We Charge Vaccine Apartheid?

Matiangai Sirleaf[1]

1: UNIVERSITY OF MARYLAND, BALTIMORE, MD, USA.

Keywords: Health Inequity, Vaccine Nationalism, Global Public Health, Health Justice, Medical Apartheid

Abstract: Vaccine apartheid is creating conditions that make for premature death, poverty, and disease in racialized ways. Invoking vaccine apartheid as opposed to euphemisms like vaccine nationalism, is necessary to highlight the racialized distributional consequences of vaccine inequities witnessed with COVID-19. This commentary clarifies the concept of vaccine apartheid against the historical and legal usage of apartheid. It reflects on the connections and important disjunctions between the two. It places the intellectual property regime under heightened scrutiny for reform and transformation. This commentary finds that drawing on the intersections between a human rights and health justice approach can provide creative and novel approaches for anti-subordination. It concludes that acknowledging and naming the structural injustice of vaccine apartheid is only the first step towards providing redress.

"[T]he world is in vaccine apartheid."
– Tedros Adhanom Ghebreyesus,
World Health Organization Director-General,
May 17, 2021[1]

"Today we are witness to a vaccine apartheid that is only serving the interests of powerful and profitable pharmaceutical corporations while costing us the quickest and least harmful route out of this crisis."
– Winnie Byanyima, Executive Director, UNAIDS,
January 29, 2021[2]

Introduction

Vaccine apartheid as a concept calls attention to the effect and impact of inequitable laws and policies on historically subordinated peoples. Fatima Hassan, the founder of Health Justice Initiative, an NGO in South Africa, characterized the "prioritizing access for some countries and for some people, largely based on wealth and geography, and, in turn, resulting in a mostly self-created global supply crisis" as vaccine apartheid.[3] The twin pandemics of systemic racism and COVID-19 have vividly exposed the way structural violence impacts Black, Indigenous and other people of color's

Matiangai Sirleaf, J.D., *is the Nathan Patz Professor of Law, University of Maryland Francis King Carey School of Law.*

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)
DOI: https://doi.org/10.1017/jme.2023.14

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

lives with adverse consequences including death, injury, and illness.[4]

Most of the literature tends to refer to vaccine apartheid in passing and without further elaboration.[5] Some scholars have utilized apartheid to refer to racialized health inequities. For instance, in *Medical Apartheid*, Harriet Washington links apartheid to the problematic history of medical experimentation on Black Americans in the United States.[6] Invoking vaccine apartheid is significant because it helps to render suspect the use of terms like "vaccine nationalism"[7] to describe countries hoarding enough supplies to vaccinate their populations several times over.[8] The euphemism of "vaccine nationalism" papers over the racialized distributional consequences of vaccine inequities witnessed with COVID-19. Such rhetoric also problematically prioritizes the unit of analysis to individual nation states, which obscures the global and racialized nature of the crisis.

In many ways, vaccine apartheid is a recent instantiation of longstanding global health inequities and injustice. Continuing this history of subordination in health, wealthy countries have stockpiled doses. For instance, "Canada has procured enough doses to vaccinate all its citizens 10 times over" and Britain "could vaccinate everyone in the UK eight times over."[9] Meanwhile, countries in the Global South are currently being denied significant doses of COVID-19 vaccines.[10] Some reports indicate that "for every 100 people in high-income countries, 133 doses of COVID-19 vaccine have been administered, while in low-income countries, only 4 doses per 100 people have been administered."[11] This is glaringly reflected in the paltry number of vaccinations on the African continent, with only about 20% of the approximately 700 million people on the African continent fully vaccinated.[12] This grim statistic represents almost 70% of the vaccine doses that have been received and utilized.[13]

Considering this abysmal situation, in October 2020, India and South Africa, urgently petitioned the World Trade Organization's Council for Trade-Related Aspects of Intellectual Property Rights for "the unhindered global sharing of technology and know-how in order that rapid responses for the handling of COVID-19 can be put in place on a real time basis."[14] Though the waiver proposal was not adopted as originally envisioned, South Africa and India's intellectual property waiver proposal is informed by a health justice approach. A health justice framework prioritizes fixing the systemic and structural barriers embedded in law and policy especially as it relates to anti-subordination efforts.[15] Indeed, some have argued that at a minimum in the quest for health justice, society as a whole must prohibit, amend, or repeal laws adversely affecting health, and end discrimination and racial bias amongst others.[16] Several editors of this issue have similarly recognized, a health justice framework necessitates acknowledging that subordination is the root cause of health injustice, and that it functions as a determinant of health through various modalities.[17]

This piece considers what it would mean to take the charge of vaccine apartheid seriously. It clarifies the concept of vaccine apartheid against the historical and legal usage of apartheid. First, it analyzes the international legal framework for apartheid and vaccine apartheid. Next, it turns our attention towards the prevention of apartheid like conditions and places legislative and other intellectual property measures under heightened scrutiny for reform and transformation. This commentary concludes that the utility of vaccine apartheid as a conceptual matter lies in its ability to lay bare the racialized distributional inequi-

This piece considers what it would mean to take the charge of vaccine apartheid seriously. It clarifies the concept of vaccine apartheid against the historical and legal usage of apartheid. First, it analyzes the international legal framework for apartheid and vaccine apartheid. Next, it turns our attention towards the prevention of apartheid like conditions and places legislative and other intellectual property measures under heightened scrutiny for reform and transformation. This commentary concludes that the utility of vaccine apartheid as a conceptual matter lies in its ability to lay bare the racialized distributional inequities of access to COVID-19 vaccines.

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

ties of access to COVID-19 vaccines. Yet, recognizing and naming the structural injustice of vaccine apartheid is only the beginning. A health justice approach requires that the laws, policies, institutions, norms, and values creating these unjust health outcomes be transformed and prevented and that those subjected to harm be provided redress.[18]

Apartheid and International Law

Apartheid has historically been used to refer to "policies and practices of racial segregation and discrimination"[19] that are "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[20] The Convention on the Elimination of All Forms of Racial Discrimination (CERD) defines apartheid as "governmental policies based on racial superiority or hatred,"[21] and connotes a particularly egregious form of racial discrimination that states have agreed to prevent, prohibit and eradicate.[22] Further, the Convention on the Suppression and Punishment of the Crime of Apartheid provides that state parties are to "adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid."[23]

Apartheid is a crime against humanity, which is subject to individual criminal responsibility.[24] No statute of limitations is supposed to be applicable for "inhuman acts resulting from the policy of apartheid."[25] The gravity of apartheid in international law is reflected not only in the stand-alone instrument aimed at its suppression,[26] but also, in the Rome Statute's continued criminalization of apartheid. The International Law Commission regards the prohibition against apartheid as a peremptory norm and has indicated that acts of apartheid constitute "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being."[27] The Commission goes on to state that the prohibition against apartheid exists "in widely ratified international treaties and conventions admitting of no exception."[28]

The Rome Statute defines apartheid as inhumane acts "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[29] In order to differentiate apartheid from other forms of prohibited discrimination, commentators have honed in on the "systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed. It is this institutionalized element, involving a state-sanctioned regime of law, policy, and institutions, that distinguishes the practice of apartheid."[30] And, any form of institutionalized discrimination would inherently conflict with non-discrimination provisions reflected in international human rights law.[31] Thus, apartheid does not only touch and concern international criminal law, but also has implications for international human rights law.

Vaccine Apartheid and International Law

Certainly, the remarks of the heads of UNAIDS and of the World Health Organization (WHO) featured at the beginning of this commentary,[32] are not calling on the 109 state parties of the Apartheid Convention[33] and 123 state parties to the Rome Statute[34] to bring criminal prosecutions against individuals accused of acts of vaccine apartheid. Nonetheless, how should we conceive of the relationship between vaccine apartheid, apartheid, and international law?

The Apartheid Convention defines apartheid to include "legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms."[35] The Convention provides a non-exhaustive list of basic human rights and freedoms,[36] but does not enumerate the right to health.[37] However, the right to the highest attainable standard of health is recognized in the Covenant on Economic, Social and Cultural Rights.[38] The Committee on Economic, Social and Cultural Rights, has found that "health is a fundamental human right indispensable for the exercise of other human rights."[39] And, vaccine apartheid certainly creates conditions which prevent the full development of a racial group or groups health.

Yet, must conditions be deliberately created to count as vaccine apartheid?[40] Ideally laws would "constitute the societal building blocks that should enable everyone to lead safe, healthy lives."[41] A health justice approach requires a broader analysis beyond intentionality, motive, and the conscious objective of state actors to facilitate apartheid-like conditions. A response rooted in health justice demands consideration of the health outcomes and the lived experience of laws and policies, and not simply focusing on how a law or policy was designed.

Further, E. Tendayi Achiume, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and related Intolerance has observed that:

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

> Racism, racial discrimination, xenophobia and related intolerance operate through both: (1) differential treatment of and outcomes for individuals and groups on the grounds of their race, colour, descent, national or ethnic origin; and (2) differential treatment of and outcomes for countries and territories that were subject to prolonged exploitation and degradation during the colonial era on the basis of racist theories and beliefs.[42]

Indeed, international human rights law unambiguously acknowledges claims based on disparate impact. For instance, CERD broadly defines racial discrimination to encompass any "distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise ... of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[43] Since the international human rights framework permits claims based on effect, the primacy of intentionality is not as essential as it is in some jurisdictions.[44] International human rights law potentially creates an avenue for redress and destabilizing racialized health inequities. Under CERD, state parties are supposed to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[45] The CERD Committee has found that the unequal impact of COVID-19 across and within nations replicates colonial hierarchies and reflects the failure "to redress the effects of racism rooted in slavery, colonialism and apartheid."[46]

Seeking Redress for Vaccine Apartheid

This section turns our attention towards the prevention of apartheid-like conditions and places legislative and other intellectual property measures under heightened scrutiny for reform and transformation. The standard assumption is that pharmaceutical companies must charge monopoly prices to recover their investment in research and development.[47] However, many have demonstrated that a market-based monopoly incentive for pharmaceuticals is inadequate for addressing health needs.[48] Analysts have deftly shown the significant constraints of a research and development system premised on monopoly rights.[49] Such an incentive structure, is inclined to narrow in on "lucrative" medical conditions, that pose minimal risks and towards ailments which already have existing effective therapies.[50] As I articulated elsewhere:

> this incentive system allows many pharmaceutical corporations to benefit substantially from publicly funded research and still charge monopoly prices. Overall, the intellectual property regime shelters corporations from competition, enables them to increase prices, underproduces certain drugs, cuts back on product quality, and declines to produce some pharmaceuticals.[51]

The creation of the international intellectual property regime functioned to expand and increase the US-model of pharmaceutical patent protection globally.[52] The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement provides a twenty-year monopoly for pharmaceuticals.[53] This regime shifted patent rights from being a national prerogative to an international obligation, with vast public health implications. The Doha Declaration,[54] and specific provisions in the agreement were meant to create better flexibilities for public health,[55] or incentivize research and development.[56] However, these have had limited effect,[57] given the larger incentive-structure towards profit maximization described above. Moreover, the U.S. and others advance pharmaceutical interests on states in the Global South using restrictive provisions placed in bilateral and regional free trade agreements that have imposed more stringent requirements on countries than required by the TRIPS agreement.[58]

The pharmaceutical industry tends to neglect research and development for vaccines. The COVID-19 pandemic was no exception. The development of several COVID-19 vaccines was due to the significant support of public funding-- various countries negotiated massive buyout contracts with manufacturers using taxpayer money.[59] Pharmaceutical companies have not regarded COVID-19 vaccines as a public good. During the pandemic, they were able to exercise their monopoly power to artificially limit supply, by preventing others from accessing the technologies needed to create the vaccines. As a result, this has kept the number of suppliers small and the costs high.[60] Many of these pharmaceutical companies primarily based in the Global North have amassed substantial amounts due to the monopoly rights provided by the intellectual property regime. Pfizer, for example, reported $9.9 billion in net income, a 78% increase over the second quarter of 2021.[61] Its COVID vaccine accounted for $8.8 billion in revenue for the second quarter, and the company's 2022 sales guidance for the vaccine is $32 billion.[62]

Against this background, India and South Africa argued that a "waiver should continue in effect until

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)
https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

widespread vaccination is in place globally, and the majority of the world's population has developed immunity."[63] In South Africa's initial intervention before the World Trade Organization (WTO), it argued that "Ad hoc, non-transparent and unaccountable [vaccine] bilateral deals that artificially limit supply and competition cannot reliably deliver access needed during a global pandemic. These bilateral deals do not demonstrate global collaboration but rather reinforce 'vaccine apartheid' and enlarges chasms of inequality."[64] South Africa and India modified their proposal in May 2021, to clarify that the waiver they sought for health products and technologies would be limited in scope to COVID-19 prevention, treatment and containment; would only be applicable for three years; and incorporated concerns over continuous mutations and the emergence of new variants.[65]

How we got from these early demands for a People's Vaccine, available to all, everywhere, free of charge[66] to the ineffectual intellectual property rights waiver, eventually adopted by the WTO in June 2022, is worth considering. The initial South African and Indian waiver proposal was co-sponsored and endorsed by the African group of states as well as numerous countries in the Global South and some in the Global North. Notably, France and the United States conveyed tepid support for the waiver proposal, with the United States limiting its support to vaccines only.[67] The U.S. change in position is striking given that "[t]wenty years ago, when Brazil wanted to make its own generic versions of life saving HIV drugs, the US government took legal action" through the WTO's dispute settlement mechanism.[68] The pharmaceutical industry characteristically resisted the waiver proposal along with others primarily based in the Global North, like Canada,[69] the United Kingdom,[70] and the European Union[71] who — evidenced an incredible lack of international solidarity when it authorized countries to limit exports of vaccines in the midst of the pandemic.[72]

Those that opposed the waiver proposal argue equitable access to vaccines can be achieved through voluntary licensing and technology transfer arrangements. But, as South Africa forcefully argued at a WTO General Council Meeting, "the model of donation and philanthropic expediency cannot solve the fundamental disconnect between the monopolistic model it underwrites and the very real desire of developing and least developed countries to produce for themselves. The problem with philanthropy is that it cannot buy equality."[73]

The Decision

In June of 2022, after months of negotiations and deliberations the WTO finally reached a ministerial decision.[74] It provides that "eligible members" may waive intellectual property patents "for the production and supply of COVID-19 vaccines without the consent of the right holder to the extent necessary to address the COVID-19 pandemic," for five years.[75] In the same breath, the Decision renders itself virtually meaningless. It defines eligible members as all developing countries, but then stipulates that "[d]eveloping country Members with existing capacity to manufacture COVID-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision."[76] On its face, the Decision is aimed at boxing out countries like Brazil, China,[77] and India, which all have significant manufacturing capacity, from supplying vaccines utilizing compulsory licensing. The Decision stipulates that those eligible should "prevent the re-exportation of the products manufactured" under this Decision and shall "prevent the importation into, and sale in, their territories of products manufactured" under the Decision, but "diverted to their markets inconsistently with its provisions."[78] The Decision attempts to temper this language by specifying that in "exceptional circumstances," an eligible Member may "re-export COVID-19 vaccines to another eligible Member for humanitarian and not-for-profit purposes."[79] The Decision seemingly makes it easier for those in the Global South to issue compulsory licenses to manufacture vaccines, but this is a pyrrhic victory given the many restrictions.

Additionally, the Decision is unsatisfactory because one needs more than a patent to bring a vaccine to market. The CEO of Moderna, Stéphane Bancel, made this clear, when he remarked that "If someone wants to start from scratch, they would have to figure out how to make mRNA, which is not in our patents."[80] Indeed, when manufacturing biologics like vaccines, it is not simply the formula of the compound that one needs, but rather how to produce it on a wide-scale and ensure that during the production process things are replicated accurately. The original proposal from South Africa and India accounted for this and covers not only patents, but also copyright, industrial designs, and undisclosed information including know-how and trade secrets.[81] A company that somehow got access to undisclosed information and used industrial design, know-how and/or trade secrets without authorization to produce vaccines, would run the risks of costly legal action before the WTO or unilateral sanctions as often occurred with the AIDS pandemic. As noted earlier, the U.S. often threatened to close off its market to

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

countries who fall foul of its interpretation of what the international intellectual property regime requires for protecting patents for antiretrovirals for AIDS.[82]

Moreover, the Decision failed to address other COVID-19 health products and technologies as South Africa and India's proposal called for. Instead, in December of 2022, members are to decide whether to extend the decision "to cover the production and supply of COVID-19 diagnostics and therapeutics.[83] Waiting to decide on this is problematic for several reasons. First, the currently available antiviral drugs for COVID-19 are most effective when used within the first few days, this small window to take the drugs means that people need to access them quickly and cheaply. Yet, the unaffordable prices enabled by patent protections makes this unfeasible. This creates the current conundrum where the supply of the drugs is limited because the market is tiny, but the market is little because the cost is high. For instance, sales of Pfizer's COVID-19 treatment Paxlovid amounted to $8.1 billion for the second quarter of 2022, and it expects $22 billion for it 2022 sales guidance from this drug.[84] Furthermore, without access to reliable and easily accessible diagnostic tests, countries will be severely hampered in their COVID-19 response. For the reasons articulated above amongst others, the Decision is wanting.

There is danger in using apartheid as a metaphor and the potential to denigrate the severity of the experience of apartheid as it is historically and legally understood.

Aftermath of the Decision

Advocates have decried the Decision as "a massive setback for the cause of global health equity, which will take decades to recover from," and "a slap in the face for developing countries battling for survival in a rampant pandemic and poor people everywhere."[85] Dr. Christos Christou, International President of Doctors Without Borders, has similarly lambasted the decision for its failure:

> to offer an effective and meaningful solution to help increase people's access to needed medical tools during the pandemic, as it does not adequately waive intellectual property on all essential COVID-19 medical tools, and it does not apply to all countries. The measures outlined in the decision will not address pharmaceutical monopolies or ensure affordable access to lifesaving medical tools and will set a negative precedent for future global health crises and pandemics.[86]

Those opposed also think it sets a negative precedent. For instance, the American Intellectual Property Law Association, and other organizations, released a joint statement condemning the decision for undermining the "stability and predictability" of the intellectual property regime and research and development incentives.[87] Additionally, the Pharmaceutical Research and Manufacturers of America, accused the Biden administration of helping to give "away valuable American technologies to foreign competitors, undermining the millions of American jobs supported by our industry."[88] While others continue to view the lack of production facilities and logistical impediments as the core problem and not intellectual property protections.[89]

Some have reached the conclusion that a bad deal is better than no deal. A year and a half passed and "more than five million people died during the WTO membership's struggle to find a compromise solution."[90] While the implementation of the decision will take time to assess, the terms of the decision are not encouraging for reversing vaccine apartheid.

Significantly, this Decision took place and will likely be implemented within a political and economic climate that has prematurely declared victory. The pretense that COVID-19 is over, and policies based on this rationale have predictably been ableist, ageist and racist amongst others. I have expounded on how the racial valuation of diseases, is reflected in responses to the coronavirus, which continue to be informed by "outdated but persistent settler-colonial conventions that have mapped illness and disease on to racialized peoples and certain geographic regions."[91] To be clear, the Global North's determination to "live with COVID," is a necropolitical calculation of who must die and suffer from COVID. If the current trajectory is not reversed, this means that extant health inequities from vaccine apartheid will persist and deepen.

Implications of Vaccine Apartheid

There is danger in using apartheid as a metaphor and the potential to denigrate the severity of the experience of apartheid as it is historically and legally understood. Vaccine apartheid departs from the imposition of apartheid in significant ways. In South Africa, apartheid came on the heels of colonial occupation, which dispossessed Black people of land ownership except for in limited areas like homelands and town-

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

ships. It involved severe restrictions on the free movement of peoples, especially Black South Africans, and required individuals to show passes for passage into White areas.[92] Apartheid relegated Black South Africans to substandard education, it denigrated cultural and social institutions, and it denied them full citizenship. The above is not exhaustive of the divergences between the lived experience of apartheid, but it is illustrative of the important points of departure from vaccine apartheid.

Even still, it is important to mine the metaphor of vaccine apartheid to clarify how the techniques and tools of apartheid have not been relegated to some distant past. For instance, a common technique of apartheid was severely restricting freedom of movement. Following South Africa's genomic sequencing of the Omicron variant, instead of being rewarded for tracing and alerting the world to a variant that was already circulating in Europe, the United Kingdom, the United States, the European Union and others were hasty to make decisions informed by "Afrophobia" as the President of Malawi aptly termed it.[93] Countries in the Global North, were quick to cut off southern African countries and impose a number of unfair travel restrictions targeting Africans more generally. Similarly, the host of travel restrictions that have been imposed that require specific vaccines, or diagnostic tests for entry, function without regard to inequitable distribution of the very same diagnostics and vaccines. These additional travel restrictions render freedom of movement even more cumbersome and difficult than it already was for people from the Global South.

Another common device of apartheid was the creation of new social and spatial relations. Historian Achille Mbembe, clarifies several key aspects of how this was achieved through for instance, the "production of boundaries and hierarchies, zones and enclaves; the subversion of existing property arrangements; the classification of people according to different categories" and resource extraction.[94] Professor Priyamvada Gopal, poignantly explained how these connections continue today:

> What we now have as many people have said is vaccine apartheid, it is apartheid. It is protecting people on class lines, on caste lines and on race lines. Make no mistake this is going back to the colonial moment where cities were divided … and there were sanitary measures in White town, that there were not in Black town, which were regarded as the zones of unsanitary infection. And it was regarded as okay to have entire zones of the world that were vulnerable to infection.[95]

Her remarks remind us of how European colonizers prioritized defensive measures against contagion from racialized and "diseased" colonial territories when formulating the global health regime.[96] The birth of the global health regime was premised on colonial powers coordinating sufficiently restrictive quarantine regulations that would facilitate the unimpeded expansion of imperial trade without exposing their populations in the mother country to diseases from colonial territories.[97] The vestiges of White health as global health continue to inform the present in subtle and unsubtle ways as witnessed with vaccine apartheid.

The enactment of differential rights to differing categories of people is another technique of apartheid. Researchers have observed, "[t]he map of winners and losers in the COVID-19 vaccination race appears almost indistinguishable from the map of European colonialism."[98] Other scholars have remarked "how access to COVID-19 vaccines has been extremely limited in those parts of the world that historian Vijay Prashad, has referred to as the 'darker nations.'"[99]

A throughline connects the racial and colonial logics that rendered historically subordinated groups expendable in the past.[100] Fatima Hassan, founder, and director of the Health Justice Initiative in South Africa, reflections on this feature of vaccine apartheid are worth quoting at length:

> I grew up in apartheid. I know what it means to be a second-class citizen or even a third-class citizen. And this is what we saw in this current pandemic. Black and brown people in Latin America, in Asia and Africa were told to wait. We were told that the knowledge wouldn't be shared with us. We should participate in clinical trials. We should contribute to scientific knowledge, but we should wait, basically last in line, like we did during apartheid, for access to any kind of service, whether it was education or health, before we could get our vaccine … we believe, the world has decided — or those in power have decided that intellectual property protections and the shareholdings and the interests of pharmaceutical companies are more important than human life.[101]

As illustrated above with the analysis of South Africa and India's waiver proposal, these logics have "replicated themselves in who is entitled to get the vaccine and how property is understood and in who owns the rights to produce the vaccine."[102] As the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance,

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

powerfully argued, "nations and powerful transnational corporations based within their jurisdictions have monopolized authority to determine 'who is worth saving' — and this hierarchical power cannot be unlinked from its colonial origins.[103] The capacity to define who matters and who does not, who is *disposable* and who is not is a defining aspect of vaccine apartheid and is reminiscent of the historical experience of apartheid.

Conclusion

This commentary is influenced by the Civil Rights Congress' daring decision to hold the United States government accountable for the killing of unarmed Black people by the police and lynch mobs, by bringing a petition before the United Nations Committee on Human Rights.[104] The We Charge Genocide petition, condemned the government for its "record of mass slayings on the basis of race, of lives deliberately warped and distorted by the willful creation of conditions making for premature death, poverty and disease."[105] This petition made clear that racism is a public health issue and implored an international mechanism to remedy not just direct and spectacular physical violence, but also structural violence. While the petition was unsuccessful, it was an important precursor to recent proclamations following the uprising that racism is a public health crisis.[107]

The Civil Rights Congress leveling of the charge of genocide, and South Africa and India's deploying the charge of vaccine apartheid both potentially function as shaming sanctions. A shaming sanction operates to stigmatize an offender for a violation and to alert the public about an offense. One of the theories of punishment in criminal law focuses on the ability of criminal penalties to reverse the false message sent by the offender's actions about the value of the victim relative to the offender.[108] On this view, criminal sanctions serve as a vehicle for communicating society's condemnation of the conduct at issue and creating social cohesion by validating a victim's worth. Notably, shaming sanctions can take place outside of formalized processes. For example, in human rights law, nongovernmental and international organizations utilize "naming and shaming" as a common advocacy strategy to publicize violations as well as to encourage compliance and enforcement.[109] Indeed, the very act of naming has an expressive condemnation function because of the stigma that is thought to accompany the label of rights violator.

Deploying vaccine apartheid then is not merely a matter of rhetorical flourish, but a powerful tool that has the potential to acknowledge harm and express social solidarity with those that have been victimized. Under the theory of expressive condemnation, the shaming sanction of vaccine apartheid could function to help reaffirm the common moral order by failing to endorse violations and instead sending a powerful message that vaccine apartheid is wrong and wrongdoers must remedy the consequences. Yet, recognizing and naming the structural injustice of vaccine apartheid is only the first step. Addressing the root causes of vaccine apartheid will require more systemic and transformational changes.

Deploying vaccine apartheid then is not merely a matter of rhetorical flourish, but a powerful tool that has the potential to acknowledge harm and express social solidarity with those that have been victimized. Under the theory of expressive condemnation, the shaming sanction of vaccine apartheid could function to help reaffirm the common moral order by failing to endorse violations and instead sending a powerful message that vaccine apartheid is wrong and wrongdoers must remedy the consequences.

The arrival and spread of the Delta variant and Omicron and its various subvariants has already indicated what the dangers of haphazard and lackadaisical vaccination programs are. Low global rates of vaccination allow space for the virus to mutate and propagate into potentially more dangerous forms. The world cannot allow vaccine apartheid to continue unabated, "the stakes to global health and our collective futures are too high."[110]

Note

The author has no conflicts to disclose.

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

References

1. "WHO Says World has Entered State of 'Vaccine Apartheid'," *Reuters YouTube Channel*, May 17, 2022, *available at* <https://www.youtube.com/watch?v=FxMdIL6qERk> (quoted language begins at 00:09) (last visited Nov. 3, 2022); *see also "World Has Entered Stage of "Vaccine Apartheid" - WHO Head," Reuters*, May 17, 2021, *available at* <https://www.reuters.com/business/healthcare-pharmaceuticals/world-has-entered-stage-vaccine-apartheid-who-head-2021-05-17/> (last visited Nov. 3, 2022).
2. W. Byanyima, "A Global Vaccine Apartheid Is Unfolding. People's Lives Must Come Before Profit," *The* Guardian, January 29, 2021, *available at* <www.theguardian.com/global-development/2021/jan/29/a-global-vaccine-apartheid-is-unfolding-peoples-lives-must-come-before-profit> (last visited Jan. 24, 2023).
3. F. Hassan, "Don't Let Drug Companies Create a System of Vaccine Apartheid," *Foreign Policy*, February 23, 2021, *available at* <https://foreignpolicy.com/2021/02/23/dont-let-drug-companies-create-a-system-of-vaccine-apartheid/> (last visited August 11, 2022).
4. See, e.g., P.E. Farmer et al., "Structural Violence and Clinical Medicine," *PLOS Medicine* 3, no. 10 (2006): 1686–1691 (connecting the concept of structural violence to the spread of epidemic diseases); J. Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 167–191 (defining structural violence as unique in that the violence is built into the structure and manifests as "unequal power and consequently as unequal life chances").
5. See, e.g., C. Ho, "Confronting IP Nationalism" *Denver Law Review* 100, no. 1 (2023) (forthcoming), *available at* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910806> (last visited August 11, 2022), https://dx.doi.org/10.2139/ssrn.3910806; S. Joseph and G. Dore, "Vaccine Apartheid: A Human Rights Analysis of COVID-19 Vaccine Inequity," June 30, 2021 (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.3876848; E. Torreele and J. J. Amon, "Equitable COVID-19 Vaccine Access," *Health and Human Rights* 23, no. 1 (2021): 273-288.
6. See generally H.A. Washington, *Medical Apartheid: the Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (New York: Harlem Moon, 2008).
7. For further commentary on vaccine nationalism, see, e.g., I.T. Katz et al., "From Vaccine Nationalism to Vaccine Equity — Finding a Path Forward," *New England Journal of Medicine* 384 (2021): 1281–1283; U. Chohan, "Coronavirus & Vaccine Nationalism," CASS Working Papers on Economics & National Affairs No. EC030UC, January 16, 2021, *available at* <https://ssrn.com/abstract=3767610> (last visited August 11, 2022); D.P. Fidler, "Vaccine Nationalism's Politics," *Science* 369, no. 6505, August 14, 2020, *available at* <https://www.science.org/doi/full/10.1126/science.abe2275> (last visited November 4, 2022); A. Santos Rutschman, "The Reemergence of Vaccine Nationalism," *Georgetown Journal of International Affairs*, July 3, 2020, *available at* <https://gjia.georgetown.edu/2020/07/03/the-reemergence-of-vaccine-nationalism/> (last visited Nov. 4, 2022).
8. See, e.g., ONE, *Rich Countries on Track to Stockpile over 1 Billion Surplus C19 Vaccines*, March 24, 2021, *available at* <https://www.one.org/international/policy/rich-countries-on-track-to-stockpile-at-least-1-billion-surplus-c19-vaccines/> (last visited August 11, 2022).
9. G. Gonsalves and G. Yamey, "The Covid-19 Vaccine Patent Waiver: A Crucial Step Towards a 'People's Vaccine'," *British Medical Journal* 373 (2021): n1249, *available at* <https://www.bmj.com/content/373/bmj.n1249.short> (last visited Nov. 4, 2022).
10. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*, Johns Hopkins University and Medicine Coronavirus Resource Center, *available at* <https://coronavirus.jhu.edu/map.html> (last visited August 11, 2022).
11. F. Grandi, A. Vitorino, and T.A. Ghebreyesus, Letter, "An Appeal to G20 Leaders to Make Vaccines Accessible to People on the Move: Open Letter to G20 Heads of State and Government," October 29, 2021, *available at* <https://www.who.int/news/item/29-10-2021-an-appeal-to-g20-leaders-to-make-vaccines-accessible-to-people-on-the-move> (last visited August 11, 2022).
12. *COVID-19 Vaccination*, Africa Centers for Disease Control and Prevention, *available at* <https://africacdc.org/covid-19-vaccination/> (last visited August 11, 2022)
13. *Id.*
14. Communication from India and South Africa, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, IP/C/W/669 (October 2, 2020) [hereinafter cited as Original Waiver Proposal].
15. D.E. Dawes, *Health Justice Can't Be Blind*, October 19, 2022, Bill of Health Blog, *available at* <https://blog.petrieflom.law.harvard.edu/2021/10/19/health-justice-cant-be-blind/> (last visited August 11, 2022).
16. See, e.g., E.A. Benfer, "Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice," *American University Law Review* 65, no. 2 (2015): 275–351.
17. L.F. Wiley and R. Yearby, "Symposium Conclusion: Health Justice: Engaging Critical Perspectives in Health Law & Policy," October 22, 2021, Bill of Health Blog, *available at* <https://blog.petrieflom.law.harvard.edu/2021/10/22/symposium-conclusion-health-justice/> (last visited August 11, 2022).
18. See S. Venkatapuram, *The Target of Health Justice*, October 18, 2021, Bill of Health Blog, *available at* <https://blog.petrieflom.law.harvard.edu/2021/10/18/the-target-of-health-justice/> (last visited August 11, 2022).
19. International Convention on the Suppression and Punishment of the Crime of Apartheid, art. II, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter cited as Apartheid Convention].
20. See *International Convention on the Elimination of All Forms of Racial Discrimination*, pmbl, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter cited as CERD].
21. *Id.* at art. 3; see *International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Treaty Collection Website, *available at* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en> (last visited August 11, 2022) (noting that the Convention has 182 state parties).
22. *See* Apartheid Convention, *supra* note 18, at art. IV.
23. See *id.* at art. I(1), art. III; see also Rome Statute of the International Criminal Court, art. 7(1)(j), July 17, 1998, 2187 U.N.T.S. 9 [hereinafter cited as Rome Statute].
24. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1(b), Nov. 26, 1968, 754 U.N.T.S. 73.
25. Apartheid Convention, *supra* note 18.
26. Report of the International Law Commission on the Work of its Fifty-Third Session, 56 U.N. GAOR Supp. No. 10, at 31, U.N. Doc. A/56/10 (2001), *reprinted in* 2 Year Book International Law Commission 113 n.651, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). A peremptory norm or *jus cogens* is used for a small category of customary international law norms from which no derogation is to be permitted.
27. *Id.* at 112.
28. Rome Statute, *supra* note 23, at art. 7(2)(h).
29. J. Dugard and J. Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory," *European Journal of International Law* 24, no. 3 (2013): 867–913.
30. See, e.g., International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1996, 999 U.N.T.S. 171; Universal Declaration of Human Rights, art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
31. See *supra* Introduction.

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

32. See *International Convention on the Suppression and Punishment of the Crime of Apartheid*, United Nations Treaty Collection Website, *available at* <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en> (last visited August 11, 2022) (noting that the Convention has 109 state parties).
33. See *Rome Statute of the International Criminal Court,* United Nations Treaty Collection Website, *available at* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en> (last visited August 11, 2022) (noting that the Statute has 123 state parties).
34. See Apartheid Convention, *supra* note 18, at art. II(c).
35. *Id.* (the list includes "the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association").
36. See Apartheid Convention, *supra* note 18, at art II(c).
37. International Covenant on Economic, Social and Cultural Rights, art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3 (recognizing "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").
38. Commission on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights) ¶ 1, U.N. Doc. E/C.12/2000/4 (August 11, 2000).
39. *See* Apartheid Convention, *supra* note 18, at art. II(c).
40. J.B. Teitelbaum, J. Theiss, and C.H. Boufides, "Striving for Health Equity through Medical, Public Health, and Legal Collaboration," *Journal of Law, Medicine and Ethics* 47, no. 2 supplement (2019): 104–107.
41. E.T. Achiume, Letter, *Open Letter from the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to the World Trade Organization's Twelfth Ministerial Conference* (June 13, 2022) 1–4, at 2, *available at* <https://www.ohchr.org/sites/default/files/2022-06/2022-06-13-WTO-Open-Letter.pdf> (last visited August 11, 2022).
42. CERD, *supra* note 21, at art. 1 (emphasis added).
43. For instance, in the United States, the availability of disparate impact claims has been severely hampered due to requirements that claims reach a certain threshold level of significance and demonstrate a causal relationship, and by the business necessity defense.
44. CERD, *supra* note 21, at art. 2(1)(c).
45. Committee on the Elimination of Racial Discrimination, *Statement on the Lack of Equitable and Non-Discriminatory Access to COVID-19 Vaccines* (April 25, 2022): 1–4, at 1 (statement at the 106th Session of CERD).
46. I. Venzke, Inaugural Lecture Universiteit van Amsterdam, International Law and the Spectre of Inequality (2019): 1–37, at 8, *available at* <https://pure.uva.nl/ws/files/38035248/Venzke_International_Law_and_the_Spectre_of_Inequality_2019.pdf> (last visited August 11, 2022).
47. See *id.* at 8 (discussing how there "is now a growing consensus across disciplines that such protection has gone too far, stifling rather than sparking innovation, and transferring rather than creating value). See also K. Sunder Rajan, *Pharmocracy: Value, Politics and Knowledge in Global Biomedicine* (Durham, NC: Duke University Press, 2017); M. Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven, CT: Yale University Press, 2012); M. Chon, "Intellectual Property and the Development Divide," *Cardozo Law Review* 27, no. 6 (2006): 2821–2912; D.J. Halbert, *Resisting Intellectual Property* (New York: Routledge, 2005).
48. See generally A. Vats and D. Keller, "Critical Race IP," *Cardozo Arts and Entertainment Law Journal* 36, no. 3 (2018): 735–795 (discussing the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of intellectual property laws.); K. Aoki, "Space Invaders: Critical Geography, The 'Third World' in International Law and Critical Race Theory," *Villanova Law Review* 45, no. 5 (2000): 913–957 (discussing the problems of transplanting U.S. and European intellectual property regimes to countries in the developing world and expecting comparable results).
49. See Y. Heled, L. Vertinsky, and C. Brewer, "Why Healthcare Companies Should Be(come) Benefit Corporations," *Boston College Law Review* 60 (2019): 73–144.
50. M. Sirleaf, "Disposable Lives: COVID-19, Vaccines, and the Uprising," *Columbia Claw Review Forum* 121, no. 5 (2021): 71–94.
51. See J.T. Gathii, "Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable Aids Drugs to Low-End Consumers," *Florida Law Review* 53 (2001): 727–783 (discussing the shift in U.S. trade policy in the 1980s to focus on the production and transformation of conceptual notions into intangible flows of idea and money). This led to a concerted policy towards enhancing the protection of U.S. intellectual property rights globally and culminated in an international agreement. *Id.*
52. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 33, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter cited as TRIPS Agreement] ("[t]he term of protection available [for patents] shall not end before the expiration of a period of twenty years counted from the filing date.").
53. The Doha Declaration looked to clarify that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health and that it should be interpreted as compatible in a manner that promotes access to medicines. World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001 ¶ 4, WTO Doc. WT/MIN(01)/DEC/2, 41 ILM 755 (2002) [hereinafter cited as Doha Declaration].
54. See, e.g., TRIPS Agreement, *supra* note 52, at art. 31 (authorizing compulsory licensing).
55. The TRIPS Agreement also seeks to bind developed countries to provide incentives to "enterprises and institutions in their territories" for technology transfer to developing countries to "enable them to create a sound and viable technological base." *Id.* at art. 66(2). Additionally, the Doha Declaration tries to reaffirm the commitment of countries in the Global North to provide incentives to corporations and other institutions to promote and encourage technology transfer to countries in the Global South. Doha Declaration, *supra* note 53, at ¶ 7.
56. For further discussion, see United Nations Secretary-General's High-Level Panel on Access to Medicines, *Report of the United Nations Secretary-General's High-Level Panel on Access to Medicines: Promoting Innovation and Access to Health Technologies* (September 2016): 23–27 [hereinafter cited as UN High Level Panel on Access to Medicines].
57. See *id.* at 25–26 (table with sample of restrictive provisions).
58. See M.D. Shin et al., "COVID-19 Vaccine Development and a Potential Nanomaterial Path Forward," *Nature Nanotechnology* 15 (2020): 646–655.
59. S. Kimball, "Pfizer Quarterly Sales Surge to Record High, Driven by Covid Vaccine and Antiviral Treatment Paxlovid," *CNBC*, July 28, 2022, *available at* <https://www.cnbc.com/2022/07/28/pfizer-pfe-earnings-q2-2022.html> (last visited August 10, 2022).
60. *Id.*
61. *Id.*
62. Original Waiver Proposal, *supra* note 14.
63. *Minutes- TRIPS Council – View Details of the Intervention/Statement*, December 10, 2020, E-TRIPS Gateway: WTO, *available at* <https://e-trips.wto.org/En/CouncilMinuteNotifications/Intervention/21708> (last visited August 11, 2022); see also Original Waiver Proposal, *supra* note 14.
64. Communication from The African Group, The Plurinational State Of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, The Ldc Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic Of Venezuela And Zimbabwe, *Waiver from Cer-*

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

tain Provisions of the TRIPS Agreement for the Prevention, Containment And Treatment of Covid-19 Revised Decision Text, IP/C/W/669/Rev.1 (May 25, 2021) [hereinafter cited as Modified Waiver Proposal].

65. *Who We Are*, The People's Vaccine, *available at* <https://peoplesvaccine.org/supporters/> (last visited August 11, 2022).
66. Office of the United States Trade Representative, Press Release, *Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver* (May 5, 2021), *available at* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver> (last visited August 11, 2022).
67. Gonsalves and Yamey, *supra* note 9, at n1249.
68. J.B. Tasker, "Trudeau Non-Committal on Waiving Intellectual Property Rights for COVID-19 Vaccines," *CBC*, May 7, 2021, *available at* <https://www.cbc.ca/news/politics/canada-waiving-intellectual-property-rights-1.6017776> (last visited August 11, 2022).
69. U.K. Government, Press Release, *UK Statement to the TRIPS Council: Item 15 Waiver Proposal for COVID-19*, October 16, 2020, *available at* <https://www.gov.uk/government/news/uk-statement-to-the-trips-council-item-15> (last visited August 11, 2022).
70. A. Green, *Europe Still Can't Get On Board with the TRIPS Waiver*, May 31, 2021, Devex, *available at* <https://www.devex.com/news/europe-still-can-t-get-on-board-with-the-trips-waiver-100027> (last visited August 11, 2022).
71. O.C. Okafor and J.T. Gathii, *The EU's Vaccine Export Controls Negate its Self-interest, International Solidarity and International Law*, February 18, 2021, AfronomicsLaw, *available at* <https://www.afronomicslaw.org/category/analysis/eus-vaccine-export-controls-negate-its-self-interest-international-solidarity-and> (last visited August 11, 2022).
72. World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting, Apr. 7, 2021, 5, IP/C/M/97/Add.1 (noting South Africa's representative's remarks).
73. For further discussion of the deliberations, see generally P.K. Yu, "The COVID-19 TRIPS Waiver and the WTO Ministerial Decision," in Jens Schoysbo, ed., *IPR in Times of Crisis: Lessons Learned from the COVID-19 Pandemic* (Cheltenham, UK: Edward Elgar Publishing, forthcoming 2023).
74. World Trade Organization, Ministerial Decision on the TRIPS Agreement, Ministerial Conference Twelfth Session, paras 1, 6, WT/MIN(22)/30 WT/L/1141, June 22, 2022 [hereinafter cited as The Decision]
75. *Id.* at n.1.
76. For further discussion, see T. Balasubramaniam, *TRIPS Waiver Negotiations Go Down to the Wire in the Run-Up to MC12*, June 7, 2022, International Institute for Sustainable Development, *available at* <https://www.iisd.org/articles/policy-analysis/trips-waiver-negotiations-mc12> (last visited August 10, 2022).
77. The Decision *supra* note 74, at para 3(c).
78. *Id.* at para. 3(c), n.3.
79. C. Thomlinson, "In-depth: What Will it Take to Actually Make mRNA Vaccines in SA," *News24*, May 25, 2021, *available at* <https://www.news24.com/health24/medical/infectious-diseases/coronavirus/in-depth-what-will-it-take-to-actually-make-mrna-vaccines-in-sa-20210525> (last visited August 10, 2022).
80. Original Waiver Proposal, *supra* note 14.
81. Section 301 authorizes the use of unilateral trade sanctions as a retaliatory measure by the United States. U.S. Trade Act of 1974, 19 U.S.C. §§ 2411–2420. The U.S. removed South Africa from its watch list following advocacy by HIV/AIDS organizations. See K. Vick, "African AID Victims Losers of a Drug War," *Washington Post*, December 4, 1999, at A01. For further discussion, see R.S. Park, "The International Drug Industry: What the Future Holds for South Africa's HIV/AIDS Patients," *Minnesota Journal of Global Trade* 11, no. 1 (2002): 125–154. See also Exec. Order No. 13,155, 65 Fed. Reg. 30,521, 30,522 (May 10, 2000) (noting that the U.S. would not seek the revocation or revision of any intellectual property law in sub-Saharan African nations, so long as they promote access to HIV/AIDS medication or treatment. It also requires sub-Saharan African countries to provide adequate and effective intellectual property protection as a precondition for increasing access to HIV/AIDS drugs.).
82. The Decision, *supra* note 74, para 8.
83. Kimball, *supra* note 59.
84. Y. Vawda, F. Hassan, and T. Johnson, "Opinion: New WTO Deal Is a Slap in the Face for Poorer Countries," fin24, June 18, 2022, *available at* <https://www.news24.com/fin24/opinion/opinion-new-wto-deal-is-a-slap-in-the-face-for-poorer-countries-20220618> (last visited August 10, 2022).
85. Médecins Sans Frontières, Press Release *MSF is disappointed in the inadequate outcome after nearly two years of discussions at the WTO* (June 17, 2022), *available at* <https://msfaccess.org/inability-agree-real-pandemic-intellectual-property-waiver-wto-devastating-global-failure-people> (last visited August 10, 2022).
86. American Intellectual Property Law Association, Press Release, *Joint Statement on the WTO's Decision* (June 23, 2022).
87. PhRMA, Press Release, *PhRMA Statement on the TRIPS Waiver* (June 17, 2022), *available at* <https://phrma.org/resource-center/Topics/Trade/PhRMA-Statement-on-the-TRIPS-Waiver-Agreement> (last visited August 10, 2022).
88. See, e.g., T. Lee, *The 'Limited' TRIPS Waiver, COVID-19 Vaccines, and Intellectual Property*, June 28, 2022, American Action Forum, *available at* <https:// www.americanactionforum.org/insight/the-limited-trips-waiver-covid-19-vaccines-and-intellectual-property/> (last visited August 10, 2022).
89. Yu, *supra* note 73, at 14.
90. M. Sirleaf, "Entry Denied: COVID-19, Race, Migration & Global Health," *Frontiers in Human Dynamics* 2, 599157 (2020): 1–7, *available at* <https://www.frontiersin.org/articles/10.3389/fhumd.2020.599157/full> (last visited August 10, 2022). For further discussion, see generally M. Sirleaf, "Racial Valuation of Diseases," *UCLA Law Review* 67, no. 1820 (2021).
91. For further discussion, see generally H. Giliomee, ed., *Up against the Fences: Poverty, Passes and Privileges in South Africa* (Cape Town: David Philip, 1985); F. Wilson, *Migrant Labour in South Africa* (Johannesburg: Christian Institute of Southern Africa, 1972).
92. S. Rai, "Malawi's President Rips New Omicron Travel Bans: 'Afrophobia'," *The Hill*, November 29, 2021, *available at* <https://thehill.com/policy/international/africa/583396-malawis-president-rips-new-travel-bans-on-african-nations/> (last visited Nov. 4, 2022).
93. J.-A. Mbembé and L. Meintjes, "Necropolitics," *Public Culture* 15, no. 1 (2003): 11–40.
94. J. Kollewe, "Coronavirus Live: Americans Offered Free Taxies to Vaccine Centres; Airlines Plead for Reopening – as it Happened," *The Guardian*, May 11, 2021, *available at* <https://www.theguardian.com/world/live/2021/may/11/coronavirus-live-news-india-variant-of-concern-globally-says-who-pfizer-vaccine-approved-for-us-12-15-year-olds?page=with:block-609a7a058f08162fadb17ac8> (last visited August 10, 2022).
95. For further discussion, see generally Sirleaf, "Entry Denied," *supra* note 90.
96. N. Howard-Jones, *The Scientific Background of the International Sanitary Conferences 1851-1938*, World Health Organization Technical Document (1975), *available at* <https://apps.who.int/iris/handle/10665/62873> (last visited August 10, 2022).
97. T. Aloudat, D. A. Kirpalani, and M. Davis, *Decolonisation and Global Health*, October 26, 2021, Geneva Graduate Institute, *available at* <https://www.graduateinstitute.ch/communications/news/decolonisation-and-global-health#:~:text=Decolonisation%20cannot%20happen%20without%20democratisation,adopting%20

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press

more%20diverse%20governance%20models> (last visited August 10, 2022).
98. L. Paremoer, "A Pandemic of Vaccine and Technology Hoarding: Unmasking Global Inequality and Hypocrisy," *Cairo Review of Global Affairs* Summer 2021, *available at* <https://www.thecairoreview.com/essays/a-pandemic-of-vaccine-and-technology-hoarding-unmasking-global-inequality-and-hypocrisy/> (last visited August 10, 2022).
99. Sirleaf, "Disposable Lives," *supra* note 50.
100. D. Folkenflik, "As New COVID-19 Variant Spreads, Human Rights Lawyer Points to 'Vaccine Apartheid'," *NPR*, November 28, 2021, *available at* <https://www.npr.org/2021/11/28/1059649438/as-new-covid-19-variant-spreads-human-rights-lawyer-points-to-vaccine-apartheid> (last visited Nov. 4, 2022).
101. F. Adebisi, *The 'Vaccine Apartheid': A Long History in the Making*, June 7, 2021, African Skies, *available at* <https://folukeafrica.com/the-vaccine-apartheid-a-long-history-in-the-making/> (last visited August 9, 2022).
102. Achiume, *supra* note 41.
103. W.L. Patterson, ed., *We Charge Genocide: The Historic Petition to the United Nations for Relief from a Crime of the United States Government Against the Negro People* 2d edition (New York: Civil Rights Congress, 1951).
104. *Id.* At xi.
105. See Sirleaf, "Disposable Lives," *supra* note 50.
106. *Racism as a Public Health Crisis: Map of Declarations*, American Public Health Association, *available at* <https://www.apha.org/topics-and-issues/health-equity/racism-and-health/racism-declarations> (last visited August 9, 2022).
107. See, e.g., D.M. Kahan, "'The Anatomy of Disgust' in Criminal Law," *Michigan Law Review* 96, no. 6 (1998): 1621- 1657; J. Hampton, "An Expressive Theory of Retribution" in W. Cragg, ed., *Retributivism and its Critics* (Druck, Germany: Franz Steiner Verlag Stuttgart, 1992): at 1.
108. For further discussion, see E.M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization* 62, no. 4 (2008): 689–716.
109. See Venkatapuram, *supra* note 18.
110. S.S Bajaj, L. Maki, and F.C. Standford, "Vaccine Apartheid: Global Cooperation and Equity," *The Lancet* 399, no. 10334 (2022): 1452–1453, doi.org/10.1016/S0140-6736(22)00328-2.

The Journal of Law, Medicine & Ethics, 50 (2022): 726-737. © 2023 The Author(s)

https://doi.org/10.1017/jme.2023.14 Published online by Cambridge University Press