NO DECOLONIZATION WITHOUT REPARATIONS: BUILDING A FRAMEWORK FOR REPARATIONS FOR PUERTO RICO & PUERTO RICANS

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ABSTRACT

This article argues that to promote a just and democratic process of decolonization and self-determination, stakeholders in the United States and Puerto Rico must seriously consider, explore, and promote reparations for Puerto Rico and Puerto Ricans after over a century of direct occupation and colonization. I develop this article by exploring past reparation packages extended or considered both in the context of the United States and in the international context for other similarly harmed groups (e.g. African-Americans, Japanese-Americans, and Jewish Holocaust survivors). I also incorporate the United Nations' General Assembly resolution 60/147 on reparations for victims of gross violations of international human rights law as I outline a holistic framework that others can use to further conceptualize and outline appropriate reparation packages that address the harms perpetuated through the colonization of Puerto Rico and to promote the nation's decolonization.

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I. Introduction

Puerto Rico is a colony of the United States.[1] US-Americans rarely spend much time thinking about this, and when they do, it is frequently from an exploitative lens that prioritizes what Puerto Rico can add to the empire.[2] Conversely, I can say from experience, people in Puerto Rico frequently spend their time thinking about our colonial status given how it has left us with increasingly precarious access to basic necessities such as water, health care, and electricity.[3]

This article explores a series of considerations and theories that highlight why reparations are a necessary element to promote and implement an honest and just process of decolonization for Puerto Rico and Puerto Ricans. With this end in mind, I hope this article can serve as an evolving framework for anti-imperialist allies in the legal profession who seek to promote just decolonization processes in the modern day. The analysis herein builds on existing legal frameworks from early 21st century scholarship on reparations by incorporating international principles that could help promote a more robust set of individual and collective remedies to address the harms of ongoing colonization. Aside from demonstrating why reparations are an essential element of any genuine process of self-determination for Puerto Rico, this article contextualizes the need for reparations for Puerto Rico within a wider advocacy movement that seeks reparations for all groups harmed by extreme injustices.

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[1] *See generally* José Trías Monges, Puerto Rico: Las penas de la colonia más antigua del mundo [Puerto Rico: The Sorrows of the Oldest Colony in the World], (La Editorial de la Universidad de Puerto Rico ed., 1999).

[2] US-Americans frequently spend time considering questions such as: *How much federal taxes could Puerto Rico contribute? Would Puerto Rico's representatives benefit the Republican or the Democratic party? Do I need a passport to vacation there?* Notably, none of these questions center the rights and interests of a people who have been colonized for centuries. *See* Ryan Struyk, *Here's What Would Happen To US Politics If Puerto Rico Became a State*, CNN (Oct. 14, 2017), https://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html (describing the potential political and partisan effects that Puerto Rican statehood would have on Congress), *archived at* https://perma.cc/Q7BC-SR2H; *See also*, Olga Khazan, *Why Does Puerto Rico Want Statehood, Anyway?*, The Washington Post, (Nov. 7, 2012), https://www.washingtonpost.com/news/worldviews/wp/2012/11/07/why-does-puerto-rico-want-statehood-anyway/ (limiting an analysis of desire for Puerto Rican statehood to congressional representation and equality in federal tax and benefit programs), *archived at* https://perma.cc/SZ64-HTHG; *See also*, Lilian Bobea, *Need Another Reason to Help Puerto Rico? It's a Key US Economic and Military Asset*, The Conversation (Oct. 13, 2017), https://theconversation.com/need-another-reason-to-help-puerto-rico-its-a-key-us-economic-and-military-asset-85453 (emphasizing the strategic benefits that Puerto Rico represents for the United States), *archived at* https://perma.cc/96N2-ERLU. Although these news articles arguably render the complexity of Puerto Rican voices invisible, they do not do so out of malice or a desire to distort realities. Rather, because the topic of Puerto Rico is so rarely discussed or taught in school, journalists must consider what arguments and rhetorical strategies will engage readers and convince them to learn more about the topic.

[3] Naomi Klein, The Battle for Paradise: Puerto Rico Takes on Disaster Capitalists, (Haymarket Books ed., 2018); *See also*, Isaac Chotiner, *The Frustration Behind Puerto Rico's Popular Movement*, The New Yorker, (Jul. 25, 2019), https://www.newyorker.com/news/q-and-a/the-frustration-behind-puerto-ricos-popular-movement (noting that, "when people talk about political ideology here [in Puerto Rico], they're referring to Puerto Rico's status—to wanting to be independent or being pro-statehood or pro-commonwealth."), *archived at* https://perma.cc/36DK-YB3M.

In doing so, I will also touch on the fragmenting nature of the "status debate" and why *independence*[4] is the only decolonizing alternative we should be focused on supporting.

The first part of this article analyzes the history of reparations in the United States to establish current successful tools and avenues for groups to obtain individual and collective reparations. This initial section will also emphasize the limitations of currently available remedies and the obstacles advocates encounter in both courts and legislatures in the United States. The second part of this article will examine current international frameworks for reparations and demonstrate how a more purposeful adoption of international law within U.S. courts could allow for more robust and meaningful provisions of reparations to individual and group plaintiffs. Lastly, the third and final section will apply the legal frameworks explored in the first two sections to the case of Puerto Rico to further develop existing proposals for reparations for Puerto Rico and Puerto Ricans.

The concept of reparation—the idea of compensation as a means of making amends for or redressing a wrong or injury—is not novel.[5] However, throughout the 19th and 20th centuries, reparations became a common post-war remedy and more formal jurisprudence on the topic began to develop.[6] In more recent history, the Office of the United Nations High Commissioner for Human Rights codified the concept of reparations into international law through the adoption of Resolution 60/147, titled *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[7] Although monetary restitution has become the most common form, reparations, from a legal perspective, encompass many more remedies geared towards obtaining transitional justice.[8] As will be shown throughout this article, aside from monetary payments, reparations can take on many other forms, including, but not limited to the provision of

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[4] To be clear, there is currently no consensus regarding what *independence* would mean for Puerto Rico and Puerto Ricans. What values would our Republic's Constitution embrace? What would economic progress look like in Puerto Rico? Who would our main trade partners be? What social welfare rights would we guarantee? Would we want to replicate a presidential or a parliamentary system of democratic representation? All of these are questions Puerto Ricans have never even been allowed to seriously consider nor even dream of since our years under Spanish colonization.

[5] *See Reparation*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/reparation, (last visited April 11, 2024), (defining "reparation" and noting that its first known use dates back to the 14th century), *archived at* https://perma.cc/YMK5-T7WB.

[6] A non-exhaustive list of early examples of reparations levied against nation States includes: (1) compensations paid by Haiti after the country's war of independence against France in 1804, (2) the payment made by France under the Treaty of Paris (1815) following Napoleon's final loss at the Battle of Waterloo, (3) payments made by Greece following the Greco-Turkish War of 1897, (4) reparations paid by the Central Powers for war costs after World War I, and (5) reparations paid by Germany to the Allies for war costs after World War II and to individuals who survived the Holocaust.

[7] G.A. Res. 60/147.

[8] The concept of "transitional justice" refers to the ways in which society "respond[s] to the legacies of massive and serious human rights violations." *See What is Transitional Justice*, International Center for Transnational Justice, https://www.ictj.org/what-transitional-justice, (last visited April 11, 2024), *archived at* https:// perma.cc/5WK7-6DCV.

scholarships, land-based compensations in the form of national sovereignty, economic incentives, and even formal apologies.

II. History of Reparations in the United States

"Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."

– Justice Scalia, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)[9]

The United States' government has a long, yet fraught history of extending reparations to groups that have been historically harmed through government sanctioned actions.[10] One of the most representative examples of reparation efforts in the United States is the "40 acres and a mule" promise that was never kept. This promise "was the first systematic attempt to provide a form of reparations to newly freed slaves, and it was astonishingly radical for its time, proto-socialist in its implication."[11] The goal behind this promise was to ensure the successful integration of newly emancipated African-Americans into the United States' broader social and economic framework despite the decades of profit that had been stolen from their labor and the absolute prohibitions placed on their accumulation of wealth and property. Unfortunately, due to the assassination of President Abraham Lincoln, Andrew Johnson, who sympathized with Southern slaveowners, took office, and ultimately overturned the order that would have formally advanced the "40 acres and a mule" promise.[12] Since then, efforts for reparations have continued to face an uphill battle, not just in the context of slavery, but also in the context of other systematically harmed groups.[13]

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[9] Legislation under the 14th amendment's Equal Protection Clause, which may have supported social programs geared towards reparations, was constrained by the majority's decisions in Adarand Constructors v. Pena, 515 U.S., 200 (1995) and Students for Fair Admissions v. Harvard, 600 U.S. 181, (2023), the latter of which effectively overruled Regents of the University of California v. Bakke, 438 U.S., 265 (1978). Statutory review under the Fourteenth Amendment now requires strict scrutiny of all race-based classifications by state governments, and the means chosen to achieve any valid state interest must be narrowly tailored—for the most part, race cannot be used as a proxy for or for presumption of disadvantage. Given the stringent understanding of causation established by this jurisprudence, developing thorough fact-based claims will be essential for reparations-geared litigation.

[10] *See* Allen J. Davis, *An Historical Timeline of Reparations Payments Made From 1783 through 2022 by the United States Government, States, Cities, Religious Institutions, Universities, Corporations, and Communities*, University of Massachusetts Amherst Libraries, https://guides.library.umass.edu/reparations, *archived at* https://perma.cc/QN5U-TM3M.

[11] Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule*, PBS (2013), https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/, (originally published by The Root), *archived at* https://perma.cc/JKS5-85P7.

[12] *Id.*

[13] *See* Erin Blakemore, *The Thorny History of Reparations in the United States*, History (Aug. 28, 2019), https://www.history.com/news/reparations-slavery-native-americans-japanese-internment, *archived at* https://perma.cc/BL6W-SLV3. This article discusses the Hawaiian Homes Commission Act of 1920 and the Civil Liberties Act of 1988, two notable examples of the challenges and limitations other groups have faced in their struggles to obtain

That said, in the latter half of the 2010s and early 2020s, the topic of reparations within the United States began to gain traction among voters for the first time in years. Polls in 2019 estimated that between 21 percent and 29 percent of the electorate favored reparations for Black Americans who were descendants of enslaved people in the United States.[14] By 2021, at least 35 percent of registered voters somewhat or strongly favored reparations. Popular protests in 2020, sparked by the murder of George Floyd by Minnesota officer Derek Chauvin, likely played a significant role in the rise of public support for reparations. That said, academics, community activists, and local officials have spent considerable efforts throughout the last two decades dedicated to a new anti-subordination agenda to address the country's growing economic inequalities.[15] Given the Supreme Court's decision in *Students for Fair Admissions v. Harvard*[16], it is unlikely that any type of race-based affirmative action programs will pass judicial review any time soon. However, some judicial decisions and new legislative efforts have begun to pave the road for reparations, arguably a more transformative approach towards redressing individual and collective harms committed in the past on the basis of suspect

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reparations. In the first example, the United States government established a land trust for Kānaka Maoli people (i.e., Native Hawaiians) and allowed those with "half Hawaiian ancestry by blood to lease homesteads from the federal government for 99 years at a time for a total of $1." Unfortunately, much of the land that was provided was remote and unfit for development, thereby severely limiting any long-term gains from this Act. In the second example, Japanese survivors of World War II internment camps were granted $20,000, but only after over 40 years of concerted grassroots activism and litigation.

[14] An April 2019 public opinion poll conducted by Rasmussen Reports, LLC and a September 2019 poll conducted by the Associated Press-NORC Center for Public Affairs Research found 21 percent and 29 percent support respectively. *Most Still Reject Reparations for Slavery*, Rasmussen Reports (Apr. 2019), https://www.rasmussenreports.com/public_content/politics/current_events/social_issues/most_still_reject_reparations_for_slavery, *archived at* https://perma.cc/DT8X-CGE5; *The Legacy of Slavery*, Associated Press-NORC Center for Public Affairs Research (Sep. 2019) https://apnorc.org/projects/the-legacy-of-slavery/, *archived at* https://perma.cc/ND8L-E995.

[15] It is important to note that George Floyd's murder by police officers is representative of a larger and systemic issue of police violence against Black and brown communities within the United States. *See* Lauren Gambino, *Calls for reparations are growing louder. How is the US responding?*, The Guardian (Jun. 20, 2020), https://www.theguardian.com/world/2020/jun/20/joe-biden-reparations-slavery-george-floyd-protests, *archived at* https://perma.cc/TJE3-A8QJ; *See also*, Ashley D. Farmer, *The black woman who launched the modern fight for reparations*, The Washington Post (Jun. 24, 2019), https://www.washingtonpost.com/outlook/2019/06/24/black-woman-who-launched-modern-fight-reparations/, *archived at* https://perma.cc/CM9A-ZR7J; *See also*, Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998).

[16] In 2023, the Supreme Court held that race-based affirmative action programs in college admissions processes violated the Equal Protection Clause of the Fourteenth Amendment. Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181, (2023). The decision effectively overruled *Bakke* and *Grutter,* which had severely limited, but kept in place, race-based admissions programs.

The decision in *Bakke*, which held that the University of California's affirmative action admissions criteria violated the Equal Protection Clause of the Fourteenth Amendment, suggests that affirmative action programs might even be in peril in the education landscape. In fact, the current Supreme Court is set to issue a new opinion on the matter in 2022 with respect to two cases for which it has granted certiorari. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157 (C.A.1 (Mass.), 2020), consolidated with Students for Fair Admissions, Inc. v. University of North Carolina, 142 S.Ct. 896 (Mem) (U.S., 2022).

classifications.[17] This section outlines some of the judicial claims that succeeded in attaining reparations in the United States for groups and individuals. It will also outline some new potential claims that have been suggested across legal academia in order to help frame an analysis of what reparations for Puerto Rico and Puerto Ricans should entail.

A Reparations for the African-American Community

Given the broken "40 acres and a mule" promise following the abolishment of slavery and the persistent racial dimension of economic inequalities, it has long been argued that the legacy of slavery in the United States continues to impact the lives of Black Americans.[18] The earliest and most famous court action in favor of reparations for slavery involves Belinda Sutton, a Ghanaian-born woman who, in 1783, successfully petitioned the Massachusetts General Court for an annual pension to be paid to her out of the proceeds of the Royall estate, which belonged to the family who had enslaved her for decades.[19] In 1878, in *Wood v. Ward*, Henrietta Wood successfully claimed that she was owed $20,000 in reparations from kidnappers who had sold her into slavery.[20] Much later, in the 1973 case *Pollard v. U.S.*, a group of Black men reached a $10 million settlement with the United States government as part of a class-action lawsuit for harms sustained as part of the Tuskegee Experiment, an infamous study on the effects of untreated syphilis.[21]

More recently, in 1992, Black families harmed in the Rosewood massacre filed an equitable-claims bill in Florida "arguing that the state government had injured" them, and therefore "had a moral obligation to compensate them, regardless of whether there was an explicit legal one."[22] After a series of

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[17] Examples of successful reparation-based litigation include Wood v. Ward, 2 Flip. 336 (C.C.Ohio 1879) (holding that reparations were owed to a woman kidnapped and sold into slavery) and Pollard v. United States, 69 F.R.D. 646 (M.D.Ala., 1976) (holding that reparations were owed to victims of the infamous Tuskegee Syphilis Study). Examples of reparation-based legislation include California's AB 3121 and New Jersey's S386/A938, both of which seek to establish task forces to study and recommend remedies to address harms stemming from the legacy of slavery and racial discrimination. The California Bill was enacted on September 30, 2020, but the New Jersey Bill is still pending approval. For a more exhaustive list of reparation efforts in the United States, *see* Davis, *supra* note 10.

[18] *See* Juliana Menasce Horowitz, *Most Americans say the legacy of slavery still affects black people in the U.S. today*, Pew Research Center (Jun. 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/most-americans-say-the-legacy-of-slavery-still-affects-black-people-in-the-u-s-today/, *archived at* https://perma.cc/2YNF-GKDK.

[19] *See* Roy E. Finkenbine, *Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts*, 64 The Wm & Mary Q. 95 (2007); Belinda Sutton, *Petition to the Massachusetts General Court*, The Royall House & Slave Quarters (Feb. 14, 1783), https://royallhouse.org/belinda-suttons-1783-petition-full-text/, *archived at* https://perma.cc/3334-U7C3.

[20] Sydney Trent, *She sued her enslaver for reparations and won. Her descendants never knew*, The Washington Post (Feb. 24, 2021), https://www.washingtonpost.com/history/2021/02/24/henrietta-wood-reparations-slavery/, *archived at* https://perma.cc/RG3E-2GYJ.

[21] Blakemore, *supra* note 13.

[22] Victor Luckerson, *What a Florida Reparations Case Can Teach Us About Justice in America*, Time (Sept. 10, 2020), https://time.com/5887247/reparations-america-rosewood-massacre/, *archived at* https://perma.cc/X5A7-BSBU.

legislative hearings and hours of survivor testimonies, the Florida legislature finally passed the Rosewood Compensation Bill in April of 1994 and Governor Lawton Chiles signed it into law the following month, thus establishing the first legislative group compensation or reparations package for survivors of anti-Black violence.[23] Through this legislative effort, two million dollars were ultimately distributed to nine Rosewood survivors and their descendants.[24]

Despite these victories, the courts have proved to be a largely ineffective avenue for African-Americans to obtain the reparations they are owed. Given judicially imposed doctrinal limits such as time bar, sovereign immunity, and denial of jurisdiction, and the difficult burden of proof in cases involving equal protection claims and government sanctioned harms, survivors of systemic discrimination rarely succeed.[25]

Legislation has consequently been viewed as a critical element in affording claimants more opportunities for redress in the court system by recognizing reparation claims in extreme cases of group injustice.[26] The systemic harms that persist due to racism and white supremacy cannot solely be seen through the typically individualistic lens of the United States court system which focuses on specific individuals and specific harms directed at them. "Racism is a group practice,"[27] and as such, actions to redress harms created by this collective practice must account for group remedies.[28]

The material bases of the claim for group reparations to African-Americans are: "(1) the value of the uncompensated labor of generations of slaves and (2) the century-long violation of Black civil rights through state-enforced segregation" which has largely prevented any significant accumulation of wealth by Black communities in the United States.[29] Legal scholar

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[23] Maxine D. Jones, *The Rosewood Massacre and the Women Who Survived It*, 76 THE FLA. HIST. Q. 193, 206-8 (1997); C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503 (1994) (detailing the process of claim bills which allow claimants to circumvent judicial limitations by petitioning the legislature instead).

[24] Luckerson, *supra* note 22. ("The Rosewood money was divided into three pots: the $150,000 lump sum for each of the nine survivors; a $500,000 pool of funds for their descendants; and individual $4,000 scholarships for the youngest generation of Rosewood family members. The total payment was $2.1 million, significantly less than the initial request of $7 million—but, crucially, something to build on.").

[25] Westley, *supra* note 15, at 435 n.18 (highlighting the case of Cato v. United States, 70 F.3d 103 (9th Cir. 1995), where Black litigants sued the federal government for slavery and discrimination, but failed due to (1) the Court's alleged lack of subject matter jurisdiction, (2) sovereign immunity under the Federal Tort Claims Act, and (3) the statute of limitation on tort related claims); *see also*, 28 U.S.C. §2401. This federal statute, titled "*Time for commencing action against United States*" and enacted on June 25, 1948, sets a six year statute of limitations on civil actions against the United States and a two year statute of limitations on tort claims.

[26] Westley, *supra* note 15, at 433.

[27] *Id*. at 448.

[28] Examples of group remedies for collective harms will be outlined throughout the following sections which address reparations to Japanese survivors of internment camps, survivors of the Jewish Holocaust, and potential reparations for displaced Mexican-American communities.

[29] Westley, *supra* note 15, at 465–66. ("Blacks deserve reparations not only because the oppression they face is systematic, unrelenting, authorized at the highest governmental levels, and practiced by large segments of the population, but also because they face this oppression as a group, they have never been adequately compensated for their material losses due to white racism, and the only possibility of an adequate remedy is group redress.").

and attorney Vincene Verdun posits that, since the emancipation of enslaved people, there have been "five major waves of political activism that promoted reparations since the emancipation of slaves: 1) the Civil War-Reconstruction era; 2) the turn of the century; 3) the Garvey movement; 4) the civil rights movement of the late 1960s and early 1970s; and 5) the post-Civil Liberties Act era beginning in 1989."[30] Every year since 1989 the H.R. 40 bill has been introduced to establish a commission to study a realistic approach to reparations for African-Americans. It has never reached a committee vote, but after the nationwide anti-racist protests of 2020, lawmakers are seriously hoping to revive this effort and finally establish this much needed committee.[31]

At the state-wide level, California has been leading the way since September 30, 2020, when it signed into law AB 3121.[32] The following year, Governor Newsom established the nation's first task force to study and develop reparation proposals for African-Americans.[33] California lawmakers also approved legislation that has allowed the start of a complex legal process of transferring ownership of Bruce's Beach back to the descendants of the African-American family who originally owned the property until the government unconstitutionally took their land through eminent domain.[34]

The experience of African-Americans' advocacy for reparations highlights the difficulty of establishing direct claims using lineage and proof of harm on an individual basis. Although organizations like *Where is my Land*[35] have arisen to compile documentation needed for reparations claims, a more robust and publicly accountable system of academic research directed at studying potential individual claims for reparations is evidently needed. Moreover, as we will see in the following sections, reparations are likely owed to many different racialized groups across the United States. As Robert Westley argues, this means it is essential to advocate for a legal norm that "mandates reparations to groups victimized by racism that is not group specific," but rather can apply to "any group that could show the requisite degree of harm

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[30] Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597 (Feb. 1993).

[31] Grayce McCormick, *Re-upping the decades-old debate over slavery reparations*, Local 12 (Apr. 4, 2022), https://local12.com/news/nation-world/re-upping-the-decades-old-debate-over-slavery-reparations-black-americans-1865-civil-war-40-acres-and-a-mule-sherman-lincoln-african-naarc-naacp-joe-biden-psaki-enslavement, *archived at* https://perma.cc/D8G5-MKCP.

[32] *AB 3121: Task Force to Study and Develop Reparation Proposals for African-Americans*, State of California Department of Justice, https://oag.ca.gov/ab3121, *archived at* https://perma.cc/F974-8MQK.

[33] *Governor Newsom Announces Appointments to First-in-the-Nation Task Force to Study Reparations for African Americans*, Officer of Governor Newsom (May 7, 2021), https://www.gov.ca.gov/2021/05/07/governor-newsom-announces-appointments-to-first-in-the-nation-task-force-to-study-reparations-for-african-americans/, *archived at* https://perma.cc/BD3X-KJUW.

[34] Guardian staff and agencies, *Bruce's Beach to be returned to Black family 100 years after city 'used the law to steal it'*, The Guardian (Oct. 1, 2021), https://www.theguardian.com/us-news/2021/oct/01/bruces-beach-returned-100-years-california, *archived at* https://perma.cc/ATJ5-WEZH.

[35] *See* Where Is My Land's home page at https://whereismyland.org/, *archived at* https://perma.cc/Q4WS-7UPK.

from racism, linked to an international standard of human rights, plus reliable estimate of damages."[36] The next section will explore one such example of reparations geared towards a group harmed by racist violence.

B. Reparations for the Japanese-American Community

In 1942, President Franklin D. Roosevelt ordered the forced evacuation, relocation, and internment of 120,000 people of Japanese ancestry from the West Coast of the United States.[37] This federal decision—justified during World War II as a "military necessity to protect against espionage and sabotage"—resulted in an estimate of $1.3 billion in property loss and $2.7 billion in income loss as valued in 1983 dollars.[38] The first judicial challenges to the forced internment policy, filed during World War II, were *Hirabayashi v. United States*[39] and *Korematsu v. United States*.[40] In both cases, the Supreme Court ruled in favor of the United States government and their "military necessity" argument despite the plaintiff's claims asserting their Fifth Amendment rights were violated on the basis of their Japanese ancestry.[41] In 1982, a researcher found conclusive military documentation that established "the decision to impose restrictions on Japanese-Americans was based primarily on racial prejudice."[42] Because the United States' War Department had attempted to destroy copies of this documentation, the plaintiffs in *Hirabayashi* and *Korematsu* were able to prove fraudulent concealment, which "tolled the statute of limitations [for] cases brought by Japanese-Americans for civil damages arising out of their internment."[43] Both convictions were overturned in 1983 and became crucial judicial decisions that helped advance the attainment of reparations and a Congressional apology to the Japanese-American community.[44]

Despite these tremendous collective losses, the Japanese-American community initially received minimal reparations following the closing of the internment camps through the congressionally enacted American-Japanese Evacuations Claims Act of 1948.[45] Although this piece of legislation provided Japanese-American survivors with a cause of action to bring claims in United States courts, it also limited any award to $100,000 and established a difficult burden of proof that required "a showing that damage or loss of property was

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[36] Westley, *supra* note 15, at 436.
[37] *Id.* at 449.
[38] *Executive Order 9066: Resulting in Japanese-American Incarceration (1942)*, National Archives Education Team (last reviewed on Jan. 24, 2022), https://www.archives.gov/milestone-documents/executive-order-9066, *archived at* https://perma.cc/6KZK-BWVL.
[39] Hirabayashi v. United States, 320 U.S. 81 (1943).
[40] Korematsu v. United States, 323 U.S. 214 (1944).
[41] Eric L. Ray, *Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations*, 37 U. Miami Inter-Am. L. Rev. 171 (2005).
[42] *Id.* at 184.
[43] *Id.* at 184–85.
[44] *Id.* at 185–96.
[45] Westley, *supra* note 15, at 450.

a reasonable and natural consequence of the evacuation or exclusion."[46] The Act also limited compensation for lost property that could be proved through records and required claimants to waive their right to make any further claims against the United States arising out of the evacuation.[47] Lastly, although courts rarely denied relief on substantive grounds, they did employ "a vast array of judicial doctrines to dispose of the case[s] on procedural grounds, e.g., sovereign immunity, tolling of the statute of limitations, [and] lack of jurisdiction," just as the courts did for cases regarding reparations for African-Americans.[48]

Given the similar obstacles that Japanese-Americans encountered in the United States' judicial system, legislation became the key to successfully obtaining reparations owed to Japanese-Americans. On August 10, 1988, President Ronald Reagan signed the Civil Liberties Act of 1988 into law, thereby establishing a statutory framework by which federal reparation payments would be made to the Japanese-American community.[49] Professor Westley captures the importance of this legislative success in the following passage:

> Although deficiencies remain in how the government has implemented this legislation, the importance of the legislation lies in the precedent established for compensation of wronged groups within the American system.[50] Crucially, the Civil Liberties Act pays compensation to the group (surviving internees and their next of kin) on the basis of a group criterion. The Act acknowledges that Japanese Americans were harmed as a group; that they should be compensated as a group; and that they should be made whole economically for the injuries they suffered on the basis of group membership.[51]

Through the 1988 Act, Congress extended an apology and payments of $20,000 to each Japanese-American who survived internment, resulting in $1.6 billion paid to over 82,000 eligible claimants.[52] Notably, the act also acknowledged "that the physical and emotional damage the internees had suffered, including missed education and job training, could never be fully compensated."[53] According to Professor Eric Yamamoto, the reason behind this legislative success is that Japanese-Americans' claims, like those of the survivors of the Rosewood massacre, "fit tightly within the individual rights paradigm of the law… by satisfying the demand for [1] identifiable victims

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[46] *Id.*

[47] *Id.* at 450–51.

[48] *Id.* at 450 n.81. (highlighting Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984) as an illustrative case of this procedural claims dismissal strategy).

[49] *Id.* at 451; *See* 50 U.S.C. app. § 1989(b)-4.

[50] *Id.* at 451 n. 87 (acknowledging the deficient implementation of the 1988 law which resulted in about 2,000 internment survivors passing away before obtaining any compensation during the years following the law's enactment).

[51] *Id.* at 451.

[52] Adeel Hassan and Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, N.Y. Times (Jun. 19, 2019), https://www.nytimes.com/2019/06/19/us/reparations-slavery.html, *archived at* https://perma.cc/D8HS-8Q6B.

[53] *Id.*

and [2] perpetrators, [3] direct causation, [4] damages that are limited and certain, and [5] acceptance of payment as final."[54]

Indeed, others have noted that in the case of Japanese internment camps, "the harm began and ended on known dates, most victims could be readily identified through official records, and more than half were still alive when the compensation was awarded."[55] The framework Professor Yamamoto posits is consequently useful, but not determinative, when developing judicial claims for reparations in other contexts. Moreover, as Professor Westley notes, "[t]he demand for identifiable victims and perpetrators and direct causation is difficult (if not impossible) to meet from a class whose reparations claims include acts that occurred hundreds of years ago, and many of whose members were not yet born when the most egregious violations were occurring."[56]

Given the potentially impossible burden of narrowly tailoring claims for reparations to fit within the individual rights paradigm of the law, more emphasis must be placed on the establishment of group-based claims for collective reparations, as well as individualized reparations that are not hampered by judicial doctrines like statutes of limitations and sovereign immunity.

C. Reparations for the Mexican-American Community

Others have suggested frameworks for individual and group reparations for Mexican-Americans displaced from the United States from 1929 to 1944 in what is known as the Mexican Repatriation.[57] Unlike the Japanese-Americans' claims, these claims and the cognizable affected group are harder to delineate in narrow terms. The affected group includes both citizens and non-citizens of the United States (many of whom did not return to the United States after they were displaced) and disparate levels of documentation regarding deportation proceedings, lost property (i.e. deeds), and lost monetary opportunities.

Between 1929 and 1944, as a response to the economic crisis caused by the Great Depression, the United States government implemented a policy of mass deportations targeting Latino immigrants. This policy resulted in the forced deportation of somewhere between 500,000 and 2 million people of Mexican descent, an estimated 60 percent of whom were either legal residents or United States citizens by birth.[58] Nevertheless, the most common cause for deportation was being in the country illegally.[59] Government sponsored abductions of people of Mexican descent resulted in deportations that were purportedly voluntary but were later found to be the contrary through official local government reports.[60]

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[54] Westley, *supra* note 15, at 452 (citing Eric K. Yamamoto, *Racial Reparations: Japanese Americans Redress and African American Claims*, 19 B.C. Third World L.J. 477 (1998)).
[55] Hassan and Healy, *supra* note 52.
[56] Westley, *supra* note 15, at 452.
[57] Ray, *supra* note 41.
[58] *Id.* at 171, 175.
[59] *Id.* at 175.
[60] *Id.*

Judicial attempts to obtain redress at the state level under the Fourteenth Amendment's Due Process Clause were dismissed because the statute of limitations had passed.[61] Given these familiar doctrinal obstacles to reparations in the courts, advocates turned towards the legislature, but hopes of redress were quashed in 2004 when "California Governor Arnold Schwarzenegger vetoed California Senate Bills (S.B.) 37 and 427, effectively ending any state cause of action for Mexican-Americans seeking financial reparations from the state of California for the injustices they sustained."[62]

Statutes of limitations place a considerable burden on claims for reparations. The purpose of these enactments is to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence."[63] Defense attorney Eric L. Ray has argued that, while it is undisputed that the claims brought by the victims of the Mexican Repatriation fell outside the requisite six years, these plaintiffs might be able to overcome the statute of limitations obstacle by establishing grounds for equitable tolling or obtaining newly discovered material evidence that was inherently unknowable or concealed by the United States' government.[64] This framework for overcoming the common obstacle that statutes of limitations entail could prove to be a foundational part of reparations litigation on behalf of groups disproportionately harmed by government action.

In the case of the Mexican Repatriation, those harmed are most likely to overcome the statute of limitations through the equitable tolling doctrine. This doctrine "allows plaintiffs to sue after the expiration of the applicable statute of limitations, provided they have been prevented from doing so due to inequitable circumstances."[65] Since the survivors of this mass displacement were forcibly resettled to Mexico it is arguable that communication and financial barriers represented inequitable circumstances that made it "impracticable for a repatriate to pursue litigation against state or federal authorities" before the statute of limitations expired.[66]

Claims based on inherently unknowable, newly discovered evidence would require the plaintiffs in this case to "rely on the fact that they were not aware of the existence of liability in order for the statute of limitations

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[61] *Id*. at 173.

[62] *Id*. at 172. S.B. 37 would have waived the statute of limitations to file tort claims by establishing a two-year window for victims of the Mexican Repatriation to file claims against the California government for damages, including loss of property, due to illegal deportation. S.B. 427 would have established a privately funded commission to research local and state involvement in deportation efforts such as raids and coercive tactics to assist people in filing successful claims for reparations. Governor Schwarzenegger justified his vetoes in messages to Congress by stating that a waiver in the statute of limitations would ultimately overburden courts with thousands of claims that would be "difficult to litigate against due to a loss of witnesses, evidence, and other factors," and that legislation was not necessary for Congress to create a new commission. Francisco E. Balderrama and Raymond Rodríguez, Decade Of Betrayal: Mexican Repatriation In The 1930s, 325-326 (UNM Press 2006).

[63] Ray, *supra* note 41, at 180 (internal citations omitted).

[64] *Id*. at 180–81.

[65] *Id*. at 187–88.

[66] *Id*. at 180–81.

to toll."[67] However, although it is likely that none of the people harmed by the Mexican Repatriation could have known of a deliberate plan to implement mass deportations as a response to the Great Depression, "[i]gnorance of rights that should be known" is not enough to preempt the obstacle set by statute of limitations.[68] Absent findings such as those in the *Hirabayashi* and *Korematsu* cases, it would be difficult to establish deliberate government participation in unconstitutional deportations and purposeful concealment of their involvement. Nevertheless, given this extreme case of group injustice and the barriers plaintiffs faced to file timely claims, application of equitable tolling should be merited and in accordance with the precedent set in *Rosner v. United States*.[69]

Once statutes of limitations no longer preempt claims for reparations, thorough documentation is still necessary to succeed in court on constitutional grounds. The strongest claims would likely come from U.S. born children of Mexican descent who were repatriated with their parents and likely lacked resources to act on any potential legal claims.[70] Using property deeds, claimants could potentially establish a Fifth Amendment Takings Clause claim against the United States government. Such claims require (1) a clear showing the property taken belonged to claimant or claimants, and (2) that the property was confiscated by force or purchased without just compensation by the government.[71] Given how neatly this approach fits into the individual rights paradigm of U.S. law, this framework of using non-monetary reparation claims under the Fifth Amendment to recover property lost due to unconstitutional takings by the government might represent the foundational judicial strategy for any advocacy movement requesting reparations.

D. Summary of Obstacles to Reparations

As shown thus far, due to the long-standing history and legal endorsement of slavery and colonialism, claims for reparations to redress these harms will usually need to contend with five judicial obstacles: (1) statutes of limitations or claims of sovereign immunity, (2) absence of directly harmed individuals, (3) absence of individual perpetrators, (4) lack of direct causation, and (5) indeterminacy of compensation amounts."[72] Moreover, establishing claims based on injustices committed decades ago will prove much harder than in

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[67] *Id*. at 179.

[68] *Id*. at 181.

[69] *Id*. at 188; Rosner v. United States, 231 F. Supp. 2d 1202, 1208 (S.D. Fla. 2002) ("[E]quitable tolling is applied when necessary to prevent an injustice.").

[70] Ray, *supra* note 41, at 181.

[71] *Id*. at 189.

[72] *Id*. at 189, 192 (noting similar judicial obstacles as those discussed by Westley, *supra* note 15, and Yamamoto, *supra* note 54, but in the context of reparations for Mexican-Americans: "[l]awsuits for slave reparations face many of the same obstacles victims of Mexican Repatriation will face, including: (1) identifying specific conduct by the parties; (2) the statute of limitations; and (3) defenses of sovereign immunity.").

the case of Japanese internment camp survivors who sought group reparations "for specific acts of injustice that they, not their ancestors, suffered."[73]

In order to overcome statute of limitation challenges, most groups will have to rely on the equitable tolling doctrine.[74] Based on *Rosner* and the earlier case of *Bodner v. Banque Paribas*,[75] statutes of limitations should be tolled "where there is [1] violent repression, followed by [2] active concealment of relevant facts surrounding the history of that repression, and an [3] officially sanctioned study that uncovers the truth of that repression."[76] These requirements belie why it is so important to have narrowly identified and thoroughly documented conduct by the parties in order to be able to overcome steep, judicially imposed burdens of proof. Instrumental research in the *Hirabayashi* case serves as "a powerful reminder of how proper funding and unlimited access to research can turn a moot case into a valid claim."[77] Likewise, as explored earlier in this section, groups advocating for reparations for African-Americans tend to focus on the need to establish task forces or committees that invest significant money, time and effort investigating violent periods in history that affected them both individually and as a group.

The challenge of overcoming sovereign immunity is perhaps the biggest hurdle and will likely require concerted efforts to obtain legislative reform. "Unless the government consents to suit, sovereign immunity applies."[78] Sovereign immunity also tends to place limits on monetary remedies, which means non-monetary remedies tend to be the more realistic or sole option for groups seeking to redress past harms. A crucial limitation of the judicial approach to group reparations is that courts have made it clear that Congress has not waived sovereign immunity for claims based on violations of conventional and customary international law.[79] As will be explored in the following section, international law would provide some of the broadest statutory and judicial frameworks for groups seeking reparations.[80] As it stands, sovereign immunity bars those who are not legal residents or citizens of the United States from full constitutional protections against government violations of civil rights. Although exception exists under the Administrative Procedure Act, "which waives the sovereign immunity of the United States for non-monetary suits against federal agencies under specified conditions," the limited access to remedies bars most meaningful and change-inducing reparations for individuals and groups affected by extreme or gross violations of their human rights.[81]

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[73] *Id*. at 192 (citation omitted).

[74] *Id*. at 193 ("Another avenue for addressing the statute of limitations problem is a waiver. As a gesture of upholding the interests of justice, private and public institutions have waived the statute of limitations when the statute stands as the only impediment to trial.").

[75] Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

[76] Charles J. Ogletree Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. C.R.–C.L. L. Rev. 279, 300–01 (2003).

[77] Ray, *supra* note 41, at 185.

[78] *Id*. at 194.

[79] *Rosner*, 231 F.Supp.2d at 1204.

[80] G.A. Res. 60/147.

[81] *Rosner*, 231 F.Supp.2d at 1211; *see also* Nestlé USA, Inc. v. Doe, 141 S.Ct. 1931 (2021) for one of the most recent examples of the limits the Supreme Court has set with respect to claims that could be made under the Alien Tort Statute by non-U.S. citizens for violations of

All three examples of successful or suggested reparation efforts analyzed in this section faced the same, frequently insurmountable obstacles in U.S. courts, while conversely finding narrow avenues of success through state and federal legislatures. In acknowledging this reality, an essential step forward towards obtaining reparations will require concerted efforts and movements of solidarity to advocate for legislation that can establish causes of action based on international law, international human rights, and values of human dignity and respect. Not only would this open up the court to more transformative litigation, but it would render moot judicial doctrines that place limits on harmed groups obtaining justice.

III. International Legal Frameworks

"The damage of colonialism extended to every aspect of life in the colonized territories. The inhabitants were mere slaves to their colonial masters. In many cases, they were sold into slavery and transported to other countries at vast distances from their homeland. Colonialism perpetuated slavery, exploiting slaves and raw materials from colonized territories in order to advance colonial countries and build modern civilization.
Inhabitants of colonized countries were killed and subjected to collective and individual imprisonment, forced migration, exile and enslavement.
Attempts were made to obliterate their national languages and cultures and replace them with the language and culture of the colonizer.
The colonizer forcibly enlisted hundreds of thousands of inhabitants of colonized countries, who lost their lives in wars from which they had nothing to gain. As a result, their families were subjected to unbearable suffering.
The colonized countries sustained massive damage as a result of illegal economic exploitation, the massive draining of resources, the plundering of natural wealth and cultural and historic property, and environmental contamination caused by radiation from nuclear testing, which led to considerable human and material damage."

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Compensation for damage caused by colonialism

Letter dated 29 July 2010 from the Permanent Representative of the Libyan Arab Jamahiriya, Ambassador Abdurrahman M. Shalgham, to the United Nations addressed to the Secretary-General of the United Nations.[82]

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the law of nations or a treaty of the United States. In this case, the Supreme Court dismissed claims by six individuals who had been trafficked into child slavery by cocoa farms contracted by Nestlé USA, Inc. and Cargill, Inc.

[82] Ambassador Abdurrahman M. Shalgham. *Compensation for damage caused by colonialism*, A/65/192 (Aug. 2, 2010).

A. International Law and Non-Binding Obligations

The field of international law refers to the rules and principles that govern relations between nation States, as well as between nation States and individuals or organizations.[83] The primary sources of modern international law are customary international law and conventional international law.[84] Customary international law refers to state practices that have been followed in a consistent and uniform manner over time due to a sense of legal obligation held by States.[85] Conventional international law, on the other hand, refers to the documented body of legal principles and obligations set forth in treaties and other international agreements that essentially create binding laws for the parties of the agreement.[86] An example of this would be the *Charter of the United Nations* (*UN Charter*), a multilateral treaty and instrument of international law that binds all UN Member States to the obligations set forth therein. The key to both these sources of law is that States have in some tangible way consented to be bound by specific rules, practices, or obligations. A State's consent is what gives international laws legitimacy in their binding and enforceable effect.[87]

Aside from these binding sources of law, international law also relies on a set of general principles that have been identified through the course of history and diplomacy to promote peace and fairness between States.[88] Although these principles are not binding, they are frequently used and referenced in the development of conventional international law and are recognized as valid secondary sources of international law when there is no applicable customary or conventional law that could resolve an international dispute.[89]

As the world became increasingly interconnected in the 20th century, and in the aftermath of World War II, representatives of 50 countries came together in 1945 to draft what came to be the *UN Charter.* This foundational treaty established the United Nations as the primary organization entrusted "to help in the settlement of international disputes by peaceful means, including arbitration and judicial settlement (Article 33), and to encourage the progressive development of international law and its codification."[90] Since then, the United Nations has developed this codified body of international law through the organization of conventions and the adoption of multilateral

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[83] *International Law*, Cornell Law School's Legal Information Institute, https://www.law.cornell.edu/wex/international_law, archived at https://perma.cc/Y9CZ-FM3B.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See generally* Matthew J. Lister*, The Legitimating Role of Consent in International Law*, Faculty Scholarship at Penn Law (2011), https://scholarship.law.upenn.edu/faculty_scholarship/317, *archived at* https://perma.cc/5JLR-NZSY.

[88] Examples of general principles in international law include the *prevention principle*, prohibiting a State to cause harm to the territory of another State, and the *sovereignty principle*, which asserts the supreme authority of every State within its territory to the exclusion of other States.

[89] *International Law*, *supra* note 83.

[90] *International Law and Justice*, United Nations, https://www.un.org/en/global-issues/international-law-and-justice, *archived at* https://perma.cc/D5CJ-MPY2.

treaties and standards in its central mission to promote economic and social development as well as to advance international peace and security.[91]

The main deliberative, policymaking and representative organ of the United Nations is the General Assembly.[92] All Member States are represented in the General Assembly, thereby making it the only body in the United Nations with universal representation.[93] Setting aside some narrow restrictions, the *UN Charter* "delegates to the General Assembly power to discuss and make recommendations on *any matter* within the scope of the *Charter*."[94] It is through this authority that the General Assembly issues resolutions which set forth formal, yet non-binding expressions of the body's opinion on matters of international law. Given their non-binding character, General Assembly resolutions are not intended to create new obligations upon Member States. Rather, the declarations they contain are grounded in existing international obligations and are meant to serve as a tool or a set of basic principles and guidelines that should be considered by UN Member States when implementing domestic policies and engaging in international relations to remain in compliance with international law. General Assembly Resolutions, despite their non-binding nature, also serve a crucial political, symbolic, and moral role that in turn influences the development of customary and conventional international law.[95]

Even the International Court of Justice, the principal judicial organ of the United Nations, has at times accorded important weight to General Assembly resolutions in the development of international law. For example, with respect to the development of international law regarding non-self-governing territories, the Court has given great weight to Resolution 1514 (XV), recognizing its role in the development of law through the *UN Charter* and by way of customary law, a stance that implies resolutions can serve as "an authoritative interpretation of Charter obligations, or… an element of customary international law, or both."[96] So, while it is crucial to remember the non-binding nature of General Assembly resolutions, it is also important to recognize their weight as expressions of the only U.N. body with universal representation. Since resolutions must receive either a majority vote or consensus support, they represent at minimum recommendations that most States believe are necessary for the progressive development of international law and the protection of

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[91] *Id.*

[92] *See Main Bodies*, United Nations, https://www.un.org/en/about-us/main-bodies, *archived at* https://perma.cc/2EPQ-K42S.

[93] *Id.*

[94] Christopher C. Joyner, *U.N. General Assembly Resolutions And International Law: Rethinking The Contemporary Dynamics Of Norm-Creation*, 11.3 Cal. W. Int'l L.J. 445, 448 (1981) (emphasis added).

[95] Oliver J. Lissitzyn, International Law Today and Tomorrow, Oceana Publications, 34-36 (1965) ("Statements or declarations not binding as treaties may also give rise to reasonable expectations. If such statements or declarations emanate from a large number of States and purport to deal with a legal matter, they may be regarded in some circumstances as indications of a general consensus amounting to a norm of international law.").

[96] Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 Am. Soc'y Int'l L. Proc. 301, 303 (1979); G.A. Res. 1514 (XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

international peace and security. With that established, the rest of this section will explore a series of resolutions (including the aforementioned Resolution 1514 (XV)) that should arguably guide the approach that should be taken with regards to the decolonization of Puerto Rico.

B. Reparations in an International Context

In 2005, the United Nation's General Assembly adopted Resolution 60/147, titled *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* as recommended by the Commission on Human Rights and the United Nation's Economic and Social Council.[97] This document, based in part on Article 8 of the *Universal Declaration of Human Rights*, as well as several other resolutions, treatises, and accords, represented the codification of the rights of victims of human rights violations to reparations and access to justice within domestic legal systems and was produced.[98] Despite its non-binding nature, it is worth noting that this resolution obtained widespread support from U.N. Member States that composed the Human Rights Commission.[99] Moreover, Resolution 60/147 does not impose any new international or domestic obligations, but rather outlines "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law."[100]

The claim for reparations as articulated in Resolution 60/147 is based on binding obligations under the *UN Charter,* as well as the law of State responsibility which holds that an internationally wrongful act arising from the breach of an international obligation entails the responsibility of the breaching State to make reparations and redress any injury they may have caused. The *UN Charter* establishes under Chapter 1, Article 1, that one of the purposes of the United Nations is to develop relations among nations *based on respect for the principle of equal rights and self-determination of peoples*.[101] To this end, States' obligations in relation to this principle are further outlined under Chapter XI, Article 73 which provides a set of requirements to be met by administering powers of non-self-governing territories, such as due respect for the culture of the peoples concerned, the promotion of social, economic, and scientific development, and the regular transmission of "statistical and other

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[97] G.A. Res. 60/147; Human Rights Resolution 2005/35, Office of the High Commissioner for Human Rights (Apr. 19, 2005).

[98] G.A. Res. 217 A (III), *Universal Declaration of Human Rights*, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

[99] Not only did it receive endorsement by all Latin American and Caribbean countries, but also almost unanimous support from European countries. *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, The Redress Trust (March 2006), https://redress.org/wp-content/uploads/2018/01/MAR-Reparation-Principles.pdf, *archived at* https://perma.cc/EH3B-LPYR.

[100] G.A. Res. 60/147, *Preamble*.

[101] U.N. Charter art. 1, ¶2 (emphasis added).

information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible."[102] These obligations have arguably not been met by the United States in relation to Puerto Rico and the principle of State responsibility demands that this be redressed. This principle was formally developed by the International Law Commission (ILC), a body of experts elected by the General Assembly to develop and codify international law, through the adoption of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* in 2001.[103] These *Draft Articles* hold States responsible for internationally wrongful acts, which are then defined as actions or omissions attributable to the State under international law that constitute a breach of an international obligation.[104] The *Draft Articles* further establish that States responsible for internationally wrongful acts are "under an obligation to make full reparation" for any injury their wrongful act may have caused, with injury defined as "any damage, whether *material or moral*, caused by the internationally wrongful act of a State."[105] These reparations "shall take the form of restitution, compensation and satisfaction."[106]

Puerto Rico's decolonization process, as will be explored in Section III.C, was not lawfully completed having regard to international law. Instead, the United States orchestrated a sham process to forgo their obligations under Article 73 of the *UN Charter*.[107] The injuries caused by the United States' past and continued occupation of Puerto Rico have therefore never been addressed. That is why Res. 60/147 must serve as a crucial guiding framework to guarantee Puerto Rico's right to self-determination, as well as full compliance with international law. As we have seen from our examination of United States' jurisprudence regarding reparations, "the legal basis for such [claims] is weak." Even in the context of international law, attorney Bill Sundhu acknowledged in his essay *Reparations for Colonialism and the Trans-Atlantic Slave Trade* that slavery and colonization were not recognized crimes or violations of human rights at the time of their inception, so arguably, States could not be held accountable on the basis of these being internationally wrongful acts.[108] However, this argument does not preclude the powerful moral basis for

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[102] U.N. Charter art. 3, ¶¶1–5.

[103] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Commission (November 2001) [hereinafter *Draft Articles*]. It is worth noting that the International Court of Justice had already cited an earlier version of the *Draft Articles* in the *Case Concerning the Gabčíkovo-Nagyamaros Project (Hungary v. Slovakia)*, Judgement, 1997 I.C.J. Rep. 7, ¶46 (September 25) ("It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect… see Article 17 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission.").

[104] *Draft Articles*, *supra* note 103, at art. 1–2.

[105] *Id.* at art. 31 (emphasis added).

[106] *Id.* at art. 34.

[107] *See infra,* Section III.C.

[108] Bill Sundhu, *Reparations for Colonialism and the Trans-Atlantic Slave Trade*, https://billsundhu.ca/essays/colonialism/#21, *archived at* https://perma.cc/8B39-6HJ3; *Draft Articles*, *supra* note 103, at art. 13 ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

claims seeking reparations from State governments for harms and damages committed through historical conduct.[109] Anchoring itself on this moral basis, Resolution 60/147 recognizes that extreme cases of individual and group injustice constitute an affront to human dignity, and as such, victims of such harms are entitled to justice and redress. Taking together both factual and moral considerations, the United States' breach of its international obligations as an administering power of a non-self-governing territory should be characterized as an internationally wrongful act that warrants reparations for Puerto Rico and its citizens. Furthermore, both international courts and courts in the United States should take into account the framework provided by Res. 60/147 to outline the specific obligations and responsibilities of the United States with respect to these reparations.

The general framework established by Resolution 60/147 outlines the UN member States' duties and obligations to ensure respect for international human rights laws, as well as the rights to remedies that must be extended to victims of gross human rights violations. Unlike existing legal frameworks in the United States, this resolution provides a broad approach to reparations that recognizes both individual and group claims, thereby making it a more appropriate guide to use in the context of decolonization, a process that must inherently consider individual and collective rights of the colonized peoples.[110] To ensure respect for and proper implementation of international laws, the Resolution outlines four critical State duties:

> (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
> (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
> (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice… irrespective of who may ultimately be the bearer of responsibility for the violation; and
> (d) Provide effective remedies to victims, including reparation.[111]

These duties are not that different from what advocates in the United States hope to make the government accountable for in the reparation cases discussed in Section I. In particular, the recurring desire for thorough investigations of reparation-based claims is held in this Resolution as a critical

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[109] Sundhu, *supra* note 108.

[110] G.A. Res. 60/147, ¶8 (defining "victim" as "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.").

[111] *Id.* at ¶3.

obligation of any State seeking to redress extreme harms.[112] Fully embracing these duties and obligations—as well as adopting the explicit ban on statute of limitations for claims involving gross violations of international human rights law, or serious violations of international humanitarian law—could radically transform the generally unsympathetic view that courts hold towards over-inclusive reparation claims. With respect to victim's rights to remedies, the resolution outlines three key rights: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[113]

Equal access to justice under international law captures a broad range of remedies, including proper dissemination of information regarding all available remedies, provision of proper assistance to victims seeking justice, guaranteed access to all appropriate legal, diplomatic, and consular means of exercising rights to reparations, and the development of procedures to allow group victims to present claims based on collective harms caused by state action.[114] With respect to the right to reparation for harm suffered, the Resolution makes clear that member States should "provide reparations to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."[115] Reparations should naturally be proportional to the gravity of the violation and the harm suffered, but to be full and effective, they must include a combination of the following forms: restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition.[116] Together, these five forms of reparation encompass a wide array of remedies.[117] Lastly, the right of access to information guarantees that individuals and groups affected by gross violations of human rights can obtain all pertinent information with respect to the nature, causes, and conditions that led to their victimization and the violation of their human rights.[118] Since it is the duty of each member State to properly incorporate agreed upon principles of international law and human rights into their statutory framework and jurisprudence, advocates in the United States should demand a more genuine adoption of this international legal framework for reparations. Success in this endeavor could lead to more

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[112] *Id*. at ¶4 ("States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him").

[113] *Id*. at ¶11.

[114] *Id*. at ¶¶12–14.

[115] *Id*. at ¶15.

[116] *Id*. at ¶¶15–23.

[117] A non-exhaustive list of available reparations under the United Nations' framework include: the right to return, return of property, monetary compensation for physical or mental harms and lost opportunities (including education, employment, earning, and social benefits), material damages, compensation of costs required for development of research and cultural works, medical and psychological care, social and legal services, full disclosure of the extent of harms committed during periods of extreme injustice, public apologies, ensuring effective civilian control of the military and security forces, promoting observance of codes of conduct by public servants, reforming laws and institutions that contribute to or allow gross violations of human rights law and serious violations of international humanitarian law, etc. *Id*.

[118] *Id*. at ¶24.

robust and morally just approaches for redressing groups harmed by extreme violence or human rights violations due to government action or inaction.

C. Colonialism in an International Context

Before fully analyzing the case of Puerto Rico, it is crucial to also consider how the international legal framework on the right to self-determination should inform the United States' approach to reparations for Puerto Rico, which arguably must entail an obligation to decolonize the archipelago. Contrary to the United States government's efforts to frame the issue as a domestic civil rights dispute, this issue is one that relates to the international law of decolonization and the right of self-determination. To this day, Puerto Rico's decolonization has not been lawfully completed with regards to international law, yet the United States managed to use its power and influence as a permanent member of the United Nations security council to allege that it had and free itself from the international obligations that follow the continued occupation and colonization of a foreign territory.

In 1953, the United States submitted a position paper to the United Nations titled "*Cessation of Transmission of Information Under Article 73(e) of the Charter in Respect of Puerto Rico*."[119] With this report, the United States government successfully removed Puerto Rico from the international list of non-self-governing territories, thereby discharging themselves from the responsibility under Article 73 of the *UN Charter* to annually transmit to the Secretary General information on Puerto Rico and the efforts being made to ensure the archipelago could attain a full measure of self-government.[120] This strategic move has since allowed the United States to frame the colonization of Puerto Rico as a purely domestic issue, rather than an international one, for decades. Since the international community is no longer prioritizing the decolonization of Puerto Rico, politicians and citizens in the United States are free to ignore the voices of Puerto Ricans while simultaneously avoiding any accountability for subjecting us to such an undemocratic and subordinated form of government. This section explores the framework for decolonization that the United Nations established in 1960 and applies it to the context of Puerto Rico in order to demonstrate why this must be treated as an international issue of colonization and not a domestic issue of representation.[121]

In 1960, the United Nations played a crucial role in the decolonization of countries around the world through the adoption of Resolutions 1514 (XV)

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[119] SD/A/C.4/115, *Position Paper Prepared in the Department of State for the United States Delegation to the Eighth Regular Session of the General Assembly*, (Sep. 2, 1953), https://history.state.gov/historicaldocuments/frus1952-54v03/d911, *archived at* https://perma.cc/AZ36-3FEG.

[120] U.N. Charter art. 73, ¶5.

[121] This argument is not unique. For decades, groups and individuals have lobbied the United Nations to re-designate Puerto Rico as a non-self-governing territory. An example of these efforts can be found in reports from the United Nations' Special Committee on Decolonization, 2019 Session, 5th & 6th Meetings (AM & PM), https://www.un.org/press/en/2019/gacol3337.doc.htm, *archived at* https://perma.cc/S3SF-PG6W.

and 1541 (XV).[122] The first of these resolutions established the right to self-determination and the obligation of member States to aid in the ending of colonialism around the world. The second resolution clearly defined what the United Nations would consider a non-self-governing territory and established the procedural standards to be met in order to ensure a previously colonized nation obtained full self-determination. Although the United Nations' efforts of decolonization ultimately fell short the two adopted resolutions created a useful framework for decolonization that prioritized sovereign equality in any collective process of self-determination.[123]

Resolution 1541 (XV) restated the international obligation to transmit information under Article 73(3) with respect to "territories whose peoples have not yet attained a full measure of self-government."[124] Principle IV of the resolution further noted that a *prima facie* case which carried such an obligation would arise with respect to any "territory which is geographically separate, and is distinct ethnically and/or culturally from the country administering it."[125] Other elements aside from geography and culture could also be taken into consideration when evaluating whether a territory was non-self-governing, such as, the territory's administrative, political, juridical, economic, or historical nature. The goal of the analysis is to determine whether any of these factors affected the relationship "between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination."[126]

Applying these factors, Puerto Rico is indisputably geographically separate from the United States and has a distinct ethnicity *and* culture.[127] Moreover, our administrative, political, juridical, economic, and historical nature has been under the control of the United States' Congress and subject to their use of plenary powers under the United States Constitution's Territorial

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[122] G.A. Res. 1514 (XV); G.A. Res. 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter.*

[123] The United Nations' decolonization efforts failed in two key respects: (1) not all readily identifiable occupied nations were decolonized, and (2) proper reparations were not paid in order to redress the human rights violations committed during the period of colonization. Moreover, the subsequent Resolution 2625 (XXV) in 1970 belied the United Nations' commitment to sovereign equality in processes of decolonization and self-determination by including a new and vague fourth option for self-determination ("the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people").

[124] G.A. Res. 1541 (XV), *Principle I.*

[125] *Id.* at *Principle IV.*

[126] *Id.* at *Principle V.*

[127] I highly doubt any US-American would patriotically sing the Puerto Rican anthem written by Lola Rodríguez de Tío, which includes lyrics such as: "*Nosotros queremos la libertad y nuestros machetes nos la darán.*" (translation: "We want liberty and our machetes will give it to us."), Lola Rodríguez de Tió, *¡Despierta, borinqueño…*, https://ciudadseva.com/texto/despierta-borinqueno/, Ciudad Seva, *archived at* https://perma.cc/WQA7-UJDB. Conversely, I spent several nights during the 2019 protests in Puerto Rico against ex-governor Ricardo Rosselló surrounded by other fellow Puerto Ricans as we sang our anthem with pride and hope.

Clause for over 120 years.[128] So, why is Puerto Rico not considered a non-self-governing territory?

The answer lies in *Principle VI* of Resolution 1541 (XV) and the fraudulent information submitted by the United States to the United Nations in their 1953 position paper on the status of Puerto Rico. *Principle VI* recognizes that:

> A Non-Self-Governing Territory can be said to have reached a full measure of self government by:
>
> (a) Emergence as a sovereign independent State;
> (b) Free association with an independent State; or
> (c) Integration with an independent State.[129]

The first means of self-determination is rather self-explanatory and includes countries such as Kenya, Rwanda, Eritrea, and Algeria, all of which became sovereign nations, separate from those that colonized them. Puerto Rico has never been able to govern itself as a sovereign independent State. Instead, in 1953, the United States alleged that Puerto Rico had achieved self-determination through the second proposed means: free association with an independent state. The proposition made was that through "the establishment of the Commonwealth of Puerto Rico under the constitution promulgated on July 25, 1952 the United States Government and the Puerto Rican Government concluded that the people of Puerto Rico… attained a full measure of self-government and that it was no longer appropriate to transmit information on Puerto Rico under Article 73(e)." For this to be an accurate assessment of Puerto Rico's degree of self-government under the statutory terms of Resolution 1541 (XV), the process by which Puerto Ricans established the Commonwealth and enacted the constitution would have to adhere to *Principle VII* of the Resolution and the two requirements set forth therein.[130]

The first requirement for a process of self-determination through free association is the "free and voluntary choice by the peoples of the territory concerned… through informed and democratic processes."[131] The argument made by the United States is that the people of Puerto Rico voluntarily voted in favor of Public Law 600 and in favor of the resulting Constitution of Puerto Rico free and democratic elections held in 1951 and 1952 respectively.[132] Unfortunately, contrary to what most academics in the United States believe (and contrary to what many Puerto Ricans now believe), the electoral processes that guided the consultations between the people of Puerto Rico and the local and federal governments they were under were fraught with repression, violence, corruption, intimidation tactics, and violations of peoples' right to self-expression and assembly.[133] A process of self-determination that is carried

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[128] U.S. Const. art. IV, § 3, cl. 2; Puerto Rico v. Sanchez Valle, 579 U.S. 59 (U.S.P.R., 2016); United States v. Vaello Madero, 596 U.S. 159 (2022).

[129] G.A. Res. 1541 (XV).

[130] *Id.*

[131] *Id.*

[132] *Developments in the Law — The U.S. Territories*, 130 Harv L. Rev. 1616, 1656 (2017).

[133] Ivonne Acosta Lespier, La Mordaza [Gag Law], (DS eds. 2018). Many Puerto Rican academics have covered the historical period that covers the establishment of the

out while gag laws are in place[134], opposition leaders and their potential voters are incarcerated,[135] misinformation is being disseminated by the state government,[136] and people's livelihoods and careers are placed at risk by government forces[137] can hardly be deemed to be legitimate.[138]

Nevertheless, for 70 years Puerto Ricans have been obligated by federal and local elites to pretend that it was legitimate and that we are under the rule of a democratic government and not a colonial government manufactured by the United States' federal government in collusion with local political elites to ensure Puerto Rico could be kept as a permanent colony.[139] Although much

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Commonwealth of Puerto Rico (known in Spanish as *El Estado Libre Asociado de Puerto Rico*), but the book *La Mordaza* by Ivonne Acosta Lespier is one of the most well-known books covering the human rights violations that occurred during that period. Although it was first published in Spanish on June 15, 2008, I rarely see this book cited, particularly within academia in the United States. Now that an English version of the book has been published, I hope to see more honest engagement with its findings and the colonial realities that it lays bear. *See also* Mayi Marrero, Prohibido Cantar: Canciones carpeteadas y artistas subversivos en Puerto Rico, Mariana Editores (2018), (documenting the persecution of Puerto Rican artists throughout the period of COINTELPRO).

[134] Law 53, enacted by the Puerto Rican government in 1948, is frequently referred to as "la ley de la mordaza" (translation: the gag law). Essentially, two years prior to the signing of Public Law 600, the colonial government of Puerto Rico had begun the development of statutory and policing practices that would justify the oppression and suppression of dissenters and opponents. Under this law, Puerto Ricans were arrested for delivering speeches, handing out pro-independence propaganda, booing the police, or even flying the flag of Puerto Rico. *See* Acosta Lespier, *supra* note 133, at 124, 147.

[135] On November 2, 1950, two days before the period of new voter registration for the upcoming Special Elections on Public Law 600, Puerto Rican Governor Luis Muñoz Marín ordered "the arrest of Nationalists." During the next two days, police and National Guardsmen arrested over one thousand Puerto Ricans under this pretext. These "preventative" arrests were carried out from early in the morning on November 2 until the night of November 4 and dramatically set the undemocratic stage for the registration process which was set to begin on November 5th. *Id.* at 145–47. Opposition leaders were arrested and would remain incarcerated until November 8th without ever receiving a summons for their arrest. *Id.* at 148.

[136] *Id.* at 161–62 (discussing government sponsored propaganda that implied support for independence and against the process outlined in Public Law 600 amounted to support of Communism).

[137] Adopting language from the Smith Act, a federal law enacted in 1940 to criminalize behavior geared towards the violent overthrow of the United States government, Law 53 rendered anyone convicted under the law ineligible for employment by the United States, or any department or agency thereof, for five years. *Id.* at 87. On May 4, 1951, the Puerto Rican legislature also passed Act 214 which provided that any violation of Law 53 was a sufficient basis for suspension from employment. *Id.* at 161.

[138] This claim is made taking into account the "*Obligations for Democratic Elections*" that have been set forth by The Carter Center, a nongovernmental organization known and respected for its contributions to the field of independent election observation. Given the political and social conditions under which elections have been held in Puerto Rico since 1952, it is likely that an in-depth analysis using the legal framework provided by The Carter Center would show the electoral system of Puerto Rico is undemocratic and its legitimacy is cause for concern. *Election Obligations and Standards*: *A Carter Center Assessment Manual,* The Carter Center (2014), https://www.cartercenter.org/resources/pdfs/peace/democracy/cc-OES-handbook-10172014.pdf, *archived at* https://perma.cc/V7SC-BA94.

[139] *See* Franklin D. Roosevelt, *Message to Congress on Self-Government for Puerto Rico*, The American Presidency Project (Sep. 28, 1943), https://www.presidency.ucsb.edu/documents/message-congress-self-government-for-puerto-rico, *archived at* https://perma.cc/LSW2-BT4D. In this memo, President Franklin D. Roosevelt outlines a political structure proposal that is strikingly similar to that which was ultimately adopted for the Commonwealth of Puerto Rico almost a decade later. ("The fiscal relationship of the Insular Government to

more research regarding this period in Puerto Rican history is likely necessary, it is clear that the first requirement of exercising a "free and voluntary choice" for self-determination through free association was not met.[140]

The second requirement for a process of self-determination through free association is that the associated territory "should have the right to determine its internal constitution without outside interference." Since Congress eliminated Section 20 under Article II of the Constitution that was purportedly approved by the people of Puerto Rico through free and democratic elections, external interference can easily be established. To be clear, this section was not a trivial one. Section 20 was one of the most important clauses under the Bill of Rights of the Puerto Rican Constitution and it notably recognized education, employment, health care, housing, and many other basic needs as human rights that must be safeguarded and promoted by the government.[141] The explicit elimination of such language by the United States Congress should shed light on the coercive and exploitative nature of the "free association" that was created in this time period. Since neither requirement for self-determination through free association was met, the only plausible conclusion is to accept that the determination made between the United States and the United Nations to remove Puerto Rico from the list of non-self-governing territories was a mistake and the colonization of Puerto Rico must again be made an international issue.

Before concluding this section, it is crucial to recognize the third internationally established means of self-determination (*i.e.*, integration with an independent State), an option that has long been advocated by many Puerto Ricans and US-Americans as a means of liberation. Although statehood for Puerto Rico is portrayed as a means to obtain equal citizenship and electoral rights as those enjoyed by citizens living within the fifty states of the United States, the power dynamics that underlie the suggested processes of annexation are rarely analyzed using the framework provided by the United Nations. The negotiation process of a free association between Puerto Rico and the United States was arguably undermined by the lack of sovereign equality between the two nations. This political power disparity would not disappear in negotiations to annex Puerto Rico. Potentially bearing this in mind, the United Nations' framework for self-determination through integration is governed by two main principles.

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the Federal Government would not be altered, nor would the ultimate power of Congress to legislate for the territory. The people of the island would, however, be given assurance of the intention of Congress to obtain the concurrence of the people of the island before imposing upon them any further changes in the Organic Act."). President Roosevelt also acknowledges the United States' interest in retaining Puerto Rico as a permanent colony, despite the paternalistic concessions it must make so this inherently undemocratic political structure seems like it extends avenues of democracy to Puerto Ricans ("[Puerto Rico's] possession or control by any foreign power—or even the remote threat of such possession—would be repugnant to the most elementary principles of national defense." and "As to the future, it is not proposed that the political development of Puerto Rico be left to chance.").

[140] *See Election Obligations and Standards, supra* note 138 (outlining standards for electoral democracy and legitimacy).

[141] Puerto Rico Const. art. II, § 20.

Principle VIII of the United Nations Resolution 1541 (XV) states that "[i]ntegration with an independent State should be on the basis of complete equality between the people of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated." Given the historical oppression and marginalization of Puerto Ricans, coupled with the lack of recognition under United States law of Puerto Ricans as a protected minority or a suspect class subject to heightened scrutiny and protection under the law, this requirement is presently not met. For that reason, laws like Puerto Rico's Act 60—which financially discriminates against Puerto Ricans (or rather against the tax-paying residents of Puerto Rico from 2009 to 2019, which just so happens to mostly include Puerto Ricans) by giving special taxation benefits to foreigners—are constitutionally permissible.[142]

Nevertheless, even if complete equality between the people of Puerto Rico and the people in the fifty United States could be established, the process of integration must also guarantee two circumstances outlined in *Principle IX* of the United Nations Resolution 1541 (XV) which seem to promote equal sovereignty between nations and the independent State with which they seek integration.[143] The first requirement holds that the integrating territory "should have attained an advanced stage of self-government with free political institutions" such that people can make choices through an informed and democratic process.[144] Given the conditions under which the colonial government (i.e. the "Commonwealth") was established and the continued corruption, lack of transparency, and disinformation that is evidenced within the Puerto Rican government, this condition has not been met such that the United States would have a valid, non-colonial claim to annex us. The second circumstance would require Puerto Ricans, "acting within the full knowledge of the change in their status," freely and democratically expressing a desire to integrate with the United States. Although more research is required for this following assertion, proposals for "Compensation for 'Damage caused by colonialism'" at the United Nations have recognized "that the concealment of realities concerning colonized territories and the conditions of their inhabitants under foreign occupation has resulted in the distortion of the history of colonized peoples, causing considerable moral damage." Without addressing this harm, no plebiscite or electoral process could meet the standards of "full knowledge" needed to represent the freely expressed wishes of the people of Puerto Rico. Genuine efforts to support self-determination in Puerto Rico should be geared towards Puerto Ricans obtaining equal sovereignty as a nation, not just marginal representation as a national minority within a foreign nation.[145] Moreover, efforts should seek to end the historical fragmentation

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[142] *Código de Incentivos de Puerto Rico*, Ley Núm. 60-2019, https://www.lexjuris.com/lexlex/Leyes2019/lexl2019060.htm, *archived at* https://perma.cc/R3E6-5SFZ.

[143] G.A. Res. 1541 (XV).

[144] *Id.*

[145] Given the conditions of colonialism that Puerto Rico is under and the limitations of any exercise of self-determination that is not based on sovereign equality between the Non-Self-Governing Territory and the occupying nation State, neither of the two legislative proposals being considered by the United States Congress as of April 2022 will genuinely create

of the Puerto Rican community around the status debate by recognizing the persistent colonial nature of the two current non-independence alternatives.

The pitfalls that the United Nations attempted to avoid through the carefully crafted decolonizing framework of Resolution 1541 (XV) have arguably been contravened by the subsequently adopted Resolution 2625 (XXV).[146] Through this resolution, the United Nations articulated a fourth means of self-determination that had never been put forth previously: "the emergence into any other political status freely determined by a people."[147] Given how broad this standard is and how little reference is given to dynamics of power and guarantees of sovereign equality, it is unsurprising that this fourth option has since been used to justify dependency-ladened, neo-colonial forms of governments.[148]

Given the limitations discussed in this section with respect to the United Nations' decolonization framework, it is crucial to supplement any approach to decolonization with the values, statutes, and frameworks laid out in the Geneva Convention and their Additional Protocols, which "form the core of international humanitarian law" and regulate "the conduct of armed conflict and seeks to limit its effects."[149] Supplementing the decolonization framework outlined thus far with this key piece of international law allows for the recognition of a peoples' right to self-defense against imperial occupation. Protocol I of the Geneva Convention explicitly recognizes in Article I that the provisions outlined therein apply to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the UN Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."[150] Protocol I further notes that the application of the Conventions and subsequent Protocols in the case of occupied territories

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a transformative and meaningful process of self-determination. *See* H.R.1522 – *Puerto Rico Statehood Admission Act* and H.R.2070 – *Puerto Rico Self-Determination Act of 2021.*

[146] G.A. Res. 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*

[147] *Id.*

[148] Some academics like Javier J. Rúa-Jovet disagree with this argument and have instead contended that the original framework was a "myth" that did not capture the realities of self-determination and other creative processes such as those exercised by nations like Palau, the Northern Mariana Islands, or the Federated States of Micronesia. That said, if one critically analyzes the current economic and socio-political conditions of these nations, which are currently facing a potential environmental catastrophe caused in large part by the military concessions they had to make to the United States during their "process of self-determination," one could arguably conclude that their governmental model is still one rife with dependency and imperial control by the United States. Javier J. Rúa-Jovet, *Modern self-determination law and the fourth option: International and United States Law*, ACDI (Mar. 23, 2010); Chris Gelardi, *America's Colonial Climate Crisis*, The Nation (Jul. 11, 2019), https://www.thenation.com/article/archive/marshall-islands-climate-puerto-rico/, *archived at* https://perma.cc/NQ8W-2SS9.

[149] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 Treaty Series (Jun. 8, 1977), https://www.refworld.org/docid/3ae6b36b4.html, *archived at* https://perma.cc/YAL6-VCFG.

[150] *Id.*

shall cease solely upon the termination of the occupation. While not directly tied to reparations, it is important to not demonize communities based on any current or past presence of armed resistance against colonialism.[151] Moreover, the argument can be made that a postcolonial reparation framework should guarantee the freedom of anyone imprisoned or harmed during periods of colonial resistance.

Given the pernicious harms of colonialism,[152] reparations must play an essential element in any modern process of decolonization. With that in mind, the next section will address an existing framework of reparations for Puerto Rico as well as a series of suggestions with respect to other ambitious remedies that should be made available to Puerto Rico as reparations.

IV. Reparations in the Context of Puerto Rico

"*[H]ay que mantener abierta la comunicación entre el momento presente y el pasado que se descubre, y por eso cada generación necesita narrar de nuevo a Puerto Rico. No hay historias definitivas.. cualquier cosa que hagan, en esto estarán conformes, que la historia de Puerto Rico queda siempre por hacer.*"

– Fernando Picó, "Narrar a Puerto Rico"[153]

Imperialism distorts the history of colonized people in overt and violent ways, as well as in insidious ways. Myths, half-truths, suppression of events, romanticized accounts, and even outright fabrications have all been present in the historicization of Puerto Rico. Historical distortions can affect a nation's and a peoples' sense of self and belief in the group's collective power. Frustrated with the United States' invasion of Puerto Rico, Ramon Emeterio Betances[154] once exclaimed: "¿Qué hacen los puertorriqueños que no se

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[151] Opponents of the Puerto Rican independence movement frequently criticize historical moments where pro-independence groups have turned to armed struggle in the hopes of obtaining liberation for Puerto Rico. This criticism and the equation of armed resistance against colonial occupation to acts of terrorism is part of the hegemonic rhetoric that has long demonized those of us advocating for independence. I do not intend to add to that rhetoric. While I have no intention to engage in armed resistance, I recognize that under international law, Puerto Ricans have the right to use violent means of self-defense and resistance given over one century of violent occupation by the United States. The United States government is the one in violation of international laws given its ongoing, exploitative occupation of Puerto Rico.

[152] These harms include, but are not limited to the economic exploitation of colonized people, the draining of natural resources, nuclear contamination, acts of genocide, the concealment of the realities of colonization and the distortion of the history of colonized people. *See* Shalgham, *supra*, note 82.

[153] Fernando Picó, *Narrar a Puerto Rico*, 80 Grados (Nov. 11, 2011), https://www.80grados.net/narrar-a-puerto-rico/, *archived at* https://perma.cc/LQ3Q-HTL6. [Translation: The communication between the present moment and the past that is being discovered must remain open, and for that each generation needs to narrate Puerto Rico afresh. There are no definite histories… no matter what you all do, be satisfied in this, that the history of Puerto Rico always remains to be done.]

[154] Ramón Emeterio Betances was one of Puerto Rico's most well-known advocates. He is known by many as the "padre de la patria puertorriqueña" and he was the leader of the pro-independence uprising in 1868 known as *El Grito de Lares*.

rebelan?"[155] Over time, it seems like this cry of desperation has turned into an accusation against Puerto Ricans, as if it is our fault for not trying harder that we are still colonized. However, I posit that this view ignores the complex realities of our historical development as a nation. Puerto Rico is not an anomalous case of domination by consent, but another variation of domination by coercion. While discussing the topic of hegemony in the United States, critical race theorist and legal scholar Kimberly Crenshaw explained that Black Americans "do not create their oppressive worlds… but rather are coerced into living in a world created and maintained by others" and arguably *for* others.[156] In much the same way, Puerto Ricans have not chosen the current conditions of mass austerity and colonization that we are living under. Rather, as I began outlining in the previous section, the federal United States government and the government of Puerto Rico have colluded and spent concerted efforts to ensure Puerto Rico remains a permanent colony of the United States. By centering the physical and psychological harms inflicted upon Puerto Ricans as a collective group throughout history, it becomes apparent that the invasion of the United States and the later imposition of the "Commonwealth" status were carried out through deception and coercion. Puerto Ricans did not meekly consent to limited forms of self-government and our complete invisibilization both internationally and domestically within the United States's imperial regime.

As part of this initial attempt to retell Puerto Rican history, I also hope to inspire and encourage others to continue growing academic, scientific, and cultural works that center a post-colonial reality for Puerto Rico. For over a century, attempts to dream of an independent Puerto Rico have been suppressed, ignored, or erased. By choosing to take an unapologetic pro-independence and anti-imperialist stance, it becomes easier to creatively envision a more just future for Puerto Rico and Puerto Ricans.

A. Historical Snapshot of Puerto Rico

I am frequently asked why so few Puerto Ricans steadfastly support independence for the archipelago. What people don't realize is that the reason—colonization—is not a simple or clearly outlined process. Rather, the disempowering processes of colonization tend to take place over time and are not usually easy to identify. Given the expansive and pernicious effects of colonialism, available remedies and reparations in any decolonizing process must be equally expansive and favorable. Yet at the moment, reparations are not even part of the national conversation.[157]

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[155] Translation: "What are Puerto Ricans doing that they don't revolt?"

[156] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).

[157] *See* Puerto Rico Statehood Admission Act, H.R.1522, 117th Cong. (2021); Puerto Rico Self-Determination Act of 2021, H.R. 2070, 117th Cong. (2021). Both of these bills purport to advance decolonization in Puerto Rico, yet neither takes into account the need for long-term reparations for Puerto Ricans. Ignoring the historical context that brought Puerto Rico to its current debt-crisis and ignoring the need for reparations to address the generational, physical,

As scholars begin to outline what a reparations package would entail for Puerto Ricans, it is important to think expansively about the harms experienced by the Puerto Rican community while also thinking creatively about ways to remedy those harms. As Professor Westley notes, "[r]eparations include compensations such as return of sovereignty or political authority, group entitlements, and money or property transfers, or some combination of these, due to the wrongdoing of the grantor… the form reparations will take depends on, among other things, the particular demands of the victimized group and the nature of the wrong committed."[158] Because Puerto Rico has been a colony of the United States for 124 years and counting, investigation projects and historical accuracy task forces will be an essential part of any reparations project. Otherwise, remedial claims run the risk of inflicting more harm than good.[159] Although it will not be possible to delineate a clear account of Puerto Rico's history and the harms committed against the nation on a collective basis, this section seeks to highlight some trends and moments in history that will be worth further scrutiny by the academic community in order to properly document harms and potential remedies.

1. Land theft and economic exploitation

One of the primary interests that the United States hoped to gain by occupying Puerto Rico was its soil. In fact, to this day, Congressional control over Puerto Rico is based on the Territorial Clause of the U.S. Constitution. This underscores how critical it is for the United States to exert its plenary powers over the Puerto Rican territory without having to take into account or even take responsibility for how federal action will affect the people living there. "The United States has continuously used Puerto Rico for various military and private economic purposes during the more than one

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and mental harms committed against Puerto Rico, both individually and as a colonized nation, will simply lead to more fraudulent exercises of democracy like the ones carried out during the establishment of the Commonwealth of Puerto Rico.

[158] Westley, *supra* note 15, at 437.

[159] *See generally* Edward W. Said, The Question of Palestine (Vintage 1992); *see also* Mazin B. Qumsiyeh, Popular Resistance in Palestine: A History of Hope and Empowerment (Pluto Press 2011). An example of the harms that could arise when proper and carefully tailored remedies are not implemented can be found in post-Holocaust reparation efforts. While most reparations extended to the Jewish community have focused on remedying clear crimes against humanity committed against them both individually and collectively, the approach taken to restore their sovereignty and political power through the formation of Israel has come at the direct expense of Palestine and Palestinians. Although Palestinians were not among the perpetrators of the Holocaust—and were in fact living under British colonization during the time—they have been forced by the international community to pay for the harms committed by others through the dispossession of their lands and the systemic incarceration and assassination of their people as the Israeli colonial project continues to expand in the region. Throughout my research, I frequently saw David Ben-Gurión cited in hopeful and inspiring ways. For that reason, I would like to remind the scholarly community of another more insidious quote that can also be attributed to him: "We must do everything to ensure that [Palestinians] never do return!" Michael Bar-Zohar, Ben-Gurion: The Armed Prophet, 148 (Prentice Hall 1968) (referring to the Palestinian refugees who had been forcibly and violently displaced).

hundred years of its second colonization."[160] Two weeks after the start of the United States's occupation of Puerto Rico in 1898, businessmen were arriving at Puerto Rican ports in search of available land and other commercial and industrial advantages on the archipelago.[161] From that point onward, the archipelago was turned into a single-crop enterprise by foreign sugar manufacturers. The transfer of lands from Puerto Rican to U.S.-American hands was significantly accelerated by the devaluation of the local currency, Hurricane San Felipe in 1928, and the start of the Great Depression the following year.[162] In 1898, 93 percent of arable land in Puerto Rico was owned by Puerto Ricans.[163] By 1930, four North American companies had converted 45 percent of all arable land in Puerto Rico into sugar plantations.[164] By 1934, the American Sugar Refining Company, known today as Domino Sugar, together with three other U.S. companies, owned 80 percent of all the sugar cane farms in Puerto Rico.[165] In some areas, like the municipal island of Vieques, these United States corporate interests owned as much as 71 percent of the arable land.[166] After World War II, the United States military purchased from these sugar companies (but also in some instances expropriated) about two-thirds of the land in Vieques.[167] For decades, the Viequense territory was used for artillery and bomb testing that deteriorated and contaminated the land and led to one of the highest cancer rates in the archipelago for the surrounding community.[168] By 1970, thirteen percent of Puerto Rico's best (yet limited) arable land had been expropriated by the United States' Armed Forces and other branches of the federal government.[169]

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[160] Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 Berkeley La Raza L.J., 387, 389 (2002), http://scholarship.law.ufl.edu/facultypub/210, *archived at* https://perma.cc/LMW2-3WZE.

[161] Andrés Ramos Mattei. *Las Inversiones Norteamericanas en Puerto Rico y la Ley Foraker, 1898 – 1900*. Caribbean Studies, 14(3), 53–70 (1974).

[162] *Id; see also* Ed Morales, Fantasy Island: Colonialism, Exploitation, and the Betrayal of Puerto Rico, 36–37 (Bold Type Books 2019).

[163] Manuel Maldonado Denis, La situación política de Puerto Rico, 7–20, 12 (Cahiers du monde hispanique et luso-brésilien, 1972).

[164] Manuel Maldonado Denis, Puerto Rico: Una interpretación histórico-social, 306 (Random House New York, 1980).

[165] *Id*.; Maldonado Denis, *supra* note 163; Ramos Mattei, *supra* note 161.

[166] César Ayala, *Del latifundio azucarero al latifundio militar: las expropiaciones de la Marina de Guerra de los Estados Unidos en la década de 1940 en Vieques, Puerto Rico*, 10 Revista de Ciencias Sociales (UPR) 1, 5 (2001); Javier Alemán Iglesia, *Puerto Rico: El colapso de un país. Una reflexión sobre el debacle de la industria azucarera, las petroquímicas y la sección 936*, 21 Diálogos Revista Electrónica de Historia 237 (2020), https://www.redalyc.org/journal/439/43963445008/html/#redalyc_43963445008_ref12, *archived at* https://perma.cc/A25H-Z2AF.

[167] *Vieques: "Se ha ganado una batalla"*, BBC (May 3, 2003), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2993000/2993059.stm#top, *archived at* https://perma.cc/5Q5N-QM3B.

[168] *Id*.

[169] Rubén Berrios Martínez, *Military Construction Authorization, Fiscal Year 1971: Hearings Before the Subcommittee on Military Construction, of the Committee on Armed Services, House of Representatives Ninety-First Congress Second Session on H.R. 17062*, 91 Cong. 9363 (Nov. 2, 1970) (Statement by the President of the Puerto Rican Independence Party); *see also* Malavet, *supra* note 160, 415-16 n.156 (listing a significant number of the military bases established in Puerto Rico).

This history of displacement and dispossession was continued throughout the rest of the twentieth century and can be traced to present times. Between the late 1940s and early 1960s, Governor Luis Muñoz Marín implemented a massive industrialization program called Operation Bootstraps. Part of this program involved mass, government-led displacement efforts that resulted in the exodus of around 500,000 Puerto Ricans from the archipelago between 1946 and 1964.[170] Since the early 2000's and the beginning of the economic crisis on the archipelago, mass migration and a never-ending brain drain has characterized population patterns in Puerto Rico. Between 2000 and 2020, Puerto Rico has lost almost 700,000 citizens, especially after Hurricane María and the series of earthquakes that affected the island in 2020. After this series of environmental catastrophes, many Puerto Ricans simply lost their homes due to lack of deeds and proof of land ownership.[171] "Up to 50 percent of Puerto Rico's 1.2 million homes are thought to be 'informal'" meaning "built on land the inhabitants do not own."[172] Modern displacement of Puerto Ricans is further fueled by discriminatory taxation schemes that have created a fiscal tax haven for U.S.-American corporations and individuals who already benefit from having higher spending power.[173] Finally, the privatization of public utilities, services, and important cultural and environmental areas has resulted in the transfer of some of our most valuable resources from Puerto Rican to foreign hands.[174] Before continuing to the next historical snapshot, it is important to note that the economic crisis in Puerto Rico and the ability to

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[170] Frances Negrón-Muntaner, *The Emptying Island: Puerto Rican Expulsion in Post-Maria Time*, Hemispheric Institute (2020), https://hemisphericinstitute.org/es/emisferica-14-1-expulsion/14-1-essays/the-emptying-island-puerto-rican-expulsion-in-post-maria-time.html, *archived at* https://perma.cc/J99Z-ZLBA .

[171] Ivis Garcia, *The Lack of Proof of Ownership in Puerto Rico Is Crippling Repairs in the Aftermath of Hurricane Maria*, American Bar Association (May 21, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--44--no-2--housing/the-lack-of-proof-of-ownership-in-puerto-rico-is-crippling-repai/, *archived at* https://perma.cc/974D-23YD.

[172] Sebastien Malo, *Puerto Rico land ownership system hampering rebuilding*, Thomson Reuters Foundation (Jun. 20, 2018), https://www.reuters.com/article/us-puertorico-hurricane-resilience-idUSKBN1JG2Q0, *archived at* https://perma.cc/G8GE-9KG2.

[173] *Hacia una recuperación justa*, Ayuda Legal Puerto Rico (December 2020), https://www.ayudalegalpuertorico.org/wp-content/uploads/2020/12/INFORME-MESA-DE-INVESTIGACIO%CC%81N.pdf?utm_source=pub&utm_medium=alpr-blog&utm_campaign=informe-mesa&utm_content=informe, *archived at* https://perma.cc/WK9U-4TAE; Oscar J. Bezares Lamboy, *La relación contributiva entre Puerto Rico y los Estados Unidos: Panorama problemático para la industria manufacturera*, In Rev, Revista Jurídica de la Universidad de Puerto Rico (Dec. 20, 2017), https://revistajuridica.uprrp.edu/inrev/index.php/2017/12/20/la-relacion-contributiva-entre-puerto-rico-y-los-estados-unidos-panorama-problematico-para-la-industria-manufacturera/. Coral Murphy Marcos and Patricia Mazzei, *The Rush for a Slice of Paradise in Puerto Rico*, The N.Y. Times (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/puerto-rico-gentrification.html, *archived at* https://perma.cc/28VK-DWWC; Jennifer Wolff, *Puerto Rico ¿paraíso fiscal?*, The Center for New Economy (Sep. 9, 2021), https://grupocne.org/2021/09/09/puerto-rico-paraiso-fiscal/, *archived at* https://perma.cc/F48P-UBYM.

[174] Since 1998, the Puerto Rican government has privatized the Puerto Rican Telephone Company, major highways, the San Juan airport, a yet unknown number of previously protected environmental reserves, services for the transportation to other islands in the Puerto Rican archipelago, and most recently the electric power authority (this last privatization effort was mandated by the federally imposed Fiscal Control Board). Since 2021, discussions have

so easily expropriate Puerto Rican lands is in no small part facilitated by the lack of control we have over our borders and our lack of access to international markets due to the Jones Act and our inability to build up diplomatic relations and trade agreements.

2. Crimes Against Humanity and Cultural Cleansing

Since the 1898 invasion, the United States government has implemented various strategies in their attempts to Americanize the island and its inhabitants. English-only instruction in Puerto Rico was mandated until 1948.[175] Federal court proceedings must occur in English.[176] The main textbook used in schools to teach Puerto Rican history upholds the establishment of the Commonwealth as democratic and barely mentions the government-sponsored silencing of any Puerto Rican decolonial movement.[177] In 2017, under the leadership of Julia Keleher, a U.S.-American who was appointed by Governor Ricardo Rosselló as Puerto Rico's Secretary of Education, the Department of Education changed the name of the long-observed "Semana de la Puertorriqueñidad" (translation: Week of Puerto Ricanness) to "Semana de Estudios Sociales" (translation: Week of Social Studies).[178] The following year, Kehleher announced instead a new school holiday for March 2nd to celebrate "U.S.-American Citizenship."[179] With respect to U.S.-American citizenship, it is important to note that, regardless of whether Puerto Ricans opposed or welcomed its imposition in 1917, the main issue was that Puerto Rican citizenship was rendered meaningless both domestically and internationally, making any concession of citizenship a coercive process. Moreover, the fact that Puerto Ricans cannot enjoy full protections under the United States Constitution unless we move to one of the fifty states can arguably be seen as another policy incentivizing the displacement of Puerto Ricans from the island. All of these official government policies promoted by the United States government are

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begun about the potential privatization of the Water and Sewage Authority which is currently under public ownership.

[175] *See generally* Erwin H. Epstein, *National Identity and the Language Issue in Puerto Rico*, 11 Compar. Educ. Rev. 133 (1967).

[176] *Idioma limita acceso a justicia, dicen expertos*, Primera Hora (Feb. 11 2009), https://www.primerahora.com/noticias/puerto-rico/notas/idioma-limita-acceso-a-justicia-dicen-expertos/, *archived at* http://perma.cc/GRY3-KC3Z.

[177] Francisco A. Scarano, Puerto Rico: Cinco Siglos de Historia, McGraw-Hill Interamericana (2008); *Time to Change the History Books?*, The Puerto Rico Report (Aug. 5, 2016), https://www.puertoricoreport.com/time-change-history-books/, *archived at* https://perma.cc/98ZH-PQFF ("[T]here is what is known as the official story, which is what the government tells itself and is found in official texts, which are those used in schools… Now, clearly and openly, it has been proclaimed by the United States that 'Look, no, it is not true that Puerto Rico acquired the right to govern themselves in '52.' So there must be a revision of teaching of all that story.").

[178] *Denuncian que se eliminó Semana de la Puertorriqueñidad en Educación*, Metro Puerto Rico (Aug. 2, 2017), https://www.metro.pr/pr/noticias/2017/08/02/denuncian-se-elimino-semana-la-puertorriquenidad-educacion.html, *archived at* https://perma.cc/ZZ5S-HQZH.

[179] *Cancelan clases por ciudadanía americana*, Metro Puerto Rico (Feb. 26, 2018), https://www.metro.pr/pr/noticias/2018/02/26/cancelan-clases-ciudadania-americana.html, *archived at* https://perma.cc/WN8H-H3QB.

strategies that are slowly being understood in an international context as cultural genocide.[180] Even worse, the United States and Puerto Rican governments colluded and, in clear violation of international laws against genocidal practices, implemented policies that promoted the sterilization of approximately one third of women in Puerto Rico, which represents the highest rate of sterilization in the world.[181] More recently, as a result of government negligence, corruption, mismanagement and exclusion of foreign aid, 4,645 Puerto Ricans died in the aftermath of Hurricane María, a number that neither the Puerto Rican nor the United States government have properly acknowledged.[182]

3. Violent and Covert Suppression of Pro-Independence Sentiment

Suppression of pro-independence sentiment among Puerto Ricans—either through overt and violent means or covert, coercive ones—has been a consistent feature of Puerto Rican history during its period of occupation by the United States. As previously stated in this article, the establishment of the Commonwealth of Puerto Rico was carried out amidst nationwide, state-sponsored persecution of pro-independence supporters. That said, violent attacks between state forces and pro-independence sectors of the population both preceded and followed long after the 1950s.[183] The federal government, together with the local Puerto Rican government, spent concerted efforts enforcing an anti-democratic regime and distorting the history and colonial reality of Puerto Rico's political status. As a result, the most common mythological argument used against Puerto Rican independence has become: *What would Puerto Rico do given how dependent its government is on federal funds from the United States?*

First, as noted in the United Nations General Assembly Resolution 1514 (XV), "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."[184] Having said that,

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[180] David Nersessian, *Rethinking Cultural Genocide Under International Law*, Human Rights Dialogue: Cultural Rights (Spring 2005), https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139, *archived at* https://perma.cc/N9JD-4KMX ("Cultural genocide… includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.").

[181] Katherine Andrews, *The Dark History of Forced Sterilization of Latina Women,* Panoramas Scholarly Platform (Oct. 30, 2017), https://www.panoramas.pitt.edu/health-and-society/dark-history-forced-sterilization-latina-women, *archived at* https://perma.cc/Z3VK-SYBZ; G.A. Res. 260 A (III), art. II ("[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:… (d) Imposing measures intended to prevent births within the group.").

[182] Omaya Sosa Pascual, *Estudio de Harvard estima 4,645 muertes por el huracán María*, Centro de Periodismo Investigativo (May 29, 2018), https://periodismoinvestigativo.com/2018/05/estudio-de-harvard-estima-4645-muertes-por-el-huracan-maria/, *archived at* https://perma.cc/LPC3-FV4E.

[183] Some of the most notable, anti-independence violence carried out in Puerto Rico include: the Ponce Massacre, the Río Piedras, the assassinations of Arnaldo Dario Rosado and Carlos Soto Arrivi at Cerro Maravilla, the assassination of pro-independence leader Juan Mari Bras's son by FBI agents, the assassination of Filiberto Ojeda Ríos by the FBI.

[184] G.A. Res. 1514 (XV), ¶3.

it is important to note that the reason we are so dependent on federal funds and programs from the United States lies in the fact that Puerto Ricans have never had their own, sovereign government to build up a sustainable economy. Given the tax breaks that are given to foreign based companies that operate in Puerto Rico, the restrictions on trade and access to free markets imposed by the Jones Act, and many other economic factors, the current economic obstacles created by the archipelago's colonial status prevent Puerto Ricans from fairly competing in both domestic and foreign markets.[185] Although much more research is needed with respect to the economic effects that colonialism has had on Puerto Rico's economic development, as well as on all other historical topics and harms covered throughout this section, I hope this provides future scholars with a solid starting point of what to begin investigating.

B. Existing Proposals for Reparations for Puerto Rico

Discussions about whether the United States must pay reparations to Puerto Rico and Puerto Ricans are extremely rare. The popular assumption is that, were Puerto Rico to choose independence, the United States would simply cease to provide any further assistance in managing our daily institutions. Some likely even believe that the United States would go further and attempt to sabotage the Puerto Rican economy in ways similar to what it has done to Cuba's economy.[186] Luckily, two prominent Puerto Rican scholars—Pedro A. Malavet and Ángelo Falcón—rose to the occasion and will likely be seen as the vanguard of these conversations.[187]

In his article, titled *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, Professor Malavet begins by deconstructing how "the legislative reparations theory" would apply to Puerto Rico and Puerto Ricans.[188] This theory encapsulates the trend that arose in the first part of this article with respect to the United States legislature which proved to be more amenable than courts in the provision of reparations to harmed individuals and groups. The rationale behind this trend is that, since "victims seeking compensation through reparations have the capacity to influence the political branches of government [through electoral means]" the legislature will eventually act on their behalf.[189] However, the political venues and methods for democratic participation in the federal government of the United States "are largely closed

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[185] Emilio Pantojas-Garcia, *"Federal funds" and the Puerto Rican economy: Myths and realities*, 19 Centro J. 206 (2007), https://www.redalyc.org/pdf/377/37719211.pdf, *archived at* https://perma.cc/4388-F88X; Chris Isidore, *The Jones Act has been hurting Puerto Rico for decades*, CNN (Sep. 28, 2017), https://money.cnn.com/2017/09/28/news/economy/jones-act-puerto-rico/index.html, archived at https://perma.cc/D46B-NPW3.

[186] David Adler, *Cuba has been under US embargo for 60 years. It's time for that to end.*, The Guardian (Feb. 3, 2022), https://www.theguardian.com/commentisfree/2022/feb/03/cuba-us-embargo-must-end, *archived at* https://perma.cc/AM4X-WNL5.

[187] Malavet, *supra* note 160; Angelo Falcón, *Colonial reparations for Puerto Rico: A framework for a postcolonial transition*, 16 Lat. Stud. 559 (2018).

[188] Malavet, *supra* note 160, at 400.

[189] *Id.*

to or ineffective for Puerto Ricans."[190] In essence, the current colonial structure both silences the voices of Puerto Ricans in any democratic process, while simultaneously placing on us all of "the burden of pleading for a postcolonial status, the burden of production of arguments in favor of it, and the burden of proving that they are entitled to any remedy at all both in the courts and in the political arenas."[191] The United States is thereby able to avoid entirely its responsibility for the harms caused by its occupation of other nations. This not only leads Malavet to recognize the moral obligation that the United States has to address this issue, but also to conclude that, at least for non-represented members of the United States polity, the courts are the only political branch in the United States that would even entertain claims about harms committed by and remedies owed for the colonization of Puerto Rico.[192]

Aside from recognizing the "legislation-litigation paradox" that arises in the case of Puerto Ricans, Malavet also states a proposal for reparations in three broad categories:

1. *Citizenship Reparations:* This category focuses on the need to build real political power among the Puerto Rican population through means that preclude assimilation or come at the expense of Puerto Ricans' cultural identity.[193] The main idea behind this category is that, regardless of how much monetary reparations are given to the Puerto Rican community, there are no guarantees of accountability or proper use of funds without Puerto Ricans having full and direct control of the institutions administering and managing the monetary reparations.[194]

2. *Land and Monetary Reparations:* This category covers the need to return lands currently being held by the military and the obligation of the United States to guarantee an environmental cleanup of those lands before transferring them back to the people of Puerto Rico. In addition, this category also encompasses the need to make the "Puerto Rican economy… work for Puerto Ricans, not just for U.S. taxpayers and investors".[195]

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[190] *Id.*

[191] *Id.* at 401.

[192] *Id.* at 401–02.

[193] As discussed above in section II.B, Puerto Rico's lack of political and democratic power would likely persist under statehood, where Puerto Rico would still have a limited number of representatives advocating on their nation's behalf within the legislature of an ethnically different and geographically separate nation. While it might seem inspiring to imagine of a powerful Latinx delegation in the United States' Congress, it is important to also recognize that many other national minorities—for example, the various Native American tribes across the United States as well as Native Hawaiians—that have been incorporated within the statehood framework still lack meaningful democratic representation and methods to ensure the protection of their culture. *See generally Struggle and Survival: Native Ways of Life Today*, THE PLURALISM PROJECT, https://pluralism.org/struggle-and-survival-native-ways-of-life-today, *archived at* https://perma.cc/T97D-UZCT.

[194] Malavet, *supra* note 160, at 412–15.

[195] *Id.* at 415–17; Falcón, *supra* note 187, 560.

> 3. *Psychological Reparations:* This category covers the need for full disclosure by the United States and Puerto Rican governments of all the benefits, operations, and decisions that have arisen, both in private and public contexts, out of the century-old occupation of Puerto Rico by the United States. This disclosure "is essential in undoing the myth of Puerto Rico as a dependent U.S. welfare-state that only drains the U.S. economy. Moreover, full disclosure of the political repression, the anti-independence violence, and police-state tactics that target any political dissent that the United States chooses to label as 'anti-American'" are also warranted.[196]

Building on this framework, Angelo Falcón adds three critical insights. First, aside from seeking reparations from the United States, Puerto Rico might justifiably have a claim in international courts for reparations from Spain as well given its role in Puerto Rico's first period of colonization.[197] Second, while Malavet focuses his analysis on Puerto Ricans on the island, Falcón recognizes that "members of the Puerto Rican diaspora stateside" must also be seen "as victims of [United States] colonialism."[198] Lastly, given that the core issue of colonization is the source of many (if not most) of Puerto Rico's economic ills, any new framework for addressing those ills must take "as its basis the notion of reparations as a transition to a postcolonial status for Puerto Rico."[199] A framework that prioritizes building up the Puerto Rican nation must inherently take into account the long-term needs of Puerto Rico and the Puerto Rican people and "will require historical and economic research to determine the amount and types of reparations necessary."[200] Falcon further notes that the usual way of launching a reparation task force involves the establishment of a nonpartisan commission with the legitimacy and resources to accomplish" its outlined goals. Given the existing power dynamic between the United States' government and Puerto Rico, "nonpartisanship" would require the ability for Puerto Rico to have its claims heard and investigated by an international body as well, such as the United Nations, which could also adjudicate the ultimate legitimacy and resolution of the reparations and self-determination process extended to Puerto Rico.[201]

C. Suggestions for Further Development

As Falcón argues, given the limitations of existing laws in the United States, advocacy efforts need to prioritize framing the issue of Puerto Rican colonialism as an international one that calls for the use of international law

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[196] Malavet, *supra* note 160, 417–21; Falcón, *supra* note 187, 560.
[197] *Id.*
[198] *Id.*
[199] *Id.* at 560–61.
[200] *Id.*
[201] *Id.* ("It is becoming more evident that the future of Puerto Rico cannot be resolved solely through a biased US legal and political framework.").

when developing steps towards decolonization and reparations for Puerto Ricans both individually and, more importantly, *as a group* that has collectively faced gross injustices. By merging the existing frameworks laid out by Malavet and Falcón and the reparations and decolonization frameworks established by the United Nations, a meaningful process of self-determination and attainment of sovereignty could emerge.

Taking into consideration the five forms of reparations that should be made available to Puerto Ricans as a cognizable group who has experienced harms at the hands of federal and state action (*i.e.*, restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition), this section outlines what a full reparations package for the archipelago would entail. Note that all suggestions made herein take into account the occupying State's obligation under international law to "[i]nvestigate violations [of international law] effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."[202] This means that, at minimum, as an initial step, the United States government must be pressured to recognize the responsibility it has to provide a mass investment in academic committees and investigative task forces that can study and facilitate the pursuance of individual, lineage based claims to reparations and collective claims to reparations as well. Moreover, investment in scholars working in history and other social sciences will be essential in this initial discovery and documentation process. That said, once studies have sufficiently identified the best means of reparations, it should also be the moral duty of the occupier State to assist significantly (if not completely) with respect to any monetary costs of implementation.

1. Restitution

The United Nations' resolution with respect to reparations for victims of gross or serious violations of international human rights law recognizes that reparations must "restore the victim to the original situation before the gross [or serious] violations of international human rights law… occurred."[203] Under this step, Puerto Ricans must be allowed to reclaim, rewrite, and safeguard our past and present history and culture to ensure a proper account of the harms individuals and groups would want to redress. Reparations seeking *restitution* must also account for the massive waves of displacement and forced migration that have either been sponsored by the United States and Puerto Rican governments, or sanctioned via gross negligence and omissions (as has happened after Hurricane María). In order to redress this harm, it is essential that we recognize the Puerto Rican community's right to return to the archipelago.[204]

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[202] G.A. Res. 60/147.

[203] *Id.*

[204] Recognition must be given to the Palestinian community for the efforts they have placed in the development of a broad, thoughtful, and humane approach to a peoples' right to return. *The Right of Return & Palestinian Refugees*, Institute for Middle East Understanding (Sep. 5, 2012), https://imeu.org/article/the-right-of-return-palestinian-refugees, *archived at* https://perma.cc/58Y4-HHC8.

Although it is essential that we prioritize claims from those who have been most recently displaced, we should also focus on developing a more radical right to return that allows Puerto Ricans living in the diaspora to return and resettle the archipelago. Through economic incentive and land redistribution programs, long-term repatriation of Puerto Ricans looking to return would be possible for both recently migrated and long displaced Puerto Ricans.

For the success of this initial set of reparations, and given the current uselessness of Puerto Rican citizenship in an international context, the United States must not revoke Puerto Ricans' U.S. citizenship. Children born in Puerto Rico will be Puerto Rican citizens, but the ability to obtain dual citizenship if one's parents are United States citizens should be allowed pursuant to the regulations laid out by the United States' Citizenship and Immigration Services.[205]

2. Compensation

This is perhaps the broadest category given the thorough and century-long damage that United States' colonialism inflicted on the Puerto Rican economy, our political capacity, and our development as a society. As stated by the United Nations' resolution, the colonizing State should provide *compensation* "for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law."[206] Under this form of reparations, the remedies include, but are not limited to: absolute debt cancellation, technical aid for economic development and diversification, preferential trade agreements as Puerto Rico finally integrates into the international market, commitment to a continued economic relationship between the United States and Puerto Rico, enactment of protective land statutes to return and maintain most land under Puerto Rican ownership, rather than foreign ownership, recognition of Puerto Rican land rights, expansion of land and housing cooperatives that place ownership of the means of production and sustainment back in the hands of Puerto Ricans, full funding of any group-based reparations program through the creation of democratically managed financial funds, development of renewable energy sources, compensation to individuals for physical and mental harms, as well as lost opportunities (which may include loss of education, employment, earnings, or social benefits), and last but not least, significant investment in science, technology, engineering, and mathematics to promote the development of agriculture, healthcare services, sustainable urban planning, and environmental protection practices on the archipelago.

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[205] USCIS Policy Manual, *Chapter 3 – U.S. Citizens at Birth (INA 301 and 309),* https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3, *archived at* https://perma.cc/5X6T-AD8K.

[206] G.A. Res. 60/147.

3. Rehabilitation

Reparations geared towards *rehabilitation* "should include medical and psychological care as well as legal and social services."[207] After more than a decade of austerity measures, environmental catastrophes, and disaster capitalism, Puerto Rico's healthcare system has been devastated.[208] Given the decline of the archipelago's healthcare system under United States occupation despite the crucial role Puerto Rico plays in the United States' pharmaceutical market, assistance should be provided to help build up robust medical service for the archipelago and its residents.[209] This effort should make it a priority to perform a full ecological restoration of the island of Vieques and to build a full-service hospital that freely serves the surrounding community, particularly with regards to cancer and other critical treatments.

4. Satisfaction

Reparations in the form of *satisfaction* guarantee that the perpetrators and the harms they inflicted on those seeking remedies are properly addressed and any resulting consequences are carried out. This requires the implementation of effective measures aimed at the cessation of continuing violations (i.e., the implementation of measures aimed at Puerto Rico's self-determination and attainment of full sovereignty). To carry out these forms of reparations thoughtfully and effectively, the colonizing state must provide a full and certified public disclosure of the truth of the crimes and harms committed during the period of occupation, so long as no further harm to the victims would result from such disclosure. One example of this would be the provision of a full audit of the current public debt held by the Puerto Rican government and proper prosecution of anyone involved in the issuing of illegal or usurious debt. On this point, given the significant levels of corruption within the Puerto Rican government and in certain private industries, all persons liable for seriously harming the Puerto Rican community must be sanctioned and held liable. Puerto Ricans could also be entitled to a national, anti-colonial education campaign and a reform of the education system and the values it upholds. Lastly, an apology including a full report of violations for future generations' use and reference is also among the symbolic remedies that could be offered to ensure the satisfaction of the harmed victims.

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[207] *Id*.

[208] Jennifer Wiscovitch Padilla & Omaya Sosa Pascual, *Males crónicos del sistema de salud de Puerto Rico impiden la respuesta efectiva al COVID-19*, Centro de Periodismo Investigativo (Jul. 16, 2020), https://periodismoinvestigativo.com/2020/07/males-cronicos-del-sistema-de-salud-de-puerto-rico-impiden-la-respuesta-efectiva-al-covid-19/, *archived* https://perma.cc/D8NB-2YU9.

[209] *Guía de País: Puerto Rico*, Oficina Económica y Comercial de España en San Juan (2023) https://www.icex.es/content/dam/es/icex/oficinas/100/documentos/2023/12/anexos/gp-puerto-rico-2023.pdf, *archived at* https://perma.cc/9Q2K-KM5A (indicating that the pharmaceutical sector represents 55% of Puerto Rico's GDP).

5. Guarantee of Non-Repeat

The last form that reparations for Puerto Rico relate to the *guarantee of non-repeat* or, in other words, the enactment of preventive measures to avoid the future colonization and exploitation of Puerto Rico and Puerto Ricans. In order to ensure Puerto Ricans are never again held under a second class citizenship or subject to marginal representation vis-à-vis the interests of a geographically separate and ethnically different nation, we must be allowed to exercise full and democratic sovereignty in the archipelago. In doing so, Puerto Ricans should be able to establish their own protection, defense, and enforcement forces such that control of any military operating within Puerto Rican borders is under absolute civilian control, rather than under the control of an occupying nation. Strengthening the independence of the Puerto Rican judiciary will also play a key role in ensuring present and future claims against individuals challenging the dignity and right to self-determination of Puerto Ricans are properly adjudicated. Reforming laws that perpetuate dependency and colonialism and the formation of a constitutional convention to form a new government free of the corruption that surrounded and permeated the Commonwealth's government will likewise be necessary. Lastly, in order for Puerto Ricans to be able to fully and permanently integrate into the international community after over 120 years of colonization, a commitment must be made by the United States to assist Puerto Rico in its development of diplomatic relationships and the attainment of a comparable world citizenship (i.e., passport and VISA rights), as those currently enjoyed through the use of the United States passport.

V. Conclusion and Immediate Next Steps

In writing this article, I strive to humbly contribute to my generation's retelling of Puerto Rican history, one that challenges the current narrative and instead focuses on uncovering and prioritizing the parts of our history that are typically suppressed, trivialized, or ignored in an attempt to instill hope and belief in our collective power and ability to end the United States occupation of Puerto Rico. Corruption, destruction and exploitation of natural resources, and economic dependency and impoverishment are not inherent to the Puerto Rican archipelago. Unfortunately, much of our past and present history, or rather, the way our past and present history has been told makes it seem otherwise.

Given the generally unfriendly nature of U.S. courts and legislatures when it comes to the topic of reparations, immediate next steps will likely involve individual, well-documented claims of reparations on the basis of forced displacement by the government or unjust enrichment at one's expense. Through impact litigation, advocates can start developing a sufficiently supportive docket in favor of reparations for Puerto Rico and Puerto Ricans as a cognizable group that has been subjected to discrimination on the basis of race and national origin. This judicial precedent can then be used to pressure

legislatures into more ambitious reparation projects and more genuine incorporations of international law into the United States' legal framework such that other groups are also able to benefit from the opportunity to have their claims for reparations heard.