

SYMPOSIUM ON WHAT MIGHT INTERNATIONAL LAW REPAIR?

BACKWARD-LOOKING REPARATIONS VERSUS FORWARD-LOOKING BUYOUTS: DISTRIBUTIVE JUSTICE ACROSS TIME IN INTERNATIONAL LAW

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Reparations aim to rectify historical harms by compensating victims, or their descendants. Even when such harms have a transnational aspect, as with the case for climate change reparations, they often stem from entrenched *domestic* political stalemates. In a common pattern, vested interest groups oppose reforms that, although supported by majorities and beneficial to society as a whole, threaten their own material interest. Such groups hold a mobilization advantage that allows them to effectively obstruct change. Left unresolved, these domestic stalemates can compound harm over time in a way that eventually forms the basis of demands for reparations.

I argue that if there exists a moral imperative to offer reparations for past injustices, a corresponding duty may exist to proactively address ongoing political impasses that perpetuate harm. One means of doing so is through buyouts, which also involve compensation. Unlike reparations, however, buyouts compensate the actors perpetuating the harmful status quo rather than the victims of that harm, as a means of removing barriers to beneficial reforms. The question I pose is, how should international law weigh these competing considerations?

The discussion over climate change has given rise to calls for two types of compensation that mirror these opposite policy options. The first involves the creation of a global fund to compensate poor countries for centuries of carbon emissions by rich countries.¹ In the second, a similar fund would compensate fossil fuel workers who currently block crucial decarbonization efforts.² The first option compensates victims of past injustice; the second compensates current beneficiaries of inefficient and unjust systems who act as hold-out interests. Both are attempts to rectify harm, yet they rest on different institutional and ethical arguments. The case for reparations is most often formulated as a deontological claim about recognizing the moral rights of victims of past harms. Buyouts rest on a consequentialist argument that improves long-term welfare by unlocking beneficial reforms—but may also give rise to its own deontological concerns, if it is seen as “rewarding” the very actors responsible for perpetuating the harm.

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¹ Olivia Serdeczny & Tabea Lissner, *Research Agenda for the Loss and Damage Fund*, 13 NATURE CLIMATE CHANGE 412 (2023). For various perspectives in this special issue, see especially Julia Dehm, *Who Receives Reparations in the Context of Climate Change: Conflicting International Legal Claims*, 119 AJIL UNBOUND 128 (2025); Anne Orford, *Reparations, Climate Change, and the Background Rules of International Law*, 119 AJIL (forthcoming 2025); Lavanya Rajamani, *Empowering International Law to Address Claims for Climate Reparations*, 119 AJIL (forthcoming 2025).

² Michaël Aklin, *The Political Logic of Just Transition Policies*, 25 CLIMATE POL’Y 319 (2024); see also note 11 *infra*.

I suggest that there is a means of recasting both policies under a common framework of harm reduction. Buyouts become a form of forward-looking compensation that fulfills an ethical duty which extends to future victims of persistent ongoing harms. Yet buyouts must be carefully balanced against existing liability claims and the attendant risk that perpetrators' accountability—such as industrialized countries' responsibility for historical emissions—may be obscured. This poses a dilemma: overlooking accountability for internationally wrongful acts can undermine foundational principles of state and corporate responsibility under international law.

Nevertheless, if buyouts succeed in tackling entrenched unjust arrangements, they may reduce the need for future backward-looking reparative compensation. There is thus an argument for international law to take forward-looking obligations into greater account, in pursuit of the very aims that underlie calls for reparations. Drawing on a pragmatic approach most often associated with transitional justice, international law might adopt harm reduction as a guiding principle. In practical terms, this suggests that where domestic political stalemates obstruct essential reforms addressing transnational harms such as climate change, the international community has compelling grounds—and perhaps an emerging duty—to facilitate those domestic reforms.

Reparations and the Study of Persistence

History has been contracting of late. State responsibility for past harms has become a prominent topic in public debates. Calls for reparations, indemnification, restitution, and compensation for victims of past injustices have grown more salient. In parallel, a growing body of social science, most often labeled “persistence studies,” has highlighted the unsuspected causal chains that link the present to the distant past, contributing to a shift in how scholars think about the relation between past events and present-day social outcomes. Whether institutions established during colonialism were more or less extractive has thus been shown to have a lasting effect on post-colonial states' economic development.³ African regions that were most exposed to the transatlantic slave trades remain poorer today.⁴ In India, regions with extractive land systems introduced under British colonialism still show lower agricultural productivity.⁵ In the United States, historical patterns of segregation continue to shape the opportunities available to different racial and economic groups.⁶ Though the link is rarely made, the persistence literature buttresses the moral case for contemporary societies addressing past harms.⁷ These are not merely regrettable artifacts of history; they continue to have run-on consequences generations later.⁸

While the call for reparations is inherently backward-looking, the contraction of history has a corresponding forward-looking aspect. If we accept that the effects of historical injustices can persist into the present day, it follows that the harms we inflict now may similarly ripple into the future, and even compound over time. Alongside the study of colonialism's legacy, the discussion of climate change may have done most to highlight this fact: the cumulative, irreversible, and long-lasting nature of greenhouse gases, combined with the persistence of warming effects like sea-level rise, means that even if we suddenly ceased emitting carbon, our past emissions

³ Daron Acemoglu, Simon Johnson & James A Robinson *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

⁴ Nathan Nunn, *The Long-Term Effects of Africa's Slave Trades*, 123 Q. J. ECON. 139 (2008).

⁵ Abhijit Banerjee & Lakshmi Iyer, *History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India*, 95 AM. ECON. REV. 1190 (2005).

⁶ Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in The United States*, 129 Q. J. ECON. 1553 (2014).

⁷ WILLIAM DARITY JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2022).

⁸ E. Tendayi Achiume, *Reparations, Race, and International Law*, 119 AJIL (forthcoming 2025).

would nonetheless continue to exert their effect for decades to come. This forward-looking aspect of climate change strengthens the moral imperative to reduce emissions now in order to avoid compounding future harm.

Backward-Looking Reparations and Forward-Looking Buyouts

The injustice of climate change lies in the asymmetry between its origin and its consequences. Rich countries have disproportionately driven carbon emissions through industrialization and consumption, while poorer nations—often least responsible for historical emissions—disproportionately endure its impacts, from floods to droughts. In recognition of this asymmetry, a proposal that has gained momentum since COP27 advocates for a global Loss and Damage fund to compensate poorer countries for the effects of centuries of carbon emissions by wealthier nations.

Meanwhile, there is growing recognition that climate change is not so much a collective action problem as a distributional one. Even when large-scale decarbonization policies would bring global welfare gains and garner widespread support, they face opposition from domestic interest groups that would suffer significant financial losses.⁹ While large-scale decarbonization policies would generate global welfare gains, the necessary reforms run into opposition from domestic interest groups that stand to lose materially. Reform can be supported by a majority and yet remain democratically incompatible, because of the uneven way democracies aggregate preferences. Yet as the study of international trade demonstrates, even when the origins of transborder harms lie at the domestic level, the most effective solutions may nonetheless be found at the international level.¹⁰

One such solution is exemplified by the Amazon Fund, an initiative funded by Norway and Germany that is designed to compensate Brazilian farmers who profit from deforestation, effectively “buying out” an interest group that would otherwise impede global efforts to fight climate change. By providing compensation, the fund shifts farmers’ incentives toward conservation.¹¹

Buyouts can easily become morally contentious, since compensation is directed at actors who either perpetrated the harm at issue, or stand in the way of rectifying it. In the case of destitute Brazilian farmers, foreign assistance may itself seem justified on ethical grounds, regardless of environmental goals. But other buyouts aimed at accelerating reform in the face of political obstruction would instead compensate the developed countries actors who are blamed for the problem at hand. By the nature of the political impasse, it is such powerful interest groups that are the binding constraint on the most impactful reforms.

Consider the proposal to buy out the U.S. coal industry, which lobbies heavily against the energy transition toward renewables, as a way of accelerating the phase-out of coal-fueled power plants, the dirtiest form of energy production in the United States.¹² A number of other countries have done just that.¹³ Jonas Meckling and Jonas Nahm contrast the successful coal phase-out in Germany, which relied on a generous compensation package, to

⁹ Michaël Aklin & Matto Mildenberger, *Prisoners of the Wrong Dilemma: Why Distributive Conflict, Not Collective Action, Characterizes the Politics of Climate Change*, 20 GLOB. ENVTL. POL. 4 (2020) Alexander F. Gazmararian, *Fossil Fuel Communities Support Climate Policy Coupled with Just Transition Assistance*, ENERGY POL’Y 184 (2024).

¹⁰ Krzysztof J. Pelc, *MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW* (2016).

¹¹ Nancy Birdsall, William Savedoff & Frances Seymour, *The Brazil-Norway Agreement with Performance-Based Payments for Forest Conservation: Successes, Challenges, and Lessons* (CGD Climate and Forest Paper Series 4, 2014).

¹² See, among others: Gil Friend & Felix Kramer, *Deal of the Century: Buy Out the US Coal Industry for \$50BN*, GUARDIAN (Mar. 11, 2014); Stephen L. Kass, *The Federal Government Should Buy Coal Plants, Shut Them Down and Pay to Retrain Their Employees*, WASH. POST (June 3, 2016).

¹³ For a survey of “wage buyouts,” see Krzysztof Pelc, *On Paying Workers to Stop Working: Public Attitudes Towards “Wage Buyouts,”* PERSPEC. POL. 1 (2025).

the case of the United States “where—in the absence of compensation-based bargains—coal regions and firms continue to actively resist federal climate policy.”¹⁴

In cases where a country is unwilling or unable to carry out such a buyout—India, which continues to rely on coal for most of its energy, may be a case in point—there is an argument for the international community to step in and offer compensation to the hold-out interests in exchange of binding commitments to reform by the home country. While “just transition” is traditionally viewed as a domestic issue, highlighting the political economic constraint on decarbonization places it in the purview of the international. Just transition represents not merely fairness toward a country’s own workers; it is a practical requirement of effective global decarbonization.

The argument is not merely a consequentialist one. The discussion over climate reparations highlights the cost of maintaining unjust arrangements that perpetuate harm. Insofar as there exists a moral imperative to offer reparations for past injustices, a corresponding duty may be said to exist in proactively addressing ongoing political stalemates that perpetuate harm. In this telling, buyouts constitute a forward-looking form of compensation: instead of redressing past harms, they are designed to prevent future environmental degradation by addressing its binding constraint: the interests of those who would lose from reform. In this sense, buyouts simply align time horizons, by giving equal weight to future harm as to past harm.

The promise of buyouts is to shift the political calculus. Instead of asking whether there exists sufficient collective will to defeat a vested interest group, the question becomes, would voters punish policymakers for using compensation to dislodge these otherwise entrenched interests? Recent work relying on surveys of U.S. audiences provides an answer: democratic majorities support buyouts, even over partisan issues like coal power.¹⁵ Buyouts appear democratically compatible where directly implementing reforms is not. Those who *are* opposed, moreover, most often object on the basis of *moral aversion*, highlighting the ethical challenge underlying buyouts. Practical issues like moral hazard remain a concern—compensating one hold-out group could encourage others to adopt obstructive stances in anticipation of similar payouts—yet political audiences approach buyouts primarily through a normative lens. They find the idea of rewarding bad actors offensive, even as they recognize that it may ultimately attain a desirable outcome, reflecting the conflict between deontological and consequentialist perspectives at the center of the argument.

Harm Reduction and International Law

Once we recognize that many transnational problems have domestic distributional origins, international law has a role to play in facilitating reforms in the face of obstructionist groups. Yet policies like coal buyouts come in direct conflict with the “polluter pays” principle, enshrined in the 1992 Rio Declaration and the Paris Agreement, which asserts that those responsible for pollution should bear the costs of managing it to prevent damage to human health or the environment. On their face, buyouts instead appear to “reward” polluters—in ways that may nonetheless result in overall welfare improvements.

More generally, given how the exercise of justice relies on claims and claimants, it may be that international law is inherently backward-looking. Given the urgency of climate change mitigation, this bias may come at a potential long-term cost if it detracts from addressing urgent irreversible harm.¹⁶ And while buyouts may be effective in pushing through systemic change and alleviating such future harms, they appear to violate principles vested in

¹⁴ Jonas Meckling & Jonas Nahm, *Strategic State Capacity: How States Counter Opposition to Climate Policy*, 55 COMP. POL. STUD. 493, 514 (2022).

¹⁵ Vincent Arel-Bundock & Krzysztof Pelc, *Buy-in for Buyouts: Attitudes Toward Compensation for Reforms*, J. POL. (forthcoming 2025).

¹⁶ Tiffany H. Morrison et al., *Radical Interventions For Climate-Impacted Systems*, 12 NATURE CLIMATE CHANGE 1100 (2022).

deontological ethics, like “polluter pays.” This tradeoff highlights the need to consider forward-looking and backward-looking actions within a single framework.

One way to approach this is through the lens of harm reduction, a concept closely associated with transitional justice. A central insight from transitional justice is that achieving (forward-looking) transition often involves difficult compromises on principles of justice.¹⁷ Amnesties or limits on prosecution may facilitate peace, but they also represent a sacrifice of accountability for past harms in favor of expedience. The greater the past harm, the greater the present moral sacrifice. Seen through the lens of harm reduction, buyouts cut short the compounding of harm, and thus preempt future calls for reparations, even as they direct compensation to the very group sustaining the socially damaging status quo. The latter should not be overlooked: the cost of condoning past harmful behavior, or present intransigence, needs to figure in the calculus. Much of the field of transitional justice is devoted to balancing these competing considerations; the question of how to balance reparations with buyouts must do the same.

Concluding Thoughts

What seems certain is that appealing to the time dimension does not, by itself, resolve the choice between backward-looking reparations and forward-looking buyouts. The “no harm” principle has recently been invoked to justify the payment of climate reparations.¹⁸ Yet the jurisprudence surrounding “no harm” suggests that addressing *ongoing* harm is at least as pressing as offering compensatory reparations if and when reform efforts eventually fail. In its primary application—managing transboundary water resources—the “no significant harm” principle, as established in six foundational International Court of Justice cases, imposes the primary legal duty of *preventing* further damage.¹⁹ The same legal foundation that may justify reparations for violations also demands the proactive use of available resources to mitigate ongoing harms. Under the logic of buyouts, if the binding constraint on addressing these harms is an entrenched interest group, then a commitment to compensating that group in exchange of unblocking entrenched reform may represent the most expedient means of addressing the harm.

Similarly, it is tempting to rely on temporal proximity when deciding how much to invest in these two compensatory approaches. Harms that are nearer, whether in the past or future, often seem more urgent. Yet one implication of the persistence literature is that relying solely on temporal proximity overlooks factors such as the magnitude, reach, and permanence of harm. An alternative might prioritize harms based on their potential to generate cascading effects that compound over time. Similarly, irreversible harms, which cannot be remedied once they occur, demand urgent attention regardless of when they happen. Assessing the effectiveness of reparations versus buyouts in mitigating harms is therefore key to deciding how to allocate policy efforts. The effectiveness of reparations hinges on their ability to address entrenched inequities that persist today. By contrast, the effectiveness of buyouts depends on changing the incentives of holdouts. The closer society is to critical tipping points—environmental or social—the more urgent the case for such interventions becomes.

Since democratic pressure for reform waxes and wanes across time, there will exist a “bittersweet spot” for buyouts that corresponds to the confluence of two trends: democratic pressure for reform should be high enough to motivate the interest group to come to the bargaining table; yet the group’s prospects cannot be so dire

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

¹⁸ Sarah Riley Case & Julia Dehm, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, in *DEBATING CLIMATE LAW* (Benoit Mayer & Alexander Zahar eds., 2021).

¹⁹ Mar Tignino & Christian Bréhaut, *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, 20 INT’L ENVTL. AGMTS. (2020).

that compensation becomes unnecessary because reform can be achieved without it. To take the case of coal, a generation ago, the industry was booming and there was little pressure to phase it out. A generation from now, it seems likely that public pressure will have led to a full phase-out of coal in advanced economies. The potential of buyouts lies between these two points in time.

In sum, this essay argues for a greater role for international law in addressing the political impasses that generate compounding harm, eventually fueling demands for reparations. By intervening earlier to alter entrenched unjust arrangements, international law can shift from a reactive stance—focused on redressing past injustices—to a proactive one, aimed at preventing their perpetuation.