecosystems and increasing demand for meat and medicine derived from wildlife" as the likely causes for this kind of viral spillover.[157] Inappropriate regulation of the production chain and of the sale conditions of meat products have emerged as at least part of the explanation of the development of the pandemic.[158] Further, once the

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[155] *See, e.g.*, Coco & de Souza Dias, *supra* note 127, at 222 ("The concept of 'harm' is broad enough to include the consequences of a disease outbreak such as COVID-19."); Russell Miller & William Starshak, *China's Responsibility for the Global Pandemic*, JUST SEC. (Mar. 31, 2020), https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic (comparing the case with the *Trail Smelter* arbitration and concluding that "China should compensate the world for the personal and economic damage its policies have caused"); Bagares, *supra* note 127 ("China is duty-bound to ensure that individuals within its territory do not cause harm to the rights of other states. Moreover, where the harmful acts were committed by persons exercising public authority, the acts are attributable to the state."). Former President Trump also seems to be thinking of something along these lines: "This was sent to us by China, one way or the other, and we're never going to forget it. Believe me, we're never going to forget it. . . . [I]t should have been stopped by China, and it wasn't." Jonathan Swan, *Donald Trump Interview Transcript with Jonathan Swan of Axios on HBO*, REV TRANSCRIPTS (Aug. 3, 2020) https://www.rev.com/blog/transcripts/donald-trump-interview-transcript-with-axios-on-hbo. Senator Lindsey Graham, as Chair of the Judiciary Committee of the Senate, seems to entertain a similar view: "Whether it was a mistake in a lab or spread at a wet market I don't know, but we do know where it came from. We also know that China failed to inform the world about the nature of the virus . . . ." *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability: Hearing Before the S. Comm. on the Judiciary*, 116th Cong., at 11:23 (2020) (statement of Sen. Lindsey Graham, Chairman, S. Comm. on Judiciary), https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability.

[156] Farnese, *supra* note 111, at 287.

[157] Gabriele Volpato, Michele F. Fontefrancesco, Paolo Gruppuso, Dauro M. Zocchi & Andrea Pieroni, *Baby Pangolins on My Plate: Possible Lessons to Learn from the COVID-19 Pandemic*, 16 J. ETHNOBIOLOGY & ETHNOMEDICINE, no. 19, 2020, at 2 (explaining that "SARS-CoV-2 is the latest of several viruses that have emerged in wildlife, . . . mutated, and then spread from human to human" and listing numerous factors that increase the likelihood of such diseases emerging).

[158] Some commentators have discussed the regulatory failures regarding wet markets, the "likely zoonotic origin of the COVID-19." Hussin A. Rothan & Siddappa N. Byrareddy, *The Epidemiology and Pathogenesis of Coronavirus Disease (COVID-19) Outbreak*, J. AUTOIMMUNITY, May 2020, at 3. Some claim that the sale of exotic animals should not be allowed in wet markets. *See, e.g.*, A. Alonso Aguirre, Richard Catherina,

outbreak was clear, negligent local decisions of various states to, for example, allow "super-spreader" massive events, delay lock-downs, or fail to implement test-and-trace policies, rapidly accelerated the dissemination of the disease, including beyond jurisdictional borders.[159]

As we saw in the previous section, the IHR do not provide specific guidance on the substantive duties of prevention that states have in relation to infectious diseases.[160] However, under general international law, states have a broad obligation not to harm each other in the exercise of their sovereignty[161]—*sic utere tuo ut alienum non laedas*, a "foundational principle of international law."[162] In the 1949 *Corfu Channel* case, the International Court of Justice explained that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[163] In the 2010 *Pulp Mills* case, the Court described this principle as a customary rule and explained that "[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage" to other States.[164]

The evident problem with the application of this principle, absent specific regulation of obligations to prevent pandemics, is that "this right not to suffer transboundary harm is also limited by a duty to tolerate certain interferences—a duty that is coextensive with the

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Hailey Frye & Louise Shelley, *Illicit Wildlife Trade, Wet Markets, and COVID-19: Preventing Future Pandemics*, 12 WORLD MED. & HEALTH POL'Y, Sept. 2020, at 8. Others, however, are more cautious, advocating for decreased meat consumption globally and moving such markets to local, more environmentally friendly markets. *See* Ivica Petrikova, Jennifer Cole & Andrew Farlow, *COVID-19, Wet Markets, and Planetary Health*, 4 LANCET PLANETARY HEALTH e213, e214 (2020).

159 *See, e.g.*, Lucas Bergkamp, *State Liability for Failure to Control the COVID-19 Epidemic: International and Dutch Law*, 11 EUR. J. RISK REGUL. 343, 345 (2020) ("For instance, it has been reported that Austrian ski resorts ignored COVID-19 outbreaks in order to avoid harm to their economies. Such omissions by municipal or local governments are likely attributable to the state of Austria, and thus will entail Austria's state liability.").

160 *See supra* Section II.B.1.

161 For a discussion of this principle and its legal validity, see *supra* Part I.

162 BRUNNÉE, *supra* note 51, ¶¶ 1, 17 ("[*S*]*ic utere tuo ut alienum non laedas* . . . stands for the proposition that one State's sovereign right to use its territory is circumscribed by an obligation not to cause injury to, or within, another State's territory.").

163 Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 6, 22 (Apr. 9). The decision of the Court built implicitly on the precedent established in the 1941 *Trail Smelter* arbitration, in which the tribunal stated that a state's use of its territory must not "cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter Arbitral Decision*, 35 AM. J. INT'L L. 684, 684 (1941). For a commentary on this caselaw and its current relevance, see TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION, *supra* note 49.

164 Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20).

neighbouring State's right to use its territory."[165] Where to draw the threshold between admissible and non-admissible externalities is a question "as important as it is complex"[166]: Is the harm "subjective or fault-based? Or is it objective, focusing on the severity of the harm inflicted on the neighbouring State? Or a combination of the two?"[167]

The ILC attempted to take up these questions and expound the meaning of the no-harm principle in the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.[168] There, the ILC explained that states have to "take *all appropriate measures* to prevent *significant transboundary harm*."[169] This formulation puts forward a more practical standard, but one that still hinges crucially, on two vague terms: first, on the meaning of the term "harm"; and second, on an explanation of which measures are considered "appropriate."[170] The Commission did make an effort to provide definitions. The ILC defined "harm" as "harm caused to persons, property or the environment."[171] Additionally, the ILC explained in its commentary that "appropriate" refers to "the degree of care in question is that expected of a good Government."[172]

Neither of these definitions provides an operative solution to the questions about the threshold between admissible and non-admissible externalities presented earlier.[173] What is significantly harmful to persons, property, and the environment? What is the degree of care expected from a good government? What indication does this give us about the legal obligations of states to prevent the pandemic? The

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165 BRUNNÉE, *supra* note 51, ¶ 4; *see also* XUE HANQUIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 160 (2003) ("Prevention of harm need not be absolute and has to be weighed against equitable and reasonable utilization.").

166 BRUNNÉE, *supra* note 51, ¶ 7; *see also* XUE, *supra* note 165, at 7 ("Both in theory and in practice, the need for a threshold criterion has never been doubted, but what that should be has long been debated, along with the dilemma of how strict international liability rules should be.").

167 BRUNNÉE, *supra* note 51, ¶ 7.

168 *See Draft Articles on Transboundary Harm* 2001, *supra* note 136, at 31.

169 *Id*. at 146 (emphasis added); *see also* XUE, *supra* note 165, at 7 ("International law only tackles those cases where transboundary damage has reached a certain degree of severity.").

170 This is not surprising. As explained by Rebecca Bratspies and Russell Miller, "[d]efining 'harm' or 'damage' . . . may be the most confounding facet of forming a legal response to transboundary harm . . . ." Rebecca M. Bratspies & Russell A. Miller, *Introduction*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION, *supra* note 49, at 1, 7; *see also infra* Section III.A.

171 *Draft Articles on Transboundary Harm* 2001, *supra* note 136, at 146.

172 *Id.* at 160.

173 Handl, *supra* note 49, at 132 (explaining that "there is general agreement that the no-significant-harm obligation is one of due diligence" and that the required restraints will vary with the circumstances).

existing rules of international law seem again unable to answer the crucial questions posed by COVID-19.

3. Liability for Licit but Hazardous Activities

Finally, some have claimed that even if states were indeed diligent in their conduct, they may still be liable for the licit but hazardous activities occurring within their jurisdiction and thus bound to compensate for the harm generated by their activities.[174] This claim has been put forward much less frequently than the previous two claims. It similarly shows, however, the need for international lawyers to rely on very general principles in order to pursue legal accountability from China.

As with the previous claims, there is no specific, consent-based regulation of liability for transboundary harm caused by pandemics. Thus, the whole claim needs to be built on the basis of the no-harm principle, as discussed by the ILC in its 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm.[175] These principles explain that states may be liable for certain licit but hazardous activities when they harm other states. The claim, in this case, is that some states, such as China, enjoyed the benefits of a number of allegedly hazardous activities (such as producing and consuming meat of wild animals, or, in the case of other states, carrying on with massive sporting events during an infectious outbreak) and should now be liable for the damage created, irrespective of whether they were diligent or not.

In the 2006 principles, the Commission acknowledged that the question of causation, foreseeability, and remoteness of the damage is difficult, stating that "[d]ifferent jurisdictions have applied these concepts with different results,"[176] making this "a highly discretionary and unpredictable branch of law."[177] The ILC also clarified that only "significant" damage generates liability—damage that is more than "detectable" but less than "serious" or "substantial."[178] As the Commission itself noted, the determination of what is "significant" is very much contextual: It "is dependent on the circumstances of a par-

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[174] *See* Chiradeep Basak, *Can China Be Sued at the ICJ for Causing Transboundary Harm for Covid-19 Pandemic?*, EURASIAN TIMES (Apr. 10, 2020), https://eurasiantimes.com/can-china-be-sued-at-the-icj-for-causing-transboundary-harm-for-covid-19-pandemic.

[175] *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, [2006] 2(2) Y.B. Int'l L. Comm'n 59–90, U.N. Doc. A/CN.4/SER.A/2006/Add.1.

[176] *Id.* at 79.

[177] *Id.* at 65.

[178] *Id.*

ticular case and the period in which it is made."[179] The ILC was also quite vague when it came to defining the meaning of "prompt and adequate compensation"[180] in the context of liability for hazardous activities, only pointing to "cost internalization" and "equity and mutual accommodation" as guiding principles.[181]

C. *Systemic Challenges with Fragmented Solutions*

Each of the three claims upon which the lawsuit approach may rely hinges on questions that the existing international rules do not fully resolve: the extent of the relevant causal links, the determination of how much of an illicit act results in an injury, the definition of what is harmful (and what is "significantly" harmful), and the determination of which measures are appropriate to prevent said harm.

These questions could have been solved by way of international agreement if the IHR had adopted a preventive, anticipatory approach to infectious diseases—which, as we saw, it did not. This is what states actually did for some other specific regimes in which transboundary damage is usual, such as those dealing with international watercourses[182] and with outer space activities.[183] They negotiated and agreed upon more precise obligations deriving from the broad rules outlined above.

In yet other regimes of international law, such as investment arbitration or human rights law, a prominent body of caselaw has developed specific answers to analogous sets of questions.[184] But that is no

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[179] *Id.*

[180] *Id.* at 72–83.

[181] *Id.* at 74, 76.

[182] *See generally* Stephen C. McCaffrey, *International Watercourses, Environmental Protection*, Max Planck Encyclopedias Int'l L. (Apr. 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e954 (explaining what harm means in the context of shared international watercourses).

[183] *See generally* Christos Kypraios & Elena Carpanelli, *Space Debris*, Max Planck Encyclopedias Int'l L. (Sept. 2018), https://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e2202 (explaining what harm means in the context of the interactions of states in outer space).

[184] Both of these regimes have two features that reasonably narrow the breadth of the question. First, they both have an authoritative adjudicator who interprets and applies reasonably self-contained bodies of law that were progressively developed through abundant caselaw. Second, and more importantly, both regimes primarily address the relationship between a state and an individual under its jurisdiction. This feature allows filling in the voids by appeal to internal features of the state's legal system through legal devices such as the "margin of appreciation" in human rights law or the "fair and equitable treatment" standard in investment law. Also, in international investment law, there is an explicit recourse to the transnational market of the goods affected. This is impossible when we talk about non-fully-commodified goods such as human health, psychological damage, or life itself. For a systematic review of the issues arising from compensation in international investment and human rights law respectively, see Irmgard Marboe,

solution here: There is no specific tribunal with jurisdiction over health issues and, in other courts, "few cases can be found tackling the international governance of infectious diseases, i.e. there is no developed judicial discourse [on these issues]."[185] The broader, state-to-state litigation context of general international law is not very helpful either. There, again, the "paucity of useful international precedents"[186]—which is itself the result of the same jurisdictional obstacles that apply to the COVID-19 scenario—has also deprived us of guidance on how to distribute the burdens caused by the pandemic. The few existing cases (for example, the *Trail Smelter* case in relation to transboundary harm[187] and the *Chórzow Factory*[188] or *Corfu Channel*[189] cases in relation to compensation) are merely sources of the broad principles outlined above.

These differences in the application of the broader principles among different regimes are, no doubt, the result of the uneven judicialization and, more broadly, of the uneven institutionalization of international law. Since "international courts and tribunals are significant on some issues but not others, [and] in some parts of the world much more than others,"[190] it is only reasonable that dense rules will only appear for certain issues and in certain places. In other words, states have decided to create tribunals to deal with investment and trade, but not to deal with the prevention of pandemics. These differences in the density of both regulation and precedent are the result not only of political decisions, but also of practical necessities. While, for example, international investment has been going on for centuries, the velocity and reach of COVID-19 took international law for surprise.[191] Recall once again Benvenisti's apartment-building meta-

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CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed. 2017) and DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 315–76 (3d ed. 2015).

185 Leonie Vierck, *The Case Law of International Public Health and Why Its Scarcity Is a Problem*, *in* THE GOVERNANCE OF DISEASE OUTBREAKS: INTERNATIONAL HEALTH LAW: LESSONS FROM THE EBOLA CRISIS AND BEYOND 113, 116 (Leonie Vierck, Pedro A. Villarreal & A. Katrina Weilert, eds., 2017).

186 Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 853 (2002).

187 *Trail Smelter Arbitral Decision*, *supra* note 163, at 684.

188 Ger. v. Pol., 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

189 U.K. v. Alb., Judgment, 1949 I.C.J. (Apr. 9).

190 Benedict Kingsbury, *International Courts: Uneven Judicialisation in Global Order*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203, 211 (James Crawford & Martti Koskenniemi eds., 2012).

191 Of course, velocity, reach, and other practical concerns are not the only explanations for the development of institutions. The fact that some institutions do emerge, and some others do not, also has prominently ideological explanations. *See id.* at 211–12 (explaining how the judicialization of certain areas of international law is the result of the expansion of

phor[192]: We have been sharing roads for years and have clear rules to govern them, but we only develop protocols to deal with broken elevators (or to prevent them from breaking) once they fail for the first time. New problems create incentives for new rules, and COVID-19 is, in many ways, new. Thus, states have not reached an agreement in relation to their obligations for the prevention of pandemics.[193] The question of who should pay for the pandemic is more difficult than it seems at first sight.

III
The Normative Background to the Lawsuit Approach

The fact that the Draft Articles on Prevention of Transboundary Harm define "harm" as "harm"[194] should not be quickly mistaken for poor craft, but rather as reflecting a fundamental condition of law more generally. It is not by chance that the lawsuit approach keeps running into a void when it tries to work out fundamental issues of harm and causation. The sweeping indeterminacy of these concepts pervades many areas of law.[195]

A general norm that prevents people, or countries, from causing harm to each other cannot be more than a formal rule, impracticable without a substantive account of what counts as a harm and what counts as causing it. Developing such an account requires more than conceptual or doctrinal analysis. Establishing what is harm (or, in other words, what constitutes an externality) depends on "an analyti-

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the international liberal order). We thank Francisco-José Quintana for pointing this out to us.

192 *See supra* note 14 and accompanying text.

193 This does not mean that international lawyers are unable to answer the question of who should pay for the pandemic. What it does mean, however, is that whoever attempts to give such an answer will need to articulate a normative argument that fills these voids, as we argue in the following sections. This is uncontroversial for nonpositivist approaches to legal interpretation, which consider normative evaluations to be part and parcel of legal reasoning. *See* Ronald Dworkin, Law's Empire (1986); Anne Peters, *Realizing Utopia as a Scholarly Endeavour*, 24 Eur. J. Int'l L. 533 (2013) (addressing the issue as it relates to international law). But it is also true for positivist approaches, which acknowledge that there may be *lacunae* in the law and that such voids are to be filled with bounded discretion by the officer in charge of the interpretation. *See* H.L.A. Hart, The Concept of Law 272–73 (2d ed. 1994) (describing the unavoidable nature of judicial discretion); Hans Kelsen, Pure Theory of Law 349 (Max Knight trans., 2d ed. 1970) (arguing that "determination can never be complete" and that, therefore, "[t]here must always be more or less room for discretion"). We thank Martins Paparinskis for pressing us on this point.

194 *See supra* note 171 and accompanying text.

195 For examples of how the concept of "harm" is undetermined in other branches of law other than international law, *see infra* Section III.A.

cally prior account of what each of us owes one another."[196] There is no raw concept of harm upon which the law later builds. The grief of a parent who is estranged from her child is legally cognizable "harm" if the child was criminally abducted but becomes irrelevant if she is legally imprisoned. Even in its crudest forms, "suffering in law is normative all the way down."[197]

Needless to say, this problem haunts international law as well. Let us come back to Mattias Kumm's account of "externalities" as the framework structuring the lawsuit approach. Kumm carefully distinguishes externalities that raise "justice concerns"[198] from those that do not.[199] At the same time, he does not consider the failure to provide for the creation of a common good as an externality per se[200]—unless there is an obligation to do so.[201] Kumm sets out to provide a justification for existing international law but is instead forced to rely on existing legal understandings to distinguish externalities that are permissible from those that are not.[202] Without incorporating an independent substantive judgment, even a sophisticated reconstruction of the lawsuit approach will fail in providing a ready-made distinction of what should count as harm to be repaired and what belongs to chaos or fate. In what follows, we analyze the normative complexities that will pervade any legal analysis of (1) "harm" and (2) "causation."

A. Harm is Normative

The lawsuit approach relies on the no-harm principle in international law: States are sovereign and have a "right to be left alone"[203] insofar as they do not impose externalities on other states—that is,

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196 Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 McGILL L.J. 91, 96 (1995).

197 Linda Ross Meyer, *Suffering the Loss of Suffering: How Law Shapes and Occludes Pain*, *in* KNOWING THE SUFFERING OF OTHERS: LEGAL PERSPECTIVES ON PAIN AND ITS MEANINGS 16 (Austin Sarat ed., 2014).

198 Kumm, *The Right to Be Left Alone*, *supra* note 6, at 251 (listing "states implementing national policies, burdening outsiders with harms, and threatening harm or risks," such as imperialist foreign policy or downstream pollution).

199 *Id.* at 253 ("A wide range of externalities, however, do not [raise justice concerns]. Outsiders have no claim of justice against a state's political community that fails to take into account their well-being when making a decision that has external effects.").

200 *Id.* at 254 ("There is no legitimate justice claim against one political community for failing to realize economic benefits for another political community.").

201 *Id.* at 251 ("Justice concerns are not merely raised by negative externalities of state action, but also by omissions that result in the failure to realize positive externalities when the state has a responsibility to act.").

202 This critique is advanced by Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 INT'L J. CONST. L. 906, 910–12 (2016).

203 Kumm, *The Right to Be Left Alone*, *supra* note 6, at 239.

unless they harm those other states.[204] The idea of "harm" is primordial in these accounts.[205] However, identifying harm is not as simple as it might look at first sight. Any theory that pertains to limiting the action of an agent based on the prohibition of inflicting "harm" on another must rely on a substantive notion of harm that it cannot itself provide.

We can find the most stylized version of this discussion in the attempt by some liberal philosophers, following John Stuart Mill, to use the harm principle to define the limits of criminal law—that is, to limit state power by preventing the state from forbidding conduct that does not harm anyone else. Most famously, for Joel Feinberg, harm and offense to others "exhaust the class of good reasons for criminal prohibitions."[206] Feinberg readily acknowledges that the concept of harm "must be made sufficiently precise" or it "may be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others for better and worse to *some* degree."[207]

It is not only, however, a matter of degree.[208] Feinberg himself incorporates normative elements into his concept of harm when he ends up defining it as "a wrongfully set-back interest."[209] Commenting on this definition, Judith Jarvis Thomson observes that, therefore, a setback of interests constitutes harm only after "incorporat[ing] moral considerations": whether the act causing the setback is "indefensible (that is, neither justified nor excused) and a violation of a right" of someone else.[210] The moral theory required for knowing what is

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[204] In his externality-based framework, Kumm conceptualizes "externalities" as a function of "harm" or "risks." *Id.* at 251. In economic analysis of law, externalities are also defined similarly to "harm" and are prey to the same conceptual problems. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 59 (1997) ("[T]he concept of externalities is one of the least satisfactory concepts in welfare economics, and the concept of harm to others is one of the least satisfactory and most indeterminate concepts in liberal political theory.").

[205] *See supra* Part I.

[206] JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 15, 26 (1984).

[207] *Id.* at 12.

[208] International law has focused on this aspect of harm, seemingly assuming universal agreement on what constitutes harm and allowing for marginal disputes as to the threshold above which harm is to be attended by the international legal system. *See, e.g.*, JULIO BARBOZA, THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW 10–11 (2011) (acknowledging the difficulties in setting a threshold for harm that is legally cognizable); *see also supra* notes 168–71 and accompanying text (surveying the discussion on what "significant" harm means in international law).

[209] FEINBERG, *supra* note 206, at 105 (emphasis omitted).

[210] Judith Jarvis Thomson, *Feinberg on Harm, Offense, and the Criminal Law: A Review Essay*, 15 PHIL. & PUB. AFFS. 381, 383 (reviewing FEINBERG, *supra* note 206).

indefensible, excusable, or justified, or to know what a person's rights are, is not provided by the harm principle itself.[211] In a similar way, most of the authors dealing with the problem of harm agree that some sort of moralization of the conception of harm is necessary if it is to be fruitful.[212] More straightforwardly, legal philosophers from continental European traditions are less troubled in recognizing that without a substantive account of value, the harm principle is circular.[213]

Saying that we should not "harm" others, therefore, does not tell us which actions are to be counted as "harming" unless we have a prior normative scheme telling us which goods we deem valuable for protection. This conceptual problem permeates many branches of law that work with one or another version of harm. *Alterum non laedere*, Latin for "do not harm others," is a principle of private law everywhere.[214] Economic-oriented analyses of law similarly propose that the state primarily regulates "externalities" that agents impose on each other as they conduct their private activities.[215] More generally,

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[211] *See id.* at 384 ("Which of the acts that set another person's interests back are indefensible? Which are violations of his rights? . . . Feinberg does not provide us with a moral theory which would answer these questions, nor does he think he needs to.").

[212] Similarly, Joseph Raz argues that "[s]ince 'causing harm' entails by its very meaning that the action is prima facie wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded," without which it would "lack[] specific concrete content and lead[] to no policy conclusions." JOSEPH RAZ, THE MORALITY OF FREEDOM 414 (1986). It is fairly discussed whether Mill's own conception of harm was a moralized one. John Gray, for example, asserts that "[n]owhere in Mill's writings do we detect any awareness that, as it is employed in ordinary thought and practice, the concept of harm embodies substantive moral judgements . . . ." JOHN GRAY, LIBERALISM 53 (1986); *see also* TREBILCOCK, *supra* note 204, at 61 ("Mill seems to have been largely oblivious to the unavoidably moralized nature of the harm principle . . . ."). *But see* Nils Holtug, *The Harm Principle*, 5 ETHICAL THEORY & MORAL PRAC. 357, 377 n.37 (2002) (stating that "[i]t is (now) common to interpret Mill as introducing a moral component in his concept of harm" and citing philosophers who have made that assertion). For a review of the strategies that have been deployed by liberal philosophers to "moralize" the harm principle, see DAVID O. BRINK, MILL'S PROGRESSIVE PRINCIPLES 187–89 (2013).

[213] *See, e.g.*, ALF ROSS, ON GUILT, RESPONSIBILITY AND PUNISHMENT 53 (1975) ("[The harm principle] was just another of those familiar idle formulae which implicitly presuppose what they set out to justify.").

[214] For a history of this principle, see Francesco Parisi, Alterum Non Laedere*: An Intellectual History of Civil Liability*, 39 AM. J. JURIS. 317 (1994). For an analysis of the context-dependent nature of torts, see Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1348–49 (2008) ("[T]he typical definition [of tort] can be characterized as content-free tautology. . . . In short, a tort is what a court says it is.").

[215] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 254 (1992) ("[T]he most dramatic economic function of the common law is to correct externalities . . . ."); *see also* GORDON TULLOCK, PUBLIC GOODS, REDISTRIBUTION AND RENT SEEKING 8 (2005) ("There is no way of deciding whether [throwing a party late at night in an apartment building] is an externality except [for] the prevailing customs or the legal situation.").

domestic legal systems usually limit access to courts to those claiming an injury.[216]

International law, as we saw, possesses its own "no harm principle." However, even though the principle can be dated back to a venerable lineage, the doctrinal need for harm as an autonomous source of legal obligation is relatively recent. Although harm was always there in the theoretical background, the development of a general theory of harm was constantly superseded by particularistic analyses of the different areas of law. To take the most obvious example, think of armed conflict: It goes unstated that the reason why we generally prohibit direct military action against a non-belligerent state is that military hostility is harmful to the country victim to it. We do not need, however, to rely on a general concept of harm to deal with military action. Because the damages caused by armed hostilities are as old as interaction between states, a body of law pertaining to regulating them developed together with history.[217] The same can be said of other areas of international law, such as law of the sea,[218] or concrete issues like downstream pollution.[219]

It is not by chance, then, that the theoretical elaboration of harm in international law as a general concept gained traction in recent decades. As the transboundary effect of domestic policies in a globalized world became harder to discipline in pre-established and discrete legal categories, the need became evident for a general notion of harm that could govern unforeseen cases of state responsibility—such as a pandemic.[220]

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[216] Cass Sunstein has shown how the attempt by the Supreme Court to establish a standard of injury-in-fact for the purposes of standing to sue independent of normative judgments is doomed to fail. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–89 (1992) ("In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden . . . .").

[217] For a comprehensive review of the evolution of the laws of war, see STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005).

[218] Take, for instance, the right of innocent passage. After centuries of practice, states acknowledged that there was no harm in allowing ships to pass through a coastal state's territorial sea provided the passage complied with a number of conditions. For a review of these norms, see Kari Hakapää, *Innocent Passage*, MAX PLANCK ENCYCLOPEDIAS INT'L L. (May 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1178?prd=MPIL.

[219] *See generally* Volker Röben, *Air Pollution, Transboundary Aspects*, MAX PLANCK ENCYCLOPEDIAS INT'L L. (July 2015), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1560?prd=EPIL (explaining the content of harm in the context of the law of transboundary air pollution).

[220] For a discussion of the importance of the no-harm principle for international law to be able to deal with novel transboundary problems such as terrorism, corporate social responsibility, refugees, internet torts, and drug trafficking, see TRANSBOUNDARY HARM

The relative novelty of the notion of "harm" in international law exposes its need for a normative ground on which to rely in unprecedented cases. The environment is perhaps an example in point—in fact, the generic notion of transboundary harm was modeled after the specific concept of transboundary environmental harm, rather than the other way around.[221] Decades ago, Martti Koskenniemi noted that "what the law protects is not the nature but what is refected [sic] of nature in the eye of the sovereign beholder."[222] This "reflection" is no more than the normative judgments that make nature valuable at all. Nature, after all, is a social creation,[223] and what counts as harming it depends on normative judgments of what we deem an "unharmed" nature to be.[224] Pollution, notably, is such a flexible concept that it could be as narrow as to exclude carbon dioxide[225] or as broad as to encompass pornography.[226]

Someone may object that COVID-19 is quite literally a matter of life or death, not a gray case subject to these scholarly elucubrations. Until very recently, however, it was denied that the generation of a pandemic could constitute harm for international law purposes at all. For decades, David Fidler, a leading scholar in international health law, could write that the effects of pandemics were not encompassed by the legal regime of transboundary harm, since he deemed this notion confined to international environmental law.[227] By 2020, however, most international lawyers agree that a pandemic can be encompassed by the general regime of transboundary harm.[228] Yet we might still disagree about which of the consequences of COVID-19 are to be

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IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION, *supra* note 49, at 225–95.

221 *See generally id.* (discussing the reconstruction of the notion of transboundary harm and its application in different fields on the basis of the seminal *Trail Smelter* arbitration).

222 Koskenniemi, *supra* note 118, at 75.

223 *See generally* NEIL EVERNDEN, THE SOCIAL CREATION OF NATURE (1992) (discussing the dynamic and society-dependent conceptions of nature over time).

224 *See* Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505, 1507 (2011) ("Descriptions of environmental harm thereby incorporate implicit normative judgments in the form of unspecified and undefended baselines.").

225 *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (showing a 5-3 split over whether carbon dioxide qualifies as an "air pollutant" under federal law for regulatory purposes).

226 *See* John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939, 940–41 (2011) (arguing that pornography can be understood and regulated "as a problem of pollution").

227 *See, e.g.*, FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 110–12.

228 Most of the international lawyers that came forward analyzing China's responsibility for the COVID-19 pandemic did not dispute the applicability of the no-harm principle. Rather, objections were directed at issues related to evidence, jurisdiction, or causation. *See supra* Section II.B.

taken into account, how deaths and health complications should be accounted for, or whether the prejudicial economic effects of lockdowns are to be counted as a direct effect of the pandemic. All these questions and many more depend on non-trivial normative assessments. They reveal, incidentally, that the question of what counts as harm is inextricably intertwined with the question of what counts as causing it.

B. Causation is Normative

We need not delve into the philosophical details of causation to grasp that selecting an actual "cause" from a "mere condition" of an event entails non-trivial normative judgments.[229] We tend to treat those actions that interfere with the normal course of events as "causes."[230] When asked for the "cause" of a fire in a house, one is expected to say something like, "The kids forgot to turn the stove off"; it would be very unusual to say that the "cause" of the fire was the presence of oxygen in the air. What constitutes a "cause," therefore, depends to a large extent on what we consider to be normal affairs. Activists for political and social change usually challenge these understandings of normalcy, and their claims can be translated to the language of causation. Feminism[231] and socialism,[232] very clearly, encourage us to see traceable causal links waiting to be interrupted and reversed, rather than the raw, inevitable coexistence of events.

This normativity of causation becomes explicit, almost manufactured, when we turn to law. It is widely argued that causation in law

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[229] Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1014 (1988) (offering an aged but relevant discussion of the main concepts in causation in the law of torts).

[230] *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 29 (2d ed. 1985) ("The notion, that a cause is essentially something which interferes with or intervenes in the course of events which would normally take place, is central to the common-sense concept of cause . . . .").

[231] Perhaps the most classical example of the role of causation in understanding gender relations is the debate about the role of pornography in fostering violence against women. Catharine MacKinnon explicitly addresses the matter: "Harm is caused to one individual woman rather than another essentially the way one number rather than another is caused in roulette. . . . Its causality is essentially collective and totalistic and contextual. To reassert atomistic linear causality as a *sine qua non* of injury . . . [ignores the] nature of this . . . harm." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 156–57 (1987).

[232] In a well-known passage, Friedrich Engels denounces the narrowness of the liberal notion of causation: "Murder has also been committed if society places hundreds of workers in such a position that they inevitably come to premature and unnatural ends. Their death is as violent as if they had been stabbed or shot." FRIEDRICH ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND 108 (W.O. Henderson & W.H. Chaloner eds. and trans., 1958).

"is not logic. It is practical politics."[233] What events are deemed to be the cause of others can be thought of as a policy choice driven by political decisions, cultural dispositions, and ideological motivations.[234] The law of torts provides abundant examples of how, in different systems, the rearrangement of relevant causality ascribes liability to different events. Morton Horwitz, for example, notes that at the end of the nineteenth century, different views on causation in American law stemmed from different ideological standpoints. In 1874, commenting on John Stuart Mill's account of causation, legal scholar Francis Wharton noted that a notion of causation according to which "the cause of an event is the sum of all its antecedents" inevitably leads to communism.[235] If everything could be deemed the cause of everything, Wharton noted, anyone, and particularly those with deep pockets, could be made to pay for any bad thing that happened.[236]

As Ripstein and Coleman remind us, "causation is everywhere,"[237] and therefore the selection of relevant causes is neither natural nor innocent. Some activities that are indisputably the cause of other events are not seen as such for legal purposes. To cite a usual example, whether "the loss you suffer when my business succeeds in taking clients away from you is yours or mine does not depend on whether my business activity is the cause of your loss; instead, it depends on whether I owe you a duty not to interfere with your business interests . . . ."[238] The rise of a successful competitor in the marketplace might very well be the "cause" of my bankruptcy, but ordinarily she will not be charged with repairing the loss she caused, unless, perhaps, she did so in violation of the applicable legal framework.

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233 Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

234 *See* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 106 (1975) ("*[I]n law* the term 'cause' is used in different guises but always to identify those pressure points that are most amenable to the social goals we wish to accomplish . . . .").

235 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 54 (1992) (quoting FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 5, 10 (1874)).

236 *See id.* at 55 ("'Here is a capitalist among these antecedents; he shall be forced to pay.' The capitalist, therefore, becomes liable for all disasters of which he is in any sense the condition . . . .") (quoting WHARTON, *supra* note 235, at 10–11).

237 Coleman & Ripstein, *supra* note 196, at 103.

238 *Id.* at 96.

International law is not exempt from this problem, although the role of causation remains relatively underexplored in the discipline.[239] A general theory of causation in international law can only go as far as a general theory of substantive obligation. Assessments of the "causes" of the COVID-19 pandemic, for example, have dwelled on a possibly problematic relationship with nature or the failure to take sufficient containment measures.[240] In legal terms, however, these could be said to be the "cause" of the pandemic only against the background of a specific obligation to act in a certain manner. Moreover, the conditions that allowed the pandemic to spread globally so quickly are innumerable. They include, notably, the proliferation of international trade and travel: The virus spread thanks to people travelling from one place to another in planes, ships, and trucks. Yet the international community seems to consider these activities valuable enough to obviate their role as "causes" of the pandemic. No one blames airlines for COVID-19, just like no one blames oxygen for house fires. Quite on the contrary, international health law has, consistently throughout its history, sought to minimize the risk of infectious diseases while making sure that the affectation of trade and travel was as minimal as possible.[241] Causation, also in the case of pandemics, involves a great deal of normative judgment.

IV
Filling the Normative Voids

The essential problem here is irreducible. To be taken seriously, a lawsuit must provide a reasonable assessment of whether, for example, China *caused harm* (and how much of it) to, for example, the United States. This is not a merely factual question, nor a strictly doctrinal one, but one that relies on previous, deep, normative assessments that putatively have to be shared by both countries. This would be easy if the IHR had included a clear statement of the preventive obligations of each state. Yet as we saw, they did not. Thus, absent specific agreement, in order to bring about compensation claims, even the most neutral adjudicator cannot avoid taking substantive stands

[239] *See supra* Section II.B.1. There are, however, certain regimes within the discipline that have explored the matter further, such as, for instance, international investment law. *See, e.g.*, Patrick W. Pearsall & J. Benton Heath, *Causation and Injury in Investor-State Arbitration*, *in* Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration 83, 85 (Christina L. Beharry ed., 2018) (reviewing analyses of causation by investment arbitrators and suggesting, nevertheless, that there is still significant confusion on the question of causation in the field).

[240] *See supra* Sections II.B.1, II.B.2.

[241] *See supra* Part I.

about what is internationally valuable in order to merit reparation—and how much of it.[242] This seems like a Herculean task, but it is actually part and parcel of an adjudicator's job. There is a significant difference, however, between how domestic and international judges approach this job. We begin (1) by considering the more familiar perspective of a domestic legal system, and then (2) by moving on to the challenges faced by international adjudicators who have to fill these normative voids.

A. Finding Value in a Domestic Legal System

In domestic settings, the complex normative decisions that underlie compensation claims are likely to go unnoticed—like the water in which we swim.[243] The normative assumptions that underlie legal determination of harm, causation, and reparation are in a way settled by communitarian norms in a dialectic relationship with legal authorities.[244] When adjudicating a case, judges both inform and draw upon social norms and expectations.[245] People, at the same time, adjust their behavior to official utterings, or react to them and attempt to modify them.[246]

An invasion of privacy, for instance, is tortious insofar as it is "highly offensive to a reasonable person."[247] When deciding whether this is the case, a judge is doing no less than enforcing "rules of civility" in her community.[248] Whether someone has been "harmed,"

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[242] The lawsuit approach, therefore, necessitates something like a "public index of goods," which is impossible to obtain without "engaging in normative argument about the values of various activities to us and the ways in which they matter in people's lives." Coleman & Ripstein, *supra* note 196, at 128.

[243] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729 (1973) ("Evaluative terms like . . . harmful are easily used because people have remarkably consistent perceptions of normal conditions and thus can agree in characterizing deviations from normalcy.").

[244] This of course does not mean that communitarian norms fully and peacefully resolve all indeterminations in the law. Our claim is only that cultural norms are frequently used for this purpose—and that this option is not available internationally.

[245] *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 349 (1996) ("[T]he law's responsiveness to shifting social norms has been mediated by the discretionary judgements of courts and juries . . . ").

[246] For the concept of "responsive law," see generally PHILIPPE NONET & PHILIP SELZNICK, LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 73–113 (2d ed. 2001). *See also id.* at 77 ("A responsive institution retains a grasp on what is essential to its integrity while taking account of new forces in its environment. . . . It perceives social pressures as sources of knowledge and opportunities for self-correction." (italicization omitted)).

[247] RESTATEMENT (SECOND) OF TORTS § 652B (Am. L. Inst. 1977).

[248] Robert C. Post, *The Social Foundations of Privacy*, 77 CALIF. L. REV. 957, 966 (1989).

in privacy law, depends on not only our self-conscious collective normative appraisals but also deep-seated cultural understandings of the community.

If the case of privacy is particularly salient, it is not because it is analytically distinct: In general, "what qualifies as harm rests largely on societal norms about acceptable behavior."[249] Comparative studies show how vicissitudes that are taken as wrongful harm in some communities are lamented as karma in others.[250] Even within the West, for instance, the birth of a healthy child after a sterilization procedure provides a cause of action in some places but is unthinkable in others.[251] Within the same community, social valuations shift across time. As a classic sociological study on life insurance policies at the turn of the 20th century shows, children's lives in America went from being economically worthless to being priceless in a few decades' time.[252] The transformation of gender and family relations in the last decades turned forms of suffering previously disattended into legally actionable harms, such as sexual harassment or corporal punishment.[253] Psychologists have reported the expansion of the realm of aspects of the human experience that are considered to be harmful,[254] which has consequences in legal assessments as well.[255]

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249 Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 932.

250 *See* Mauro Bussani & Marta Infantino, *Tort Law and Legal Cultures*, 63 AM. J. COMPAR. L. 77, 92 (2015) ("[E]mpirical studies have shown that, in rural zones of northern Thailand, innocent victims of car accidents generally believe that, if they get injured (even seriously), it was just their time to be injured, and therefore tend to blame their own karma rather than the other driver's negligent behavior." (internal quotation marks omitted)).

251 *See id.* at 93 ("Giving birth to a healthy child because of a doctor's negligence in performing a sterilization procedure . . . may be seen as no injury at all in largely Catholic countries . . . . The same event, however, would be considered to be a harm . . . in non (majoritarian)-Catholic countries . . . .").

252 *See* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 113 (1985) ("The sacralization of children in twentieth-century America introduced fundamental changes in existing standards concerning the value of child life.").

253 *See* Joanne Conaghan, *Law, Harm and Redress: A Feminist Perspective*, 22 LEGAL STUD. 319, 322 (2002) (exploring the idea of harm as a social construct).

254 Nick Haslam, Brodie C. Dakin, Fabian Fabiano, Melanie J. McGrath, Joshua Rhee, Ekaterina Vylomova, Morgan Weaving & Melissa A. Wheeler, *Harm Inflation: Making Sense of Concept Creep*, 31 EUR. REV. SOC. PSYCH. 254, 255–56 (2020) (reviewing the authors' previous work in which they found a "rising sensitivity to harm within at least some Western cultures, such that previously innocuous or unremarked phenomena were increasingly identified as harmful").

255 *See* Cass R. Sunstein, The Power of the Normal 14 (Nov. 26, 2018), https://papers.ssrn.com/abstract=3239204 ("The idea of concept creep has obvious relevance to law. Constitutional terms, such as 'freedom of speech' and 'equal protection of the law,' can undergo both vertical and horizontal expansion."); *see also* Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L.

A similar phenomenon can be described for causation. What is considered to be the "cause" of an event depends not only on the rules of the physical world, but also on cultural assessments. Often, we assess causation following moral judgments: There are motivations that we consider wicked enough as to be charged with loosely related bad consequences.[256]

Similarly, legal systems tend to deem the causal chain broken when a *force majeure*—an unforeseeable and unavoidable event—intervenes. Needless to say, what is expected from people to foresee or avoid depends on culturally informed standards about a diligent person.[257] Courts draw on these understandings to sanction legally imputable causes of events.

The infusion of culture into the legal system is inescapable. One can only imagine a legal system in which damages and causes are tabulated with a precision that prescinds of any subjective assessment: Legal systems in the real world rely on abstract standards such as that of the "reasonable person," which encompasses a hybrid judgment between statistically common behaviors and ideal communal values.[258] Moreover, despite its apparent homogeneity, the standard is itself the locus for a contest over multiple meanings within the community.[259] In the end, the "reasonable person" standard is given content only through the conscious and unconscious social deliberation

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REV. 1313, 1346 (2012) ("[W]hile supposedly objective standards like the harm principle appear to provide a way to overcome sectarian biases in legal decision making, the rhetoric of harm can covertly become a conduit for morally or ideologically motivated agendas.").

256 *See* Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368, 372 (1992) (empirically showing that when an event is the product of multiple forces, "the most blameworthy of a set of causal candidates will be cited as the prepotent cause of an event"). For an experimental application of this concept to legal judgments, see Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 292–300 (2012) (conducting "blame attribution[]" experiments and exploring their implications for "legal situations when character or motive information is most likely to enter the process," such as criminal or antidiscrimination law).

257 *See* Bussani & Infantino, *supra* note 250, at 94 ("Like the perception of injuries, understandings of causation and force majeure depend upon people's considerations for their and others' behavior, upon their apprehension of the dividing line between natural and social phenomena, and upon their visions of justice and of the society they live in.").

258 For a review of such systems, see Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293 (2018).

259 An illustrative example is provided by the advocacy by feminist lawyers in the 1970s of the "reasonable woman" standard to replace the "reasonable man" standard in workplace harassment suits. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1215–20 (1990) (discussing Judge Keith's dissent in Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986)).

that leads up to "the social norms of the particular community."[260] In this way, "cultural norms truly become the law."[261] Or, as one scholar further generalizes, "[t]ort law is one mechanism by which communities survey their membership for consensus on emerging issues and crystallize those views by announcing a verdict."[262]

B. The Building of International Social Value

Returning to the pandemic, it should be apparent by now that a compensation claim against China, or other states, for their role in the pandemic would entail a series of non-trivial normative judgments. For instance, was China's regulation of wildlife strict enough as to avoid *unnecessary* risks of generating zoonotic diseases? Did China take *enough* measures to prevent the epidemic from spreading outside its territory? Had China notified the WHO earlier about the sanitary situation, would it be *reasonable* to expect countries to have taken measures different than those they actually took? Assuming that human loss can be repaired, how much is a human life *worth* for the purposes of international reparation? Assuming economic loss is to be compensated, what degree of economic sacrifice was *reasonable* to incur in order to save lives, and what degree of it was unwarranted by the circumstances? In the face of uncertainty, what costly precautions were and were not *reasonable* for states to take?[263]

All these questions are paralyzingly complex, not only for the diabolic evidentiary hurdles they entail, but also because of the seemingly intractable normative questions they ask. Yet if a compensation lawsuit is going to be considered they have to be addressed as best as possible. Any answer will ultimately rely on the normative operators that were italicized in the previous paragraph. As one delves into them, however, the need to fill them runs into a void. In a domestic setting we would have asked how a reasonable member of the community would have acted, what she would have expected, or how much she would have valued the social goods that were lost. Social

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[260] Paul T. Hayden, *Cultural Norms as Law: Tort Law's "Reasonable Person" Standard of Care*, 15 J. AM. CULTURE 45, 53 (1992).

[261] *Id.* at 45.

[262] Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1364 (2017).

[263] These questions track the actual claims made by lawyers and politicians discussing China's international responsibility. *See supra* Parts I, II. Similar questions were posed during the SARS pandemic to show the complexity of state responsibility in such context. *See* FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE, *supra* note 16, at 111–12 ("Even if a principle of international law existed requiring all states to address sources of global or transboundary infectious disease harm within their territories, what would constitute a breach of this obligation? Would China's efforts . . . represent a breach, even though it did take some steps (albeit in secret) . . . ?").

norms would have provided us with the interpersonal measure of value that we needed to settle the case, and legal institutions would have tested and challenged those norms.

In a transnational claim, by contrast, there is no sufficient global community that can sustain the kind of global social norms needed to fill these voids. One will search in vain for a "reasonable person"; there is no way to know *whose reasonableness* should count. We, as a global community, simply have not had that conversation yet. Drawing on the reasonableness peculiar to any particular culture would be an act of domination from one onto the other. But even if we were willing to pay that price, arguably, no culture has well-developed social norms on how much effort to put into not harming outsiders (or what precautions to take to avoid being harmed by them).

Lacking the thick societal understandings that underlie domestic legal systems, international law does not seem to offer a complete guide. Take the ILC Draft Articles on Prevention of Transboundary Harm: States should "achieve an equitable balance of interests" between the state host of the hazardous activity and those potentially affected.[264] Those interests include the "degree of risk of significant transboundary harm" and the "importance of the activity, taking into account its overall advantages . . . for the State of origin in relation to the potential harm for the State likely to be affected."[265] This "balance" cannot be performed through abstract universalization or mental experiments of putting ourselves in the shoes of others.[266] The relative importance of, say, water pollution and job creation are bound to be very different in countries at different stages of development or with different conceptions of nature.[267] Whose balance should count in order to establish an "acceptable" degree of risk? There is no Archimedean fulcrum from which to make these calculations. Any answer we provide will be inevitably infused with our own idiosyncratic understandings on what is worth protecting.

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[264] *Draft Articles on Transboundary Harm* 2001, *supra* note 136.

[265] *Id.* at 161.

[266] Alexander Somek, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUR. L.J. 375, 379 (2010) ("Universalisation can only tell us what a country ought not do when we already know what . . . is objectively good regardless of what countries may in fact prefer.").

[267] To some extent, attempts to enshrine "differential treatment" in climate change law were an example of institutional acknowledgement of this kind of imbalance. *See* Lavanya Rajamani, *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, 88 INT'L AFFS. 605, 605 (2012) (describing some consequences of a "world of unequal states . . . [that] differ widely both in their contributions to global environmental degradation and in their capacities to respond to it").

In domestic institutional settings, these balances are obtained thanks to two kinds of processes, usually working in parallel. There can be collective deliberation on who should bear the costs of mischief and misfortune, i.e., legislation on torts or criminal law. Or there can be a collective practice of inter-personal claims which—through time—develops a series of social understandings on the matter, or precedent. As it is evident, neither of these processes occur in a vacuum; rather, institutions matter. Collective deliberation needs to take place in a law-making body for its decisions to actually shape social practice. And inter-personal claims need to be resolved by a system of courts for precedent to be relevant. But these institutions do not exist in a vacuum either: They are themselves grounded in social norms and responsive to social demands. When people live interdependent lives, as in Benvenisti's apartment building analogy,[268] they need to resolve how to deal with common problems, and so they tend to establish appropriate institutions to develop those understandings. In a sense, community creates jurisdiction, and jurisdiction creates community.[269]

In international law, the existing institutions seem to be incapable of fostering the kind of understandings required to fill the normative voids of these broad principles.[270] The ILC does not have sufficient legitimacy to make decisions on these complex issues,[271] and international tribunals have restrictive jurisdictional rules which prevent them from developing precedent in the matter.[272] Former President Trump's claims, if taken seriously, can be seen as requesting international institutions to develop structures and norms to fill these voids.[273] What the pandemic shows, then, is that a transnational lan-

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[268] Benvenisti, *supra* note 14, at 295.

[269] *See* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999) ("Territorial jurisdiction produces political and social identities.").

[270] For analyses of the challenges of democratic decisionmaking in international law, see, for example, Nahuel Maisley, Cohen v. Cohen*: Why a Human Right to (Domestic and Global) Democracy Derives from the Right to Self-Determination*, 4 REVISTO LATINOAMERICANA DE FILOSOFÍA POLÍTICA 1, 28–29 (2015) (arguing that current interstate decisionmaking is opaque and isolated from constituencies).

[271] *See, e.g.*, Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L & COMPAR. L.Q. 535, 538 (2014) ("This creates a dilemma for members of the legal profession committed to rule of law values—while non-legislative codifications contribute to enhancing the clarity, consistency and congruence of international law, the fact that they may portray novel rules as reflecting existing law raises legality concerns . . . .").

[272] *See* Tomuschat, *supra* note 64, ¶ 42 (explaining that international tribunals are primarily only empowered to make interim decisions, whose binding effect is uncertain).

[273] Our claim here is simply that institutions are needed—we are agnostic about which institutions are better. *See, e.g.*, Nahuel Maisley, *The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making*, 28 EUR.

guage allowing us to talk about the costs of our life in common is less of a utopian project than a practical necessity.[274] It is part of the bumpy road from the world of estates to the world of high-rise apartment buildings.

We come here to a full circle. The lawsuit approach was attractive to unilateralists because of its promise of a hollow system of justice, allowing only for minimal, discrete interventions in sovereignty that did not put countries in the need of extensively discussing their lives in common. On the road to make a workable compensation claim, however, we need to rely on mutually shared substantive accounts of what is valuable in life—what is worth preserving and what is worth repairing. In the absence of a ready-made, thick global culture to provide us with these valuations, we need to talk our way through it. The lawsuit approach, in the end, cannot do without a roundtable. Law, even in the agonic form of compensation claims, is instrumental to fostering a conversation that allows for finding a common ground as to what we all value as humans.[275]

J. INT'L L. 89 (2017) (arguing for the recognition of a human right to participate in international lawmaking and for the subsequent establishment of the appropriate institutions to implement it); Nahuel Maisley, El derecho de la sociedad civil a participar en la creación del derecho internacional 345–48 (Nov. 14, 2018) (doctoral thesis, Universidad de Buenos Aires) (on file with Repositorio Institucional CONICET Digital) (arguing for a global democratic order that is constitutionalist in its principles and pluralist in its institutions).

274 This idea builds on a Kantian intuition about the nature of our political relations, which are frequently based on necessity rather than will: "[W]hen you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition . . . ." IMMANUEL KANT, THE METAPHYSICS OF MORALS 93 (Lara Denis ed., Mary Gregor trans., Cambridge Univ. Press rev. ed. 2017). If this is true, "if we are, in Kant's words, 'unavoidably side by side' with one another (whatever the historical reasons for our current proximity), then we have no choice but to attempt to come to terms with one another in some sort of common framework of law." Jeremy Waldron, *What Is Cosmopolitan?*, 8 J. POL. PHIL. 227, 240 (2000).

275 The idea that contestation over a norm's meaning has the effect of strengthening the legitimacy of the norm has been explored in American constitutional law. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (offering a model of "democratic constitutionalism" according to which public contestation over the meaning of the American Constitution can strengthen the public's fidelity to it). International relations scholars have also explored the idea that contestation over a norm's application has the effect of strengthening the norm. *See* Nicole Deitelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms*, 22 INT'L STUD. REV. 51, 58 (2020) ("[A]ctors, by engaging in applicatory contestation, support a norm's general legitimacy and do not reject the idea that they are bound by a specific norm.").

V
From Corrective Justice to Distributive Justice

So far, we hope to have shown that "wip[ing] out"[276] the effects of the pandemic through a compensatory lawsuit such as the one envisaged by former President Trump and others entails a series of prerequisites that might not be apparent at first sight. First, transnational corrective justice necessitates a "public index of goods,"[277] transnationally shared, that allows us to know which vicissitudes we humans consider as costs and which activities we consider worth risking them. Second, absent a global communitarian culture providing ready-made answers to those seemingly intractable questions, we need to construct acceptable shared understandings through dense interactions, either through global deliberation or through a continuing practice of intersubjective claims. Third, these interactions seem to necessitate some (currently non-existent) institutional settings.

But there is more. If our argument is right, the normative agreements needed for corrective justice have necessary implications for the discussion of distributive justice. In fact, both types of justice necessitate each other. Distributive justice is impossible without a system that somehow protects initial allocations.[278] Furthermore, the very value of those initial shares is partly determined by the level and type of corrective protection they enjoy.[279]

There is, however, a deeper conceptual link between the two types of justice. Corrective justice depends on prior rules that determine which risks and costs are to be borne by whom. These rules are essentially distributive.[280] In adjudicating that a person is responsible for harming another one, the judge is saying that the former went beyond her sphere of legitimate action, and whatever suffering the latter underwent is for the tortfeasor to bear. Symmetrically, if the defendant is found not liable for the damage, it becomes for the plaintiff to bear just as if it was a brute fact of nature, as if struck by lightning. Allocating the costs of these adversities is a deeply political decision, akin to that made by distributive justice schemes. After all, a

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[276] Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

[277] Coleman & Ripstein, *supra* note 196, at 128.

[278] Corrective justice, Coleman and Ripstein tell us, "sustain[s] the prevailing distribution of resources by annulling the effects of certain changes in it." *Id.* at 93.

[279] *Id.*

[280] *See* Peter Cane, *Distributive Justice and Tort Law*, 2001 N.Z. L. Rev. 401, 412 ("[M]aking rules that define the grounds and bounds of tort liability is a distributive task, while applying such rules in individual cases is a corrective task.").

community might decide that those hit by lightning (or run over by cars[281]) are to be compensated by the state, just like those born with disabilities or in unprivileged households. Note that this statement does not take a stand towards any *particular* scheme of distributive justice, nor about the precise links between distributive and corrective justice.

Both corrective and distributive justice, in the words of Jules Coleman and Arthur Ripstein, deal with fundamentally the same question: how to make people bear the costs of their own activities and not to impose them on others? In other words, how ought society allocate the costs arising from mischief and misfortune?[282] Misfortune can arise from fortuitous events or existential luck—from the lack of natural resources within one's territory, or from the befall of a pandemic upon one's population. Who is to bear the costs of these adversities is a complex question implying both ways of reasoning about justice; leaving one aside is reductive and confusing.

The kind of argument brandished by Trump, if taken seriously, presupposes the existence of a global, shared understanding on how to deal with mischief and misfortune: how much risk people and communities are allowed to take (and which activities are worth the risk), how valuable human lives are, and what acts and omissions people and states can demand from one another in this regard. All of these normative judgments have necessary implications in terms of distributive justice. Whatever standards are agreed upon for the prevention of zoonotic diseases, they will have costs that will be borne unevenly across international communities. Countries whose economies depend more preeminently on their relationship with nature will have a harder time making their meat production processes safer[283] or effectively halting deforestation.[284] Communities who rely on wildlife for

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281 New Zealand, for example, has famously adopted a government-run compensation fund for accidents that replaces tort law in many occasions. *What We Do*, ACCIDENT COMPENSATION CORP., https://www.acc.co.nz/about-us/who-we-are/what-we-do (last visited Jan. 9, 2021) ("Everyone in New Zealand is covered by ACC's no-fault scheme if they're injured in an accident.").

282 Coleman & Ripstein, *supra* note 196, at 94.

283 *Cf.* Andrew P. Dobson, Stuart L. Pimm, Lee Hannah, Les Kaufman, Jorge A. Ahumada, Amy W. Ando, Aaron Bernstein, Jonah Busch, Peter Daszak, Jens Engelmann, Margaret F. Kinnaird, Binbin V. Li, Ted Loch-Temzelides, Thomas Lovejoy, Katarzyna Nowak, Patrick R. Roehrdanz & Mariana M. Vale, *Ecology and Economics for Pandemic Prevention*, 369 SCIENCE 379, 381 (2020) ("[P]roposals dealing with livestock's roles in pandemics are among the most advanced and ambitious of those being seriously considered.").

284 *Cf. id.* at 379 (claiming that deforestation is a key factor in generating virus transmission from displaced forms of wildlife to humans and livestock and estimating that "[a]t an annual cost of $9.6 billion, direct forest-protection payments to outcompete

consumption or commerce, out of culture or of necessity,[285] will see their way of life threatened if they are required to take some forms of severe zoonosis prevention measures. If American lives are valuable enough to impose these costs on poorer countries, it will only be because the international community as a whole finds human lives to be worth those costs. And if it does, why cannot people in developing countries demand similar sacrifices from American taxpayers in the form of humanitarian aid?[286]

The lawsuit approach, *malgré soi*, invites these conversations. If the bonds that link people and states to each other are sufficient to establish a community for the purpose of corrective justice, with its corresponding shared valuation of social goods and activities, those links and valuations are also sufficient to establish a community for the purpose of (some degree of) distributive justice. By this, we do not mean to reach a self-standing conclusion on the long-debated issue of whether (and which kind of) distributive justice is applicable in the global sphere.[287] We are only claiming that the opening of the discussion on corrective justice—which Trump and others are demanding—necessarily implies the opening of a discussion on distributive justice as well.

Conclusion

At first sight, former President Trump's lawsuit rhetoric could be attributed to the vindictive intuitions of a diehard unilateralist. In fact, some from the left have criticized his approach as a smokescreen distracting us from the building of a more just global order.[288] To locate the lawsuit approach within the broader international discussion, how-

deforestation economically could achieve a 40% reduction in areas at highest risk for virus spillover").

[285] *See id.* at 379 (noting that wildlife markets are a huge risk to global health and noting that "[t]he United States is one of the biggest global importers of wildlife, including for the massive exotic pet industry").

[286] For arguments in this direction, see Peter Singer, One World 13 (2002) ("[H]ow well we come through the era of globalization (perhaps whether we come through it at all) will depend on how we respond ethically to the idea that we live in one world."); Charles R. Beitz, *Justice and International Relations*, 4 Phil. & Pub. Affs. 360 (1975) (arguing for substantive obligations of international distributive justice).

[287] *See* Thomas Nagel, *The Problem of Global Justice*, 33 Phil. & Pub. Affs. 113, 113 (2005) ("We do not live in a just world. . . . But it is much less clear what, if anything, justice on a world scale might mean . . . ."). For a review of critiques, see Linarelli et al., *supra* note 74, at 38–77.

[288] *See, e.g.*, Bowcott & Giuffrida, *supra* note 16 (statements of Luis Eslava); *see also* Quintana & Uriburu, *supra* note 20, at 690 ("[T]he professionally oriented approach to legal thought shifts the focus of legal thinkers away from the task of informing the conversation about institutional futures, which though possibly less immediate, is surely more important.").

ever, it might be more helpful to contrast it with a more consistent unilateralism—one that would not trust international law to force China to internalize the costs of the pandemic. For example, a senior fellow at the Cato Institute has argued that Trump's "foolish" idea of suing China "would set an extraordinarily dangerous precedent"[289] that could eventually backfire. The lawsuit approach, building upon the idea that all sovereigns are equal, is dangerous: "Imagine the rest of the world 'making America pay' for Washington's mistakes, failures, and crimes."[290] The logic, hidden in plain sight, is straightforward: Even the most powerful should tremble when facing the majesty of law's empire.[291]

We hope to have shown that the rhetoric of the lawsuit approach, even though possibly fostered by a willingness to retreat from multilateralism and its normative commitments, requires the same kind of thick transnational understandings that were repudiated in the first place. To some extent, this is a result of the recourse to law, with its inherent appeal to intersubjective agreements and aspiration to legitimacy. Even those distrustful of multilateralism and its institutions, when placed in the internal perspective of an international lawyer, need to frame their claims in a manner consistent with a certain normative understanding of the obligations that subjects owe to each other. Some might speak the language of law hypocritically, but they would be underestimating the "civilizing force of hypocrisy."[292] The lawsuit approach, despite Trump's intentions, leads inexorably to a conversation about global justice. Perhaps it's time to take him—at least this one, exceptional time—seriously.

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289 Doug Bandow, *Making China Pay Would Cost Americans Dearly*, FOREIGN POLICY (May 5, 2020, 2:59 PM), https://foreignpolicy.com/2020/05/05/trump-pandemic-making-china-pay.

290 *Id.*

291 This is, of course, a far-fetched homage to DWORKIN, *supra* note 193.

292 Elster, *supra* note 18, at 111.