FEATURE

Multilateralism and the Global Co-Responsibility of Care in Times of a Pandemic: The Legal Duty to Cooperate

Thana C. de Campos-Rudinsky

Recent events during the COVID-19 pandemic have led some to believe that the international legal order in general, and international cooperation in particular, are collapsing.[1] Among other things, the COVID-19 pandemic has exposed some fissures in countries' support of multilateralism. Examples include the United States' withdrawal from the World Health Organization (WHO) under the Trump administration,[2] followed by President Biden's continuation of several of Trump's protectionist foreign policies;[3] the global rise of what has been called "liberal sovereigntism" or "neonationalism" (with varying degrees of both populism and anti-populism) from Western to Eastern Europe to the Philippines, New Zealand, India, and Brazil;[4] and, finally, countries' rampant violation of the International Health Regulation (IHR),[5] the binding legal instrument that regulates and coordinates the actions of WHO member states in the event of public health emergencies of international concern (PHEIC).

Although to many it might seem intuitive that there be a moral necessity of international cooperation during pandemics, many scholars reject the existence of an established legal duty of states to cooperate under international law. I call this the "orthodox view," according to which states have no legal duty to

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Ethics & International Affairs, 37, no. 2 (2023), pp. 206–231.
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doi:10.1017/S0892679423000230

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

cooperate, including during times of pandemics. This article challenges this orthodoxy by defining and justifying this legal duty. I argue that there are moral grounds for a legal duty to cooperate in the context of COVID-19, predicated on the principles of solidarity, stewardship, and subsidiarity. More specifically, I argue that (1) states have a legal duty to cooperate during a pandemic (as solidarity requires), and that (2) while this duty entails an extraterritorial responsibility to care for and assist other nations (as stewardship requires), the legal duty to cooperate, as defined and justified in the article, also allows states to attend first to the basic needs of those under their own jurisdiction—namely, fellow nationals and residents (as subsidiarity requires).

This argument is presented in three parts: The first section introduces the legal sources of the duty to cooperate and its weaknesses, and shows how these weaknesses ground the orthodox view. Section two challenges this view by theoretically defining and justifying the legal duty to cooperate with and assist foreign countries during pandemics, which is currently missing from the literature. Section three then applies this theoretical analysis to the scenario of COVID-19, focusing on a current controversy—namely, the duty of states to assist other countries in greater need by, inter alia, exporting COVID-19 treatments, including pharmaceuticals, diagnostic test kits, ventilators, and vaccines, at a discount or donating them.

This article uses a conceptual and normative methodology, starting by identifying existing norms of international cooperation (section one), conceptually elaborating their philosophical justification (section two), and then applying this moral account to the context of COVID-19 (section three). By tempering the foundational requirements of stewardship and solidarity with those of subsidiarity, this article provides a principled tripartite account of pandemic governance. This account will offer a new lens for debating the new international treaty on pandemic prevention, preparedness, and response that has been drafted and is now under negotiation at the World Health Assembly (WHA), responding to the current backlash against multilateralism. It acknowledges the legitimacy of the concerns of the orthodox view (suggesting that a state's primary duty is toward its own nationals and residents) and seeks to establish a theoretical common ground between the opposing sides in the interest of furthering the philosophy of global co-responsibilities for international cooperation, in the context of pandemics but also beyond. The point of my argument is to show the limits of the orthodox view of international law through a test case of pandemics, on the

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

basis that we should think of COVID-19 not just as an idiosyncratic event but as an example of why the international order needs a legal obligation to cooperate going forward. As Amitai Etzioni observed, this crisis of multilateralism and enhanced nationalistic tendencies had been showing signs of its existence in the liberal international order before the pandemic broke out.[6] In this sense, the pandemic—and the crisis of international cooperation it has highlighted—is not an aberration. Instead, it is a clear example of why a renewed sense of global communitarianism—and of the global co-responsibilities for international cooperation it justifies—is needed. This article contributes to such a renewal by defending a legal obligation of international cooperation that is grounded on the ethical principles of solidarity, stewardship, and subsidiarity.

The Weak Legal Sources of International Cooperation and the Orthodox View

The first question an international lawyer might ask if told that states have a legal duty to cooperate among one another in suppressing a pandemic is what the legal sources of this duty are. One obvious place to start is the WHO constitution. While there is no explicit article stating that member states are obligated to cooperate during a pandemic, the duty to cooperate is implied in Article 9, which articulates that the work of the WHO is carried out by the member states that form the WHA. It is also implied in Article 13, which provides capacity for special sessions of the WHA to deal with crises such as pandemics and in Article 18-m, which allows the WHA to take any appropriate actions to further the objectives of the WHO, in conjunction with Article 2-g, which establishes the WHO's function of advancing the work to eradicate epidemics, endemics, and other diseases. Another relevant source is Article 2 of the UN Charter, which highlights the tensions between the principle of sovereign equality among all members and their duty of mutual cooperation, coupled with a reference to Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which posits the following:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[7]

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Article 2(1) seems to establish a general duty to cooperate coupled with an extraterritorial obligation to assist other countries in fully realizing economic, social, and cultural rights (including the human right to health), especially through economic and technical means. This is the interpretation of the Committee on Economic, Social and Cultural Rights (CESCR), which presents this view in two subsequent general comments; namely, in paragraph fourteen of General Comment No. 3, on the nature of state parties' obligations,[8] and in paragraph forty-five of General Comment No. 14, on the right to the highest-attainable standard of health.[9] Both comments emphasize the centrality of international cooperation for the fulfillment of economic, social, and cultural rights in general, and the fulfillment of the right to health in particular, as "an obligation of all States"[10] that is "particularly incumbent on States parties and other actors in a position to assist."[11]

Under the committee's interpretation, the legal duty of state parties to the ICESCR to cooperate with and assist one another is made explicit. However, not only has the ICESCR been historically perceived as a weakened instrument[12] but the legal force of the committee's interpretation contained in the general comments has also been repeatedly questioned. The International Court of Justice (ICJ), for example, has either disagreed with or discredited the legal force of the committee's general comments on at least two occasions.[13] In her analysis of these two occasions, Rana Moustafa Essawy concludes that although there is agreement on the necessity of international cooperation when it comes to the realization of economic, social, and cultural rights, it is not possible to rely exclusively on the interpretation that the committee provides in its general comments. The general comments do not have force to establish a legal duty, she argues, because they are not sufficiently strong legal instruments or sources.[14]

One may contend, in response to Essawy, that even if the general comments of the committee alone may not provide sufficient justificatory legal force, together with other legal documents, they reflect state practice. Examples include the 1970 "Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN,"[15] the 1986 "Declaration on the Right to Development,"[16] and the 2000 "United Nations Millennium Declaration."[17] However, here again these legal documents offer insufficient justification for the legal duty to cooperate, given their soft-law nature.

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Indeed, states have adopted several other legal documents emphasizing the necessity of international cooperation for the progressive realization of economic, social, and cultural rights. However, in these other documents, international cooperation and assistance has also been explicitly rejected as a legal duty. I will discuss two examples of such documents as well as their rationale, since they help illustrate the main features of the orthodox view—that is, (1) legal positivism and the rejection of the moral foundations of legal duties; and (2) voluntarism and the necessity and sufficiency of state consent for the existence of legal duties.

The Positivist Severance of the Moral and the Legal

Legal positivism seeks to determine legal validity exclusively based upon posited legal norms or other traditional sources of international law, with no reference to moral evaluation.[18] One key document in which international cooperation as a legal duty was explicitly rejected based on legal positivism is the 2005 *Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* report, put together by the Open-Ended Working Group, organized to consider options regarding this elaboration. In paragraph 76 of the report, representatives of the U.K., the Czech Republic, Canada, France, and Portugal state that they "believed that international cooperation and assistance was an important moral obligation but not a legal entitlement, and [that they] did not interpret the Covenant [ICESCR] to impose a legal obligation to provide development assistance or give a legal title to receive such aid."[19]

The 2005 report is certainly correct in differentiating moral and legal duties. These are not synonymous and should not be conflated. However, it seems that the report makes this conceptual distinction primarily to assert that the duty to cooperate and provide assistance lacks legal validity in international law because it can only be backed up by morality and not by any valid legal instrument. Therefore, in the report's view, although the duty to cooperate and provide assistance could be morally justified, it cannot be legally justified because these countries did not consent to it in a valid legal instrument or other traditional source of international law with legal force (the ICESCR lacks such legal force).

The Voluntarist Emphasis on State Sovereignty

Voluntarism holds that sovereign states are subjects of international law only insofar as they consent to be bound by its legal requirements.[20] One document in which international cooperation as a legal duty is explicitly rejected based on voluntarism is the 2012 *Fifth Report on the Protection of Persons in the Event of*

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

Disasters. Similar to the first example, several states acknowledge the moral necessity of cooperation when assistance is requested but reject a specific legal duty to cooperate and provide assistance in the context of disaster relief. The report concludes that the duty to cooperate and assist "had no basis in existing international law, customary law or practice, and that the creation of such a new duty would not only be controversial but would give rise to numerous legal and practical problems."[21]

In rejecting the existence of a legal duty to cooperate and assist in disaster relief, the 2012 report emphasizes the voluntary nature of cooperation. Accordingly, legal enforcement of such a duty would presumably (1) contradict this voluntary nature of cooperation; and (2) improperly interfere with state sovereignty.[22] This emphasis on the voluntary nature of international cooperation, coupled with the prominence given to state sovereignty, exemplifies the voluntarist justification of international law.

The Pillars of the Orthodox View of International Cooperation

Positivism and voluntarism are two basic features that renowned international legal scholar Prosper Weil classically assigned to international law.[23] They are the pillars of the orthodox view, which denies the existence of states' legal duty to cooperate and assist other states in need on the grounds that (1) this duty is not posited in any valid legal instrument or other traditional sources of international law with legal force, and (2) not all states have consented to it.

One may ask what the relevance of Prosper Weil's orthodox view of international law is for today's world affairs. After all, it is not immediately clear who would still defend an orthodox view of international law, especially in the context of a pandemic. John Tasioulas argues that beyond the historical significance of Weil's view of international law, his idea "gives eloquent expression to a theoretical approach to international law, which may be called the positivist/voluntarist approach (PVA), whose power and seductiveness deserves the tribute of serious critical examination."[24] That is, even if one rejects Weil's view, his positivist/voluntarist approach raises serious questions about how international law can best secure international cooperation and whether or not international law should aim higher than simply mere co-existence among nations.[25] These questions have, I would add, not only theoretical but also practical relevance to the field of international affairs presently.

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Weil's orthodox view of international law raises relevant theoretical questions and, while controversial, still fosters ongoing debates in academic discussions.[26] His positivist/voluntarist approach remains influential not only in the field of international law but also in other fields, such as constitutional theory, where there has been a revival of the orthodox view of state sovereignty. For example, in his recent book *The Principles of Constitutionalism*, Nick Barber argues that state sovereignty is subject to neither moral nor legal limits (including from domestic and international law alike).[27]

The evolution of the concept of state sovereignty, as well as its limits, has been widely discussed by international law theorists, constitutional theorists, and legal philosophers for quite some time.[28] This is not a new debate in the academic literature of international affairs. While many theorists reject Weil's orthodox view, the ideal of strong state sovereignty, coupled with enhanced nationalistic tendencies, has more recently gained force in both the theory and the practice of international affairs. This has arguably led to the current crisis of multilateralism.

As noted earlier, Amitai Etzioni has argued that while this crisis of multilateralism in the liberal international order already showed signs of existence before the outbreak of the COVID-19 pandemic,[29] recent events during the pandemic have led many more people to believe that the international legal order in general, and international cooperation in particular, is indeed collapsing.[30] Ezekiel Emanuel and colleagues, for instance, have discussed some examples in which a strong ideal of state sovereignty, coupled with radical nationalism, has unfolded in the context of the pandemic. As they put it:

> Radical nationalists hold that governments are permitted—even required—to strictly prioritize their own people's interests. Thus, whenever they make agreements with pharmaceutical firms to reserve a supply of a vaccine for domestic use, even when that supply might otherwise have saved a large number of lives in other countries, governments act ethically. This view can grant that once a country achieves its domestic objective, such as arriving at herd immunity or vaccinating its entire population, it should share its vaccine globally. But it is not under any ethical obligation to share before that objective is realized.[31]

Weil's orthodox view of international law is therefore still relevant to contemporary international affairs, finding defenders also in the context of the COVID-19 pandemic, where we have seen state sovereignty and nationalism serve to justify more self-sufficient and less cooperative approaches to global public health. As Emanuel and colleagues have pointed out, the writings of

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contemporary theorists such as David Miller and Margaret Moore, whose views support stronger state sovereignty and nationalism, have also been used to justify this less cooperative approach to pandemic preparedness and response.[32]

In response to supporters of the orthodox view, for whom cooperation needs to be previously posited and explicitly consented to, one could point to the fact that there have been several pre-COVID instances of cooperation in the preparedness and response to PHEIC, and that these instances have established a customary practice on how countries jointly handle outbreaks (even before the advent of the original IHR in 1969 and its precursor, the International Sanitary Regulations of 1951). Since the establishment of the WHO, there have been numerous examples of countries cooperating with each other to suppress outbreaks. The times this has happened include the 1957 Asian flu, the 1961 cholera pandemic, the 1968 Hong Kong flu pandemic, the 1977 Russian flu, the HIV/AIDS pandemic starting in the 1980s, the 2002 SARS outbreak, the 2009 swine flu pandemic, the 2012 outbreak of the Middle East respiratory syndrome (MERS-CoV), the 2014 West African Ebola virus epidemic, and the 2015 Zika epidemic in Brazil. This abundance of examples provides, some would argue, a solid basis to claim a legal obligation to cooperate grounded in customary practice. The COVID-19 pandemic is simply the most recent instance where countries have been called on to cooperate with each other to suppress an outbreak. And indeed, this was the understanding that several countries reiterated in the 2020 UN resolution "Global Solidarity to Fight the Coronavirus Disease," which reaffirmed their "commitment to international cooperation and multilateralism . . . in the global response to the COVID-19 pandemic."[33] Incidentally, the 2020 report included support from several countries that had previously opposed international cooperation as a legal duty in the 2005 and the 2012 reports.

Supporters of the orthodox view, however, would likely respond by insisting on three main points. First, all of these previous outbreaks serve only to prove the morally voluntary nature of international cooperation coupled with the prominence of state sovereignty: In all of these numerous instances of countries cooperating to address a global public health crisis, their cooperation was the result of the voluntary choice by each sovereign state. Second, the "Global Solidarity to Fight the Coronavirus Disease" resolution, as yet another soft law, has no legal force. Also, the resolution has not been explicitly consented to by several other states that have remained silent about it. Third, supporters of the orthodox view could point to the several violations of the IHR, particularly around the

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imposition of trade and travel restrictions, as an illustration of the persistent objector rule in international law.[34] According to this rule, if a state persistently objects to a newly emerging norm of customary law throughout the process of its formation, then the objector exempts itself from such a norm once it is fully established and crystallized into law.[35] The historical resistance of the United States and some other countries to multilateralism and international cooperation, more generally, and to the IHR, in particular, reinforces the supremacy of states' self-determination, especially in times of PHEIC.

International cooperation, supporters of the orthodox view would insist, is a voluntary moral enterprise; it is not posited in any valid legal instrument or other traditional source of international law with legal force—including customary international law. According to Article 38(1) of the Statute of the International Court of Justice, customary international law has two elements: general state practice and *opinio juris*. And supporters of the orthodox view would be quick to remind us that both ingredients bear on the formation and consolidation of a customary norm. The persistent objector rule, they would add, is key in the concept of customary international law: it preserves the positivist-voluntarist notion that any norm of international law can only bind a state that has consented to be bound by it. The persistent objections from the United States and other countries—the supporters of the orthodox view would conclude—confirm that there is a weak basis to claim a legal obligation to cooperate grounded on customary practice.

It is true that the IHR has been violated in several instances, and several countries have not only persistently objected to multilateralism and international cooperation[36] but have also not consented to the 2020 resolution. However, international law has other ways of establishing and justifying legal duties: positivist voluntarism is not the only available theory of international law, and other schools of thought establish and justify obligations using other reasons—including moral reasons.

In the next section, I provide an alternative response to the orthodox view by presenting and critically examining certain theories that challenge positivist voluntarism. These theories divert from what I have called the orthodox view in that they take the moral (conceptual and normative) justifications of international legal obligations seriously. In doing so, they question state consent as a necessary and sufficient condition for justifying obligations in international law.

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The Moral Foundations of the Legal Duty to Cooperate and Assist during a Pandemic

Several scholars have argued against the orthodox view of international law that is exemplified by Weil's positivist-voluntarist account.[37] Here, I will examine the arguments of some of these scholars and apply their moral accounts to the context of a state's legal duty to cooperate and assist other states in times of pandemics, independently of their formal consent to be bound to such duty. The selected moral accounts are relevant for the purpose of explaining my philosophical account of pandemic governance, predicated on the moral principles of stewardship, solidarity, and subsidiarity. These three principles taken together justify why (1) states have a legal duty to cooperate during a pandemic, irrespective of their consent (as per solidarity); and why, (2) while this duty entails an extraterritorial obligation to care for and assist other nations (as per stewardship), it also allows states to attend first to the basic needs of those under their own jurisdiction—namely, fellow nationals and residents (as per subsidiarity). The purpose of my account is to provide the missing philosophical ground of a duty of care under international law, applied to the context of pandemic governance.

A Principled Tripartite Account of Pandemic Governance

Among the opponents of the orthodox view, Evan Criddle and Evan Fox-Decent's recent theory of mandatory multilateralism is helpful for my purpose because it establishes the moral justification for "mandatory multilateral cooperation," where "mandatory" means that "states lack discretion under international law to make public policy decisions unilaterally in relation to matters of global concern."[38] Criddle and Fox-Decent argue that whenever there is a conflict involving international human rights and international peace and security matters—such as those conflicts arising in the context of COVID-19—international cooperation is compulsory. That is to say, under such circumstances international law legally obliges states to "cooperate with one another in good faith to achieve or promote multilateral solutions."[39] Criddle and Fox-Decent's theoretical justification for mandatory multilateral cooperation is based on two organizing principles of international law; namely: sovereign equality and joint stewardship. While the former is predicated on the idea that states should be mutually independent in the international legal order, the latter is predicated on the idea that states should also be mutually dependent when it comes to issues related to global public goods

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(including global public health) and the need to manage them multilaterally. Criddle and Fox-Decent point out that states' mutual dependence is evident whenever the international legal order needs to regulate a matter of global or transnational concern. By the same token, since the COVID-19 pandemic, as a PHEIC, has made states' mutual dependence more evident, now the international legal order needs to regulate the transborder implications of the pandemic.

Stewardship

Criddle and Fox-Decent's conception of stewardship is helpful in establishing the legal duty to cooperate and assist other nations in times of pandemics and other global health threats. As they explain, where international law designates a matter of global concern, such as a PHEIC, there arises a joint stewardship. This means that a "joint administrative authority is shared by all states, and all states stand in a symmetrical relation of sovereign equality to one another." They elaborate that since joint administrative authority "is shared by states over collective regimes that govern global public goods, states can only exercise joint authority on behalf of humanity."[40]

Joint stewardship therefore provides the justification for states' duty to manage global public goods multilaterally rather than unilaterally. If global public health (including pandemic concerns) fits in this category of global public goods, then Criddle and Fox-Decent's conception of joint stewardship would imply that states have a co-responsibility to manage it on behalf of humanity. However, this definition needs some clarification. For example, it is not clear whether Criddle and Fox-Decent's conception of "joint stewardship" is synonymous with the international law principle of solidarity, which has at its core, as will be discussed below, cooperation for the sake of the global common good. Perhaps a way to more clearly differentiate stewardship from solidarity would be to start by defining what is morally distinct about the principle of stewardship.

For Criddle and Fox-Decent, the definition of stewardship implies that there is a duty to manage a global public good on behalf of humanity, but I would add that stewardship implies that there is not merely a duty to manage but also a duty to care for those entrusted to the steward.[41] To manage and to care for are not synonymous. When the steward manages a global public good on behalf of humanity, it could be said that the steward is, by extension, caring for humanity. However, in this case, management is still the primary purpose of stewardship, and care but a secondary consequence. To say that stewardship implies not merely a duty to

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manage but, more fundamentally, a duty to care for those entrusted to the steward puts care at the center. Care becomes the primary purpose of stewardship. In the ethics-of-care literature, care is personal.[42] While all human beings are entitled to receive care, thus making care a universal concept, care is given and experienced in a unique, personal way by each individual. This means that the steward has a universal duty to care for all humanity by managing global public goods (including global public health) well, by respecting the dignity of each unrepeatable human being, by being attentive to his or her unique needs, and therefore by responding personally to those entrusted to the steward's care.

The steward is the guardian, regulator, or leader who has a specific duty of care under her mandate.[43] So, when it comes to a global health threat, like the COVID-19 pandemic, states, as the stewards, have not merely the duty to manage its suppression adequately but also, and more fundamentally, the duty to care for the health of humanity, by being attentive to the specific needs and vulnerabilities of different populations: care is universal but also deeply personal. This cannot be done unilaterally; it can only be done multilaterally, given that pandemics are a matter of global concern (whether states have explicitly consented to the duty or not). Accordingly, states, as stewards of global public health, have a duty to care not only for the public health of those populations under their jurisdiction (that is, fellow citizens and residents) but also for the public health of those outside their territory.[44] This latter extraterritorial responsibility to care for and assist outsiders raises the further question of solidarity, which is my second principle of pandemic governance.[45]

Solidarity

Solidarity is a fundamental principle of international law in general, and of international human rights law in particular. As a principle of justice, solidarity has the purpose of protecting the human dignity of all individuals while also upholding the global common good, where each individual life in every community matters, within the reality of our mutual vulnerabilities and interdependence.[46] Solidarity and the mutual duty of care it entails depend therefore on the very idea of a global common good.

There are two main theoretical approaches to the idea of "global common good": utilitarian and Aristotelian. Utilitarians define the global common good as the maximized welfare for the greatest number of people, determined by a cost-benefit analysis, or a Pareto-optimal outcome. The utilitarian definition has been

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widely utilized in the context of the COVID-19 pandemic because it has the advantage of providing straightforward solutions to ethical dilemmas by weighing the costs and benefits of a certain choice. While it is appealing for the pragmatic solutions it offers, the utilitarian approach has also been widely contested, particularly when it comes to important human rights questions of equality and nondiscrimination. The Aristotelian definition of global common good is an alternative that takes such human rights questions seriously, and for this reason, this is the definition I am employing here. Aristotelians conceptualize the global common good as the set of values and reasons that justify collaboration with others in a way that enables mutual flourishing. More specifically, in the context of a pandemic, the Aristotelian definition of the global common good emphasizes the fact that nations are mutually vulnerable to viruses such as SARS-CoV-2, and this mutual vulnerability is a reason that justifies a collaborative effort among nations that are entrusted to each other's care. This effort should be made in such a way that leaves no one behind (thus honoring the human rights principles of equality and nondiscrimination among individuals of different nationalities, ethnicities, sexes, languages, religious beliefs, political opinions, and socioeconomic statuses).

These two definitions of the global common good lead to two distinct understandings of solidarity and the mutual duties of care that solidarity entails. In other words, the utilitarian and the Aristotelian interpretations of solidarity justify mutual duties of care of different kinds and scopes. Eyal Benvenisti puts forth a utilitarian reading of solidarity by exploring the idea of mutual trusteeship. For him, sovereign states, as "trustees of humanity," only have duties of care for other nations in two situations: (1) when bestowing such extraterritorial care is costless, according to a Pareto outcome of a cost-benefit analysis; and (2) when there is a catastrophe.[47] Benvenisti's utilitarian definition of solidarity and the types of mutual duties of care it justifies are more restrictive and therefore less burdensome than the Aristotelian definition.

The Aristotelian reading of the principle of solidarity (and my tripartite account of pandemic governance) would justify extraterritorial obligations to care for and assist outsiders even when it is costly to do so and when a Pareto-optimal outcome cannot be achieved. Upholding the global common good (in the Aristotelian sense) is, in fact, often costly and even inefficient, but a nonutilitarian morality would still require actions in support of it, whether there is a catastrophic pandemic or not.[48] Since the Aristotelian reading of solidarity and the duties of mutual care it grounds are predicated on the idea that nations are mutually

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vulnerable to epidemics and are thus entrusted to each other's care, market considerations of cost and efficiency, though important, are less morally weighty than the basic needs and human rights of every individual in every community.

My definition of solidarity does justify universally shared duties of care for individuals and communities among nations—particularly in the context of a pandemic. However, it does not entail that such duties, though universal, are all identical in content when discharged: not only is it the case, as discussed above, that care is personal but it is also the case that responsibilities of care depend on the type of relationship between the caregiver and the care receiver. Prima facie, it is reasonable to shift the actual delivery of care whenever possible to the most local and personal levels.[49] To illustrate this, a third principle of pandemic governance is useful.

Subsidiarity

If solidarity requires that the basic needs and human rights of foreign nationals be taken seriously, one might think that states should then have an equal duty to care for those under their jurisdiction and for outsiders. One might even be led to think that the state's duty to care for outsiders should trump the duty to care for locals if outsiders seem to be in greater or more desperate need. The principle of subsidiarity clarifies these misperceptions.

Subsidiarity is a structural principle of international human rights law that locates the proper level of responsibility and decisional authority among multilevel stakeholders according to a bottom-up approach—that is to say, from local, to regional, to global.[50] Subsidiarity recognizes the value of first trying to solve problems locally and then moving up to higher levels of governance only as necessary.[51] The principle of subsidiarity justifies, therefore, the *decolonization* of global health governance, respecting the agency of local communities in deciding how best to assess and act on their public health concerns.[52] Because local stakeholders typically have better knowledge of the epidemiological reality and medical culture in a particular country, they are, prima facie, best positioned to more effectively solve public health problems that require the coordination of persons and institutions across sectors and across nations. However, as Paolo Carozza observes, "Subsidiarity cannot be reduced to a simple devolution of authority to more local levels."[53] In other words, subsidiarity should not be invoked by powerful global health actors as an excuse to abandon local communities in need of help and to shirk their responsibility to provide aid when assistance is needed and

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requested. For this reason, the principle of subsidiarity should be understood as complementary to the principle of solidarity in upholding the global common good.[54]

In the context of a catastrophic pandemic like COVID-19, where there has been much confusion about the allocation of priorities, subsidiarity can be helpful in providing clear ethical guidance and justification. By proposing a bottom-up perspective that allocates duties of care first to local communities and then to higher levels only insofar as the lower-level communities need assistance, subsidiarity ethically justifies why states are allowed to attend first to the basic needs of those under their own jurisdiction while also requiring that they not abandon (and therefore cooperate with and care for) outsiders.[55] To be clear, the principle of subsidiarity would not corroborate claims of extreme radical nationalism, self-sufficiency, or protectionism, which would result in the abandonment and exclusion of the most vulnerable outsiders. Instead, subsidiarity is to be read in consonance with multilateralism and a global co-responsibility of care in the face of common threats. Subsidiarity, properly understood, does not provide reasons for the state to avoid its responsibility to care for those outsiders in need when care is due; instead, subsidiarity allows for better, more-tailored, -local, and -personal care that meets the specific needs of the most vulnerable.

It is worth pausing to examine what some may view as the slipperiness of the principle of subsidiarity: At what point does a state go too far in prioritizing its own people? This is a valid question. In upholding the global common good in the Aristotelian sense, the principle of subsidiarity (and my tripartite account of pandemic governance) may not offer a straightforward, pragmatic answer to this question. However, to prepare for and respond to a global health problem such as a pandemic in both an effective and ethical manner, more than straightforward pragmatic solutions are needed. Decision-making in global public health policy requires substantial trade-offs between competing policy goals and relative utilities, and also between objective values and principled reasons, which are not easily quantifiable and which add layers of complexity as well as uncertainty.[56] A range of values and principled reasons that justify collaboration with outsiders in a way that protects the jurisdictional duties to care for locals while enabling the mutual flourishing of both outsiders and locals is a crucial component of good decision-making that goes beyond utilitarian calculations of the costs and benefits of policies.

My Aristotelian reading of the principle of subsidiarity does justify extraterritorial obligations to care for and assist outsiders even when doing so is costly and

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

when a Pareto-optimal outcome cannot be achieved. However, the answer to the question of how much care is too costly is not an answer that an Aristotelian account such as mine can or should provide in advance. As a bottom-up principle, subsidiarity is contrary to imposing top-down, rigid constraints on the freedom of local governments. Subsidiarity (and my tripartite account) provides the guiding values and reasons that states need to freely make a reasonable, principled decision on how to discharge their duty to cooperate with and assist other countries in need while also fulfilling their primary duty to care for locals.

A Principled Tripartite Account of Pandemic Governance: The Current Controversy around the Global Allocation of Covid-19 Vaccines and Their Patent Waivers

I have presented my tripartite account of pandemic governance, which establishes the moral foundations of the legal duty to cooperate during a pandemic (as solidarity requires). This legal duty, as I have defined it, includes an extraterritorial obligation to care for and assist other nations (as per stewardship) as well as the obligation to focus first on those under a nation's own jurisdiction (as per subsidiarity). In this final section, the article will apply the philosophical analysis presented in the second section to the global allocation of COVID-19 vaccines, specifically concerning the controversy around patent waivers for these vaccines.

How does my principled tripartite account propose to address the issues around the global allocation of COVID-19 vaccines? The crux of the problem is that there are two competing duties. On the one hand, states have jurisdictional duties to care for those under their jurisdiction; but on the other hand, states have cosmopolitan duties to care for and assist vulnerable populations of other nations in need. Those who defend extreme vaccine nationalism, self-sufficiency, and protectionism typically defend jurisdictional duties over cosmopolitan duties based on the criterion of community membership, whether based on nationality or citizenship.[57] Those who defend extreme vaccine cosmopolitanism typically defend the primacy of cosmopolitan duties to care for and assist the vulnerable populations of other nations, based primarily on the idea of need, and judging the criterion of community membership as morally irrelevant.[58]

My principled tripartite account of pandemic governance would justify a moderate view of vaccine cosmopolitanism, which acknowledges and reconciles both

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

jurisdictional and cosmopolitan duties while permitting a certain degree of partiality toward the members of one's own national or legal community. My account would never require states to prioritize caring for outsiders at the cost of neglecting the vulnerable populations under their own jurisdiction. This would be contrary to the principle of subsidiarity. However, my account would require extraterritorial obligations to care for and assist vulnerable outsiders by, inter alia, exporting at a discount or donating scarce COVID-19 treatments (including pharmaceuticals, diagnostic test kits, ventilators, and vaccines)[59]—when the state has the capacity to do so without abandoning its vulnerable fellow citizens and residents (in this category of "residents," I am including migrants, refugees, and internally displaced persons). Both stewardship and solidarity require such measures.

But how should these two competing duties have been balanced during the COVID-19 pandemic, given the reality that the initial supply of coronavirus treatments (including pharmaceuticals, diagnostic test kits, ventilators, and vaccines) was scarce and the global demand could not be realistically met? One might claim that there was not enough supply to allow for the full realization of jurisdictional duties, let alone cosmopolitan duties. Indeed, the main problem during this pandemic (especially in its first wave) was that most countries experienced shortages of coronavirus treatments. Their domestic manufacturing capacities were not able to self-sufficiently serve their domestic demand for all of these treatments. Most countries' domestic manufacturing capacities currently still need to be supplemented by imports in order to meet their surge in demand for COVID-19 treatments.

If, as I am claiming, states have a jurisdictional as well as cosmopolitan duty to assist other countries in greater need (for example, by exporting at a discount scarce COVID-19 treatments or donating them),[60] how can these moral requirements be made practically feasible, especially given that most of these treatments are patent protected? That is to say, donating or exporting the treatments at a discount involves intellectual property restrictions, regulated internationally by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization (WTO). Are patent waivers the solution for the practical feasibility of the moral requirements of my proposed account?

In cases of a public health necessity such as the COVID-19 pandemic, the TRIPs agreement indeed offers legal exemptions to intellectual property rights (such as through licenses) applicable to medical treatments. These licenses

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(contained in Article 31*bis* of the TRIPs) allow countries not only to produce generic (and therefore more affordable) treatments but also to export them to other countries. Licenses that waive the patent protections on COVID-19 treatments (including vaccines) seem, therefore, to be a promising way forward to boost domestic production and export generic coronavirus treatments. The United States, Russia, China, India, and South Africa have all publicly expressed support for this waiver (while EU countries, the U.K., Japan, and South Korea, in addition to vaccine producers and philanthropists such as Bill Gates, have voiced resistance).[61] However, more than simply licensing intellectual property for treatments is necessary. Patent waivers alone are not the solution. While licensing is relevant, it is not sufficient to guarantee the adequate production, distribution, and administration of COVID-19 vaccines (and other treatments) to those who wish to receive them in countries where the vaccines remain scarce. Difficult questions regarding a lack of raw materials for producing vaccines, manufacturing capacity, technology transfer, import tariffs, and other logistical and infrastructure issues still need to be solved.[62]

A true solidaristic pandemic suppression strategy requires reciprocally coordinating global pharmaceutical supply chains. This would involve products being complementarily produced and globally shared. Some countries would produce certain generic active pharmaceutical ingredients, drugs, and vaccines to address COVID-19, while other countries would produce other generic pharmaceuticals and vaccines. Then, countries would import and export these products among all WTO member states. The principles of solidarity and stewardship (within my tripartite account of pandemic governance) would require this division of labor and a reciprocal, complementary cooperative strategy. This is how true solidarity among nations should look during pandemics. Such a division of labor would not only be morally justified but also strategically helpful for the international community, and legally consistent with the existing intellectual property rights regime, specifically Article 31*bis* of the TRIPs agreement.[63]

An additional complication regarding patent waivers is that several WTO member states—including the United States, Australia, Canada, and some EU member states[64]—decided unilaterally to opt out of the Article 31*bis* system in 2003, gambling that they would never need to import generic medications. Things looked different in 2020 during the first wave of the COVID-19 pandemic, and most of these countries would have benefited from the Article 31*bis* system of generics importation—if not in terms of the importation of COVID-19 vaccines,

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then in terms of the importation of other necessary COVID-19 treatments, such as pharmaceuticals, diagnostic test kits, and ventilators. Most countries have, at some point during the pandemic, struggled with scarcity of those supplies.

Most of these developed countries (particularly the United States, Canada, EU member states, Japan, and the U.K.) unilaterally entered into a number of direct agreements with pharmaceutical companies to secure their own supplies of COVID-19 vaccines, even before the vaccines were developed. By January 2021, these countries had combined claims to 60 percent of the vaccines that were then developed, despite representing only 14 percent of the global population.[65] These direct agreements with pharmaceutical companies, grounded in the spirit of vaccine nationalism, self-sufficiency, and protectionism, have arguably marred multilateral efforts at international cooperation, such as the COVAX Facility—a global partnership co-led by the WHO; Gavi, the Vaccine Alliance; and the Coalition for Epidemic Preparedness Innovations.[66] The developed countries that opted out of the Article 31*bis* system have been less cooperative and helpful during the pandemic than they could or should have been.

Now, given that these developed countries unilaterally opted out of the Article 31*bis* system, should they be now permitted back in so that they can not only benefit from patent waivers but also collaborate more fully with multilateral initiatives of international cooperation? What would my tripartite account propose?

A positivist-voluntarist position, as discussed in the first section, may argue that these developed countries should not be allowed to benefit from the Article 31*bis* system because they explicitly expressed their decision not to be part of this multilateral enterprise and such a decision has become part of the law. My proposed account, however, would give a different answer, supported by morality as well as the understanding that states' unilateral consent is not sufficient to justify them opting out from their multilateral engagements (such as the WHO or the WTO) and their duties to cooperate multilaterally. My proposed tripartite account (justified here by the principles of solidarity and stewardship) would let them back in the system, as the global common good (in an Aristotelian sense) requires.

Potential Objections

I anticipate at least two main objections to my principled tripartite account of pandemic governance and the legal duty to cooperate in the context of COVID-19. The first objection relates to the practical feasibility of my

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philosophical account. The second objection relates to the conception of multilateral cooperation that my account puts forth.

First, if a democratic state has the right to decide where it places its solidarity, where is the legal duty to cooperate located? In other words, how would one expect my framework to practically influence the behaviors of states in the international system?

My short answer to this pragmatic question is global co-responsibility, which entails mutual accountability. True, my account (justified by the principle of subsidiarity) places the primary responsibility on states themselves to decide how to cooperate internationally (and how, for example, to allocate vaccines globally). One who holds a traditional view of sovereignty (positing that states wield absolute authority within their respective jurisdictions) would be skeptical of my proposed account: no state would simply choose to be benevolent and cooperate with other nations. But others, like Criddle and Fox-Decent, who hold a more contemporary and relational view of sovereignty (according to which states are joint stewards of humanity),[67] may be more confident that my theoretical account could succeed in positively influencing the behaviors of equally sovereign states, which ought to account to one another in how they discharge their mutual duty of care for humanity. The legal duty to cooperate internationally is therefore located in this relational understanding of sovereignty. The key for my theoretical account to practically influence states' behaviors would be located in this very idea of global co-responsibility, which necessitates a scheme of mutual accountability on how nations care for each other in the exercise of their "joint stewardship," as Criddle and Fox-Decent conceptualize it. This scheme of mutual accountability would disincentivize nonparticipation in multilateral solutions to pandemic containment and noncompliance with the legal duty to cooperate during a pandemic. This idea of mutual accountability that I propose is not simply a generic claim for more institutions that would hold states accountable. Instead, what I mean by mutual accountability is mutual answerability: the building of a culture of reason-giving relationships to others.

The second potential objection to my argument is that my theory of global co-responsibility of care seems to necessitate a rigid and overly regulated multilateralism. If the scheme of mutual accountability that my theory suggests succeeds in disincentivizing nonparticipation in multilateral solutions to pandemic containment as well as noncompliance with the legal duty to cooperate during a pandemic, it seems that it would also succeed in disincentivizing some fluid and spontaneous forms of vaccine diplomacy between countries (for example,

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bilateral agreements directly between countries often involving multiple vaccine manufacturers). It seems, at first glance, that my theory would morally condemn those states that decide to bypass the WHO's bureaucracy and sidestep its COVAX facility and IHR treaty in the name of their (traditional view of) sovereign interests. Some would argue that just because a state decides to directly work with and collaborate with others outside of the structures established by the WHO (for example, because of the corruption and political grandstanding within the organization), that does not mean that such a state is necessarily unwilling to cooperate internationally or meet the multilateral imperative.

My theory of multilateralism and global co-responsibility of care would not go as far as to impose rigid constraints on the freedom of governments to directly interact with other nations and global actors (this would contradict the spirit of subsidiarity, which cherishes freedom). However, there also needs to be a balance between the need for freedom and the need to respect legal agreements (like the IHR). Legal institutions exist to solve coordination problems that could not be solved without these regulations. There is therefore a practical need to respect legal arrangements previously made through international organizations like the WHO. Now, that does not entail that my proposed framework would morally object to necessary reforms of the WHO, COVAX, or IHR. The principles of solidarity, subsidiarity, and stewardship would justify the necessary reform of the WHO and the revisions of its COVAX and IHR for the sake of the global common good. To be clear, my principled tripartite account does require member states to respect the WHO, COVAX, and IHR since their purpose is to solve global coordination problems (such as a pandemic) that cannot be solved effectively otherwise. However, my account equally requires their reform where they fail to uphold the global common good; for example, by maintaining an inefficient bureaucracy, proposing ineffective rules for vaccine distribution, or demanding unreasonable travel and trade restrictions. The WHO, COVAX, and IHR have several points of weakness, which undermine multilateralism and countries' abilities to mutually care for one another. My theory therefore would be supportive of WHO's reform and revisions to the COVAX and IHR, in light of the requirements of solidarity, subsidiarity, and stewardship.

Conclusion

This article has challenged the orthodox view of international law, according to which there is no legal duty to cooperate during a pandemic, arguing that there

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are moral grounds to establish a legal duty to cooperate in the context of COVID-19, predicated on the principles of solidarity, stewardship, and subsidiarity. More specifically, the article has argued that (1) states have a legal duty to cooperate during a pandemic (as solidarity requires); and (2) while this duty entails an extraterritorial responsibility to care for and assist other nations (as stewardship requires), the legal duty to cooperate also allows states to attend first to the basic needs of those under their own jurisdiction—namely, fellow nationals and residents (as subsidiarity requires).

The purpose of my argument is to show the limits of the orthodox view of international law through a test case of pandemics, since one should not think of COVID-19 as an idiosyncratic event but rather as an example of why the international order needs a legal obligation to cooperate going forward. This pandemic—and the crisis of international cooperation it displays—is not an aberration. Instead, it is a clear example of why a renewed sense of global communitarianism—and of the global co-responsibility for international cooperation it justifies—is needed.

The upshot of this conceptual and normative analysis was a principled tripartite account of pandemic governance, based on the principles of solidarity, stewardship, and subsidiarity. This account opened up a new way of theorizing a long-standing debate in the ethics and global affairs literature; namely, the moral tension between multilateralism and protectionism. By revealing the complementary relationship between the principles of solidarity, stewardship, and subsidiarity, this article provides a new lens for debating the content of the recently drafted international treaty for pandemic prevention, preparedness, and response, now under negotiation at the WHA, where a multilateral legal duty to cooperate would be reinforced. My account has also provided a new lens for responding to the current backlash against multilateralism: it has substantiated a theory of global responsibilities of mutual care, especially in—but not limited to—times of pandemics, when nations' mutual vulnerability to a certain epidemic or other common threat is more apparent.

Notes

[1] See, for example, Allyn L. Taylor and Roojin Habibi, "The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance," *ASIL Insights* 24, no. 15 (June 5, 2020); and Nikolas K. Gvosdev, "Does Covid-19 Change International Relations?," *Ethics & International Affairs* (blog), March 17, 2020.

[2] See, for example, Gian Luca Burci, "The USA and the World Health Organization: What Has President Trump Actually Decided and What Are Its Consequences?" *EJIL: Talk!*, blog of the *European Journal of International Law*, June 5, 2020, www.ejiltalk.org/the-usa-and-the-world-health-organization-what-has-president-trump-actually-decided-and-what-are-its-consequences/. On how President Trump's

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

actions galvanized support for the WHO from other member states and from philanthropists such as Bill Gates, and how this support was used to publicly highlight the president's failings in his own domestic response to the pandemic, see Sophie Harman, "COVID-19, the UN, and Dispersed Global Health Security," in "The United Nations at Seventy-Five: Looking Back to Look Forward," special issue, *Ethics & International Affairs* 34, no. 3 (2020), pp. 373–78. See also Papamichail, who recounts the past eighteen months of the pandemic, including the U.S. withdrawal from the WHO and the responses (or nonresponses) of leaders at opposing ends of the political spectrum to the virus. Andreas Papamichail, "Security before, during and after COVID-19," in *Ethics & International Affairs* 35, no. 3 (Fall 2021), pp. 467–81.

[3] Angelos Chryssogelos, "Liberal Sovereigntism, New Nationalism and the Illusion of Choice," openDemocracy, May 26, 2021, www.opendemocracy.net/en/can-europe-make-it/liberal-sovereigntism-new-nationalism-and-illusion-choice/.

[4] On the rise of protectionism beyond America, see, for example, Henry Farrell and Abraham Newman, "The New Age of Protectionism: Coronavirus 'Vaccine Wars' Could Herald a Broader Retreat from the Free Market," *Foreign Affairs*, April 5, 2021, www.foreignaffairs.com/articles/europe/2021-04-05/new-age-protectionism. On the rise of neonationalism in Europe in the context of the COVID-19 pandemic, see, for example, Zhongyuan Wang, "From Crisis to Nationalism: The Conditioned Effects of the COVID-19 Crisis on Neo-Nationalism in Europe," *Chinese Political Science Review* 6 (2021), pp. 20–39, link.springer.com/article/10.1007/s41111-020-00169-8; and Ivan Krastev and Mark Leonard, "Europe's Pandemic Politics: How the Virus Has Changed the Public's Worldview" (policy brief, European Council on Foreign Relations, June 24, 2020), ecfr.eu/publication/europes_pandemic_politics_how_the_virus_has_changed_the_publics_worldview/. On how populist, nationalist, and xenophobic strands of backlash politics have proliferated in Hungary, Poland, the Philippines, and Turkey, see G. John Ikenberry, "The End of Liberal International Order?," *International Affairs* 94, no. 1 (January 2018), pp. 7–23. For Ikenberry, while the American hegemonic organization of liberal order is weakening, the more general organizing ideas and impulses of liberal internationalism run deep in world politics. Ikenberry is hopeful that "creating an international 'space' for liberal democracy, reconciling the dilemmas of sovereignty and interdependence, [and] seeking protections and preserving rights within and between states" is still possible (p. 8). On populist nationalism in relation to global public health, see, for example, Jeremy Youde, *Globalization and Health* (Lanham, Md.: Rowman & Littlefield, 2019). On medical populism in the context of COVID-19, see, for example, Gideon Lasco, "Medical Populism and the COVID-19 Pandemic," *Global Public Health* 15, no. 10 (October 2, 2020), pp. 1417–29.

[5] Roojin Habibi, Gian Luca Burci,, Thana C. de Campos, Danwood Chirwa, Margherita Cinà, Stéphanie Dagron, Mark Eccleston-Turner, et al., "Do Not Violate the International Health Regulations during the COVID-19 Outbreak," *Lancet*, February 13, 2020.

[6] Amitai Etzioni, "The Pandemic Extends the Trend Away from Globalism," Carnegie Council for Ethics in International Affairs (blog), June 9, 2020, www.carnegiecouncil.org/publications/articles_papers_reports/pandemic-trend-away-globalism-amitai-etzioni.

[7] Article 2(1), International Covenant on Economic, Social, and Cultural Rights, December 16, 1966.

[8] General Comment No. 3, "The Nature of States' Parties Obligations," Committee on Economic, Social, and Cultural Rights, E/1991/23, December 14, 1990, para 14.

[9] General Comment No. 14, "The Right to the Highest Attainable Standard of Health," Committee on Economic, Social, and Cultural Rights, E/C.12/2000/4, August 11, 2000, para 45.

[10] General Comment No. 3, Committee on Economic, Social, and Cultural Rights, para 14.

[11] General Comment No. 14, Committee on Economic, Social, and Cultural Rights, E/C.12/2000/4, para. 45.

[12] See, for example, Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010).

[13] Ahmadou Sadio Diallo (Republic of Guinea *v.* Democratic Republic of the Congo), Judgment, 2010 I.C.J. (Nov. 30), para. 66; International Court of Justice, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," advisory opinion (July 9, 2004), para 109. See also Rana Moustafa Essawy, "The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?," *EJIL: Talk!*, blog of the *European Journal of International Law*, April 22, 2020, www.ejiltalk.org/the-legal-duty-to-cooperate-amid-covid-19-a-missed-opportunity/. The International Court of Justice (ICJ) does refer (in paragraph 109) to the interpretations of the Human Rights Committee, thus giving it credit yet apparently not full authority, since it does not rely solely on the general comments of the committee to justify a legal duty to cooperate. The fact that the ICJ supports its justification by reference to additional means of interpretation indicates, according to Essawy, the lack of legal force of the committee's interpretation.

[14] Essawy, "The Legal Duty to Cooperate amid COVID-19."

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

[15] United Nations General Assembly, "Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the UN," A/RES/25/2625, October 24, 1970.
[16] United Nations General Assembly, "Declaration on the Right to Development," A/RES/41/128, December 4, 1986.
[17] United Nations General Assembly, "United Nations Millennium Declaration," A/RES/55/2, September 18, 2000.
[18] See John Tasioulas, "'Fantasy upon Fantasy': Some Reflections on Dworkin's Philosophy of International Law," *Jus Cogens* 3, no. 1 (2021), pp. 33–50.
[19] Economic and Social Council, United Nations General Assembly, *Report of the Open-Ended Working Group to Consider Options regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Second Session*, E/CN.4/2005/52, February 10, 2005, para. 76.
[20] See Tasioulas, "'Fantasy upon Fantasy,'" p. 33.
[21] Eduardo Valencia-Ospina, International Law Commission, *Fifth Report on the Protection of Persons in the Event of Disasters*, A/CN.4/652, April 9, 2012, para 52.
[22] Essawy, "The Legal Duty to Cooperate amid COVID-19."
[23] John Tasioulas, "Prosper Weil and the Mask of Classicism," *AJIL Unbound* 114 (2020), pp. 92–96.
[24] Tasioulas, "Prosper Weil and the Mask of Classicism," at 92.
[25] Ibid.
[26] See, for example, Karen Knop, "Introduction to the Symposium on Prosper Weil: 'Towards Relative Normativity in International Law?'" *AJIL Unbound* 114 (2020), pp. 67–71.
[27] Maris Köpcke suggests that Barber's account provides an unsound view of state sovereignty. A good account of state sovereignty would consider, she argues, the legitimate scope of state's authority, over and above the authority that the state itself claims. See Maris Köpcke, "Law and the Limits of Sovereign Power," *American Journal of Jurisprudence*, 66, no. 1 (June 2021), pp. 115–28.
[28] On the limits of state sovereignty and the evolution of the concept in the field of international law, see, for example, Samantha Besson, "Sovereignty in Conflict," in Stephen Tierny and Colin Warbrick (eds.), *Towards an International Legal Community? The Sovereignty of International Law* (London: British Institute of International & Comparative Law, 2006), pp. 137–39 (Besson discusses the thresholds of sovereignty); Richard H. Steinberg, "Who Is Sovereign?," *Stanford Journal of International Law* 40 (2004), pp. 329–45, at 332–33 (Steinberg discusses the degrees of sovereignty); Timothy Endicott, "The Logic of Freedom and Power," in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 245–60. (Endicott discusses the purpose of sovereignty in international law); and Philip Pettit, "Legitimate International Institutions: A Neo-Republican Perspective," in Besson and Tasioulas, *The Philosophy of International Law*, pp. 139–62 (for Pettit, just as a state should recognize the moral value of sovereignty for its own people, it should also recognize the moral value of sovereignty for citizens of other states).
[29] Etzioni, "The Pandemic Extends the Trend Away from Globalism."
[30] Taylor and Habibi, "The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19"; and Gvosdev, "Does Covid-19 Change International Relations?"
[31] Ezekiel Emanuel, Allen Buchanan, Shuk Ying Chan, Cécile Fabre, Daniel Halliday, R. J. Leland, Florencia Luna, et al., "On the Ethics of Vaccine Nationalism: The Case for the Fair Priority for Residents Framework," *Ethics & International Affairs* 35, no. 4 (Winter 2021), pp. 543–62, at p. 545.
[32] Ibid. For Ezekiel Emanuel and his colleagues, David Miller and Margaret Moore are examples of theorists whose views would support a radical-nationalistic approach to pandemic preparedness and response. See David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); and Margaret Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press, 2001).
[33] United Nations General Assembly, "Global Solidarity to Fight the Coronavirus Disease," A/RES/74/270, April 2, 2020, para 1.
[34] On the violations of the IHR, see for example, Habibi et al., "Do Not Violate the International Health Regulations during the COVID-19 Outbreak."
[35] James A. Green, *The Persistent Objector Rule in International Law* (Oxford: Oxford University Press, 2016).
[36] Burci, "The USA and the World Health Organization"; Harman, "COVID-19, the UN, and Dispersed Global Health Security"; and Papamichail, "Security before, during and after COVID-19"; Chryssogelos, "Liberal Sovereigntism, New Nationalism and the Illusion of Choice"; Farrell and Newman, "The New Age of Protectionism"; Wang, "From Crisis to Nationalism"; Krastev and Leonard, "Europe's Pandemic

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Politics"; Ikenberry, "The End of Liberal International Order?"; Youde, *Globalization and Health*; and Lasco, "Medical Populism and the COVID-19 Pandemic."

[37] See, for example, Ronald M. Dworkin, "A New Philosophy for International Law," *Philosophy & Public Affairs* 41, no. 1 (Winter 2013), pp. 2–30; Allen Buchanan, "The Legitimacy of International Law," in Besson and Tasioulas, *The Philosophy of International Law*, pp. 79–96; Tasioulas, "Prosper Weil and the Mask of Classicism;" Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," *American Journal of International Law* 108, no. 1 (January 2014), pp. 1–40; and Evan J. Criddle and Evan Fox-Decent, "Mandatory Multilateralism," *American Journal of International Law* 113, no. 2 (April 2019), pp. 272–325.

[38] Criddle and Fox-Decent, "Mandatory Multilateralism," at p. 274.

[39] Ibid., p. 278. Criddle and Fox-Decent list five areas where multilateralism is mandatory: territorial disputes; conflicting entitlements; common resources; international peace and security; and international human rights and international criminal law. The last two are relevant for our discussion. These five areas cover pretty much all the scope of international law, leaving very little for state discretion. Grouping all five areas together may lead to moral conflation, where it is difficult to distinguish what should be mandatory from what could be discretionary. Take, for example, the right to humanitarian aid in the context of genocide. Conflicts related to this right would fall within the area of international criminal law. Now consider, by contrast, the human right to rest and leisure, which would fall within the very large area of human rights. The problem with Criddle and Fox-Decent's all-inclusive mandatory multilateralism account is that both these areas are on a moral par, when in reality they are not.

[40] Ibid., p. 300.

[41] Thana C. de Campos, "Guiding Principles of Global Health Governance in Times of Pandemics: Solidarity, Subsidiarity, and Stewardship in COVID-19," *American Journal of Bioethics* 20, no. 7 (July 2020), pp. 212–14.

[42] Virginia Held, *The Ethics of Care: Personal, Political, Global* (Oxford: Oxford University Press, 2006); and Joan C. Tronto, "Creating Caring Institutions: Politics, Plurality, and Purpose," *Ethics and Social Welfare* 4, no. 2 (July 2010), pp. 158–71.

[43] de Campos, "Guiding Principles of Global Health Governance in Times of Pandemics."

[44] Elsewhere, Criddle and Fox-Decent make a similar argument: that states, as trustees of their people, have fiduciary obligations to care for those entrusted to them, and as trustees of humanity, have fiduciary obligations to care for all. See Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016).

[45] On the tension between the ethic of solidarity and the ethic of sovereignty, in the context of a government's primary obligation is to its own people, see Nikolas K. Gvosdev, "Covid-19: Eroding the Ethics of Solidarity?," *Ethics & International Affairs* (blog), April 7, 2020, www.ethicsandinternationalaffairs.org/online-exclusives/covid-19-eroding-the-ethics-of-solidarity.

[46] Thana Cristina de Campos, *The Global Health Crisis: Ethical Responsibilities* (Cambridge, U.K.: Cambridge University Press, 2017).

[47] Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders," *American Journal of International Law* 107, no. 2 (April 2013), pp. 295–333, at pp. 314, 320.

[48] Criddle and Fox-Decent seem to arrive at a similar conclusion. See Criddle and Fox-Decent, "Mandatory Multilateralism," at p. 299.

[49] Daniel Engster, *The Heart of Justice: Care Ethics and Political Theory* (Oxford: Oxford University Press, 2007), ch. 1, p. 59.

[50] de Campos, "Guiding Principles of Global Health Governance in Times of Pandemics."

[51] de Campos, *The Global Health Crisis: Ethical Responsibilities*.

[52] Caesar Alimsinya Atuire, "Some Barriers to Knowledge from the Global South: Commentary to Pratt and de Vries," *Journal of Medical Ethics*, 49, no. 5 (May 2023), pp. 335–336.

[53] Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97, no. 1 (January 2003), pp. 38–79, at p. 79.

[54] de Campos, *The Global Health Crisis: Ethical Responsibilities*.

[55] Criddle and Fox-Decent seem to arrive at a similar conclusion. See Criddle and Fox-Decent, "Mandatory Multilateralism," at p. 298.

[56] Thana Cristina de Campos-Rudinsky and Eduardo Undurraga, "Public Health Decisions in the COVID-19 Pandemic Require More Than 'Follow the Science,'" *Journal of Medical Ethics* 47, no. 5 (2021), pp. 296–99.

[57] Emanuel et al., "On the Ethics of Vaccine Nationalism, p. 545.

[58] Explaining the tension between vaccine nationalism and vaccine cosmopolitanism/diplomacy, see, for example, Kyle Ferguson and Arthur Caplan, "Love Thy Neighbour? Allocating Vaccines in a World of

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press

Competing Obligations," *Journal of Medical Ethics* 41 (2021), jme.bmj.com/content/early/2020/12/10/medethics-2020-106887.info; and Samuel Owusu-Antwi, "Vaccine Diplomacy versus Vaccine Nationalism: Synthesis or Dissonance," Carnegie Council for Ethics in International Affairs (blog), May 20, 2021, www.carnegiecouncil.org/publications/articles_papers_reports/20210519-vaccine-diplomacy-vs-vaccine-nationalism.

[59] On how AI may be able to improve our understanding of who should receive a vaccine and how to most effectively provide for large-scale vaccine delivery, see Sara E. Davies, "Artificial Intelligence in Global Health," in "Roundtable: Artificial Intelligence and the Future of Global Affairs," *Ethics & International Affairs* 33, no. 2 (Summer 2019), pp. 181–92.

[60] The extraterritorial duty to care and assist other countries in greater need can, in reality, take different forms. Here, I am focusing on the types of cosmopolitan duties that developed countries have to facilitate access to scarce coronavirus vaccines and other treatments for vulnerable populations in developing countries. This can be done, for example, by exporting at a discount or donating these scarce COVID-19 vaccines and treatments. Cosmopolitan duties may also include the provision by developed countries of healthcare services, raw materials for producing vaccines and treatments, manufacturing capacity, technology transfer, as well as reducing import tariffs, and other logistical and infrastructure issues. In this article, however, I focus on the question of patent waivers as one element of extraterritorial care (among many other necessary elements) when it comes to global allocation of coronavirus vaccines and treatments.

[61] Sridhar Venkatapuram and Anna C. Zielinska, "Covid Vaccine Patent Waivers Are for Health Sovereignty," Hastings Center, Bioethics Forum, June 1, 2021, www.thehastingscenter.org/covid-vaccine-patent-waivers-are-for-health-sovereignty/.

[62] Ibid.

[63] I have put this argument forth in Thana C. de Campos-Rudinsky, "Intellectual Property and Essential Medicines in the COVID-19 Pandemic," *International Affairs* 97, no. 2 (March 2021), pp. 523–37.

[64] Specifically, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, Switzerland, Iceland, Norway, Japan, New Zealand, and the U.K. (in its role as an EU member at the time). See General Council, World Trade Organization, Art. 1(b), "Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health," WT/L/540 and Corr.1, September 1, 2003, fn. 3.

[65] Lukasz Gruszczynski and Chien-Huei Wu, "Between the High Ideals and Reality: Managing COVID-19 Vaccine Nationalism," in special issue, "Biotechnology in International Economic Law and Human Rights: Reconciling Biotechnology with Human Rights and the Protection of the Environment under International Law," *European Journal of Risk Regulation* 12, no. 3 (September 2021), pp. 711–19, www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/between-the-high-ideals-and-reality-managing-covid19-vaccine-nationalism/8E86A48D5071EDCB38D2BE5F19EBE8E6.

[66] Nancy Jecker and Caesar Atuire, "Out of Africa: A Solidarity-Based Approach to Vaccine Allocation," *Hastings Center Report* 51, no. 3 (May–June 2021), pp. 27–36, at pp. 32–33.

[67] Fox-Decent, "Mandatory Multilateralism."

Abstract: This article challenges the orthodox view of international law, according to which states have no legal duty to cooperate. It argues for this legal duty in the context of COVID-19, based on the ethical principles of solidarity, stewardship, and subsidiarity. More specifically, the article argues that states have a legal duty to cooperate during a pandemic (as solidarity requires); and while this duty entails an extraterritorial responsibility to care for and assist other nations (as stewardship requires), the legal duty to cooperate still allows states to attend first to the basic needs of those under their own jurisdiction—namely, fellow nationals and residents (as subsidiarity requires). The article provides a definition and philosophical justifications for this legal duty that are lacking in the literature by examining its application to a current COVID-19 controversy: namely, states' responsibility to assist other countries in greater need by, inter alia, exporting at a discount or donating scarce COVID-19 treatments (including vaccines). In providing a principled tripartite account of pandemic governance, this conceptual and normative article offers a new lens for debating the potential international treaty for pandemic prevention, preparedness, and response that has now been drafted and is under negotiation at the World Health Assembly, by responding to the recent backlash against multilateralism by substantiating global co-responsibilities in times of pandemics and beyond.

Keywords: international cooperation, solidarity, subsidiarity, stewardship, COVID-19 vaccines

https://doi.org/10.1017/S0892679423000230 Published online by Cambridge University Press