Commentary

Pathogenic viruses as a global commons: The shared responsibility of pandemics

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Abstract

In light of the Covid-19 pandemic, the international community’s approach towards pathogenic viruses needs to be re-evaluated. This commentary notes that attempts to justify viral sovereignty, either under treaties or general principles of sovereignty, are flawed. Instead, viruses share more similarities with global commons and should be treated as such. More specifically, viruses should be regarded as the shared responsibility of international society, given that all countries are responsible for the continued spread of their diseases and all stand to benefit from their eradication.

Keywords
COVID-19, global commons, global health, sovereignty, shared responsibility, pandemic, pathogenic viruses

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Introduction

An outbreak of Severe Acute Respiratory Syndrome (SARS)-CoV-2 (Covid-19) first occurred in Wuhan, China, in December 2019.1 Within two weeks, the virus had spread to neighbouring countries, and days later cases were reported in the United States and

1. World Health Organization, Novel Coronavirus (2019-nCoV) SITUATION REPORT – 1, 21 January 2020 (pp. 1–5, Rep.) (2020). Available at: https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf (accessed 30 July 2020).

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Europe, leading the World Health Organization (WHO) to declare an international health emergency.\(^2\) Between the first reported case in China and the time this paragraph was written (27 January 2021), there have been over 100 million cases of reported infections and over 2 million deaths worldwide,\(^3\) leading to many governments developing elaborate health and safety plans to combat the virus.

The world has been thrown into a period of great uncertainty, but one thing is clear. Pathogenic viruses and the pandemics they have the potential to create can no longer be managed at a purely national level. National efforts to contain and/or prevent the disease are no longer sufficient, as the world we live in is too interconnected.

Today’s global society differs drastically from the one we experienced when the 2003 SARS and the 2007 Influenza A virus subtype H5N1 (H5N1) epidemics occurred. Those viruses stirred great debate about whether countries had a right to exercise sovereignty over pathogenic viruses born within their regions. During the H5N1 outbreak, the Indonesian government claimed a right to control foreign access to the virus found within its territory.\(^4\) In 2003, the Chinese government refused to let representatives from the WHO and other foreign bodies access virus samples (or any related information) as they asserted that the outbreak was an ‘internal, national matter’ and claimed sovereignty over the virus.\(^5\) However, these arguments are out of place in today’s globalised society. It is clear that arguing over who has sovereign control over a virus has not and will not help the international community in its efforts to tackle infectious diseases.

While it is understandable that countries would want to exercise viral sovereignty – the ability to have exclusive control and access over viruses being a powerful tool that governments can use to negotiate better access to health resources and vaccines for their own populations\(^6\) – this puts global health at risk. Globalisation means that a virus outbreak in any country has the potential to start a global pandemic, and this forces

\(^2\) World Health Organization, ‘Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)’ (Press release), (30 January 2020). Available at: https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) (accessed 27 January 2021).

\(^3\) COVID-19 Map (n.d.). Available at: https://coronavirus.jhu.edu/map.html (accessed 27 January 2021).

\(^4\) R. Roos, ‘Indonesia Details Reasons for Withholding H5N1 Viruses’ (15 July 2008). Available at: https://www.cidrap.umn.edu/news-perspective/2008/07/indonesia-details-reasons-withholding-h5n1-viruses (accessed 27 January 2021).

\(^5\) D.P. Fidler, ‘SARS: Political Pathology of the First Post-Westphalian Pathogen’, in Institute of Medicine (US) Forum on Microbial Threats; S. Knobler, A. Mahmoud, S. Lemon, et al., eds., Learning From SARS: Preparing for the Next Disease Outbreak: Workshop Summary. (Washington, DC: National Academies Press, 2004). Available at: https://www.ncbi.nlm.nih.gov/books/NBK92470/ (accessed 27 January 2021).

\(^6\) A4 International Law and Equitable Access to Vaccines and Antivirals in the Context of 2009-H1N1 Influenza. Institute of Medicine, The Domestic and International Impacts of the 2009-H1N1 Influenza A Pandemic: Global Challenges, Global Solutions: Workshop Summary (Washington, DC: The National Academies Press, 2010).
us to reconceptualise viruses as a global common that mankind shares regardless of national boundaries, instead of a sovereign good as some countries would like to claim. As Margaret Chan, Director of the WHO (2006–2017), said:

After all it really is all of humanity that is under threat during a pandemic.

Given their rapidly evolving nature, transmissibility and high potential for danger, pathogenic viruses should be regarded as a global common, as it is not only the right of every country to be able to access virus samples for research but also the responsibility of all countries to assist in the eradication of threatening diseases. This commentary will first briefly outline the treaties and general principles of sovereignty that governments have relied on in their attempts to exercise viral sovereignty. It then forwards two arguments supporting the premise that viruses should be a global commons: First, viruses share common traits and behave similarly to matters that are established global commons. Second, and more specifically, there will be significant benefits to global health if viruses are treated as the shared responsibility of the global community.

**Viral sovereignty**

‘Viral sovereignty’ is the assertion by an individual country of exclusive rights and control over a virus that has emerged in its territory. It enables that country to exclude all other states from accessing the virus without its permission and presupposes that any matter regarding the virus is within the jurisdiction of that country and should not be interfered with by external parties.

**Treaties**

In 2007 Indonesia attempted to claim sovereignty over the H5N1 virus and refused to share samples with the WHO and other bodies. Indonesia argued that viruses were effectively a biological resource, and therefore the country, having signed and ratified the Convention on Biological Diversity (CBD), should be able to exercise exclusive legal rights over the virus and its samples. Since then, governments and academics have also

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7. This article focuses solely on the rights of countries over pathogenic viruses (which from this point onwards will just be referred to as ‘viruses’). Additionally, this article will only look at naturally arising viruses and does not consider viruses manufactured in laboratories (such as those for the purposes of bioterrorism).
8. K. Beurskens and M. Judith, ‘Special Section Introduction – Sovereignty Contested: Theory and Practice in Borderlands’, *Geopolitics* 22(4) (2017), pp. 749–756.
9. M. Wood, ‘Non-Interervention (Non-Interference in Domestic Affairs)’ (n.d). Available at: https://pesd.princeton.edu/node/551 (accessed 27 January 2021).
10. D.P. Fidler, ‘Influenza Virus Samples, International Law, and Global Health Diplomacy’, *Emerging Infectious Diseases* 14(1) (2008), pp. 88–94.
11. M.F. Rourke, ‘Restricting Access to Pathogen Samples and Epidemiological Data: A Not-So-Brief History of “Viral Sovereignty” and the Mark It Left on the World’, in M. Eccleston-Turner and I. Brassington, eds., *Infectious Diseases in the New Millennium. International*
referred to the Nagoya Protocol, a complimentary treaty to the CBD, when trying to establish viral sovereignty as an international principle.\textsuperscript{12}

It is argued that under Article 15 of the CBD\textsuperscript{13} and Article 3 of the Nagoya Protocol,\textsuperscript{14} viruses fall under the scope of ‘genetic resources’. As both the CBD and the Nagoya protocol expressly reaffirm the sovereign rights of countries over their natural and biological resources,\textsuperscript{15} it has been argued that countries should be able to exercise sovereignty over viruses borne within their physical boundaries.

However, the assumption that viruses fall under the scope of ‘genetic resources’ has yet to be firmly established and is an extremely contentious matter. The inclusion of pathogens under the Nagoya protocol was heavily debated during negotiations, with parties failing to come to an agreement.\textsuperscript{16} Additionally, the Nagoya protocol itself states in its preamble that it is ‘mindful of the International Health Regulations (2005) of the World Health Organization and the importance of ensuring access to human pathogens for public health preparedness and response purposes’,\textsuperscript{17} which suggests that, particularly with regard to the protection of global health, there may be good reason to exclude viruses from the scope of the treaties.

Furthermore, the inclusion of viruses under the treaties is potentially contradictory to their intentions. Under Article 1 of the CBD, one of its intentions is ‘the conservation of biological diversity’.\textsuperscript{18} Given that countries go to great lengths to eradicate viruses,\textsuperscript{19} as well as the fact that viruses often pose a direct threat to the continued existence of other

\begin{itemize}
\item S.F. Halabi, ‘Viral Sovereignty, Intellectual Property, and the Changing Global System for Sharing Pathogens for Infectious Disease Research’, \textit{Annals of Health Law} 28 (2019), p. 101.
\item ‘Article 15. Access to Genetic Resources’ (2 November 2006). Available at: https://www.cbd.int/convention/articles/?a=cbd-15 (accessed 27 January 2021).
\item ‘Article 3. Scope’ (28 January 2011). Available at: https://www.cbd.int/abs/text/articles/?sec=abs-03 (accessed 27 January 2021).
\item ‘Preamble’. (2 November 2006). Available at: https://www.cbd.int/convention/articles/?a=cbd-preamble (accessed 27 January 2021); Preamble. (28 January 2011). Available at: https://www.cbd.int/abs/text/articles/?sec=abs-preamble (accessed 27 January 2021).
\item \textit{Ninth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing} (Montreal: Convention on Biological Diversity, 2010) (UNEP/CBD/WG-ABS/9/ING/2). Available at: https://www.cbd.int/doc/meetings/abs/abswg-ing-02/official/abswg-ing-02-abswg-09-ing-02-en.pdf (accessed 27 January 2021).
\item Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity preamble, entered into force 12 October 2014. Text Available at: https://www.cbd.int/abs/text/default.shtml (accessed 27 January 2021).
\item ‘Article 1. Objectives’ (28 January 2011). Available at: https://www.cbd.int/abs/text/articles/?sec=abs-01 (accessed 27 January 2021).
\item S. Knobler, J. Lederberg and L.A. Pray, \textit{Considerations for Viral Disease Eradication: Lessons Learned and Future Strategies: Workshop Summary} (Washington, DC: National Academy Press, 2002).
\end{itemize}
natural resources, it would be counter-intuitive to assume that viruses were intended to be included under the CBD.

Both the CBD and the Nagoya protocol also have the common objective to achieve ‘the fair and equitable sharing of the benefits arising from the utilization of genetic resources’. While benefits sharing is essential to global health, as will be explained in greater detail below, a more strategic approach may be to characterise viruses as a global commons, so that it becomes the shared responsibility of countries to combat viruses and their potential outbreaks.

**General principles of sovereignty**

In the aftermath of previous outbreaks, countries (e.g. China and Indonesia) have relied on general principles of sovereignty to justify exercising exclusive rights over viruses born within their territories. However, viruses are generally incompatible with these principles.

At their core, sovereign beings have a degree of physical permanence to a specific territory. Established sovereign beings are objects that governments want to have permanent residence in their countries, and governments will generally take steps to achieve this. This is demonstrated by the offering of citizenship privileges by governments to maintain their populations. It follows that countries can only extend sovereign rights over objects they intend to make a permanent element of their territory.

Fundamentally, countries do not intend for viruses to achieve permanence in their countries. The aim has always been to eradicate viruses, not preserve them. The extreme lengths countries have taken during pandemics demonstrate how motivated countries are to eradicate viruses. During the 2003 SARS epidemic, Hong Kong and

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20. R.D.E. MacPhee and A.D. Greenwood, ‘Infectious Disease, Endangerment, and Extinction’, *International Journal of Evolutionary Biology* 2013 (2013), pp. 9.
21. ‘Article 1. Objectives’ (28 January 2011). Available at: https://www.cbd.int/abs/text/articles/?sec=abs-01 (accessed 27 January 2021); ‘Article 1. Objectives’ (2 November 2006). Available at: https://www.cbd.int/convention/articles/?a=cbd-01 (accessed 27 January 2021).
22. Fidler, ‘SARS: Political Pathology’ *supra* note 5; Roos, ‘Indonesia Details Reasons’ *supra* note 4.
23. E. Milano, ‘Chapter 3. Statehood and Territorial Sovereignty: The Tradition of Concreteness and Realism’, in E. Milano, ed., *Unlawful Territorial Situations in International Law* (Leiden, The Netherlands: Brill | Nijhoff, 2006), pp. 55-99.
24. R. Grotenhuis, ‘Nation-Building: Sovereignty and Citizenship’, in *Nation-Building as Necessary Effort in Fragile States* (Amsterdam: Amsterdam University Press, 2016), pp. 59–72. Available at: www.jstor.org/stable/j.ctt1gr7d8r.7 (accessed 27 January 2021).
25. M. Roser, S. Oehmann, H. Behrens, et al., ‘Eradication of Diseases’, *Published online at OurWorldInData.org.* (2020). Available at: https://ourworldindata.org/eradication-of-diseases [Online Resource] (accessed 27 January 2021).
26. L.S. Hung, ‘The SARS Epidemic in Hong Kong: What Lessons Have We Learned?’ *JRSM* 96(8) (2003), pp. 374–378.
Singapore\textsuperscript{27} implemented mandatory quarantines and school closures to reduce infection rates. In 2014 Sierra Leone\textsuperscript{28} enforced a nationwide lockdown in response to the Ebola outbreak, with healthcare volunteers going door-to-door to identify potentially infected persons. During the most recent ‘Covid-19’ pandemic, virtually every European country has implemented some form of lockdown\textsuperscript{29} and instituted travel bans.\textsuperscript{30} This desire to be rid of viruses directly contradicts the characteristic of sovereign beings, which achieve their permanence either through the state’s direct actions to maintain their residence or at the very least through the state’s inaction and lack of concern over its presence. Countries that have tried to claim sovereignty over viruses in the past have not done so to establish a permanent colony of the virus, but to gain potential benefits from national and global efforts to eradicate it. It is this lack of an intention to achieve permanence that makes viruses incompatible with sovereignty.

\textbf{Similarities between viruses and global commons}

‘Global commons’ are ‘natural resources that are not subject to the national jurisdiction of a particular state but are shared by other states, if not the international community as a whole\textsuperscript{31}. Traditionally, global commons are viewed positively as the ‘common heritage of mankind’\textsuperscript{32}, the uses and benefits of which are to be shared by the international community. Commonly cited examples of this include resources available in the High Seas as well as research opportunities in the Arctics.\textsuperscript{33} Alongside this, a second, negative category of global commons has developed over the past decade, known as the ‘shared responsibility’\textsuperscript{34} of the global community. Often invoked in cases of transboundary pollution,\textsuperscript{35} a shared responsibility requires countries to contribute to the management

\begin{itemize}
\item \textsuperscript{27} Migration, ‘Sars in Singapore: Timeline’ (19 January 2016). Available at: https://www.straitstimes.com/singapore/sars-in-singapore-timeline (accessed 23 July 2020).
\item \textsuperscript{28} BBC News, ‘Ebola outbreak: Sierra Leone in lockdown’ (27 March 2015). Available at: https://www.bbc.com/news/world-africa-32083363 (accessed 23 July 2020).
\item \textsuperscript{29} (www.dw.com), D (14 April 2020). DW, ‘Coronavirus: What Are the Lockdown Measures Across Europe?’ (14 April 2020). Available at: https://www.dw.com/en/coronavirus-what-are-the-lockdown-measures-across-europe/a-52905137 (accessed 23 July 2020).
\item \textsuperscript{30} Tandfnewsroom, ‘How COVID-19 Spread Has Been Contained by Travel Bans’ (4 May 2020). Available at: https://www.eurekalert.org/pub_releases/2020-05/tfg-hcs050420.php (accessed 23 July 2020).
\item \textsuperscript{31} S.J. Buck, \textit{The Global Commons: An Introduction} (London: Routledge, 2017).
\item \textsuperscript{32} N. Schrijver, ‘Managing the Global Commons: Common Good or Common Sink?’, \textit{Third World Quarterly} 37(7) (2016), pp. 1252–1267.
\item \textsuperscript{33} Op. cit.
\item \textsuperscript{34} A. Nollkaemper and I. Plakokefalos (eds.), \textit{The Practice of Shared Responsibility in International Law} (Cambridge: Cambridge University Press, 2016), Amsterdam Center for International Law No. 2016-09, Amsterdam Law School Research Paper No. 2016-22. Available at SSRN: https://ssrn.com/abstract=2767571 (accessed 27 January 2021).
\item \textsuperscript{35} SHARES Research Paper 69 (2015). Available at: www.sharesproject.nl (accessed 27 January 2021).
\end{itemize}
and solving of a common problem, whether at a regional or international level. Viruses have an inherent duality to them – they share characteristics with both the positive and negative categories of global commons.

**Positive approach – Common heritage**

There are two common characteristics that organisms categorised as global commons have. First, unlike sovereign beings, these organisms cannot be accurately and/or specifically associated with any one country. While there may have been some attempts by countries to claim or assign these to one specific region, these have largely been ineffective and rejected by supranational bodies and the international community as a whole. This characteristic makes such organisms incompatible with basic territorial sovereignty, defeating the attempts of countries to exercise exclusive control over them. Viruses lack this inherent territorial nature. The rapidity at which they travel and spread makes it difficult to definitively assign them to any one specific region. Similar to atmospheric particles, it is near impossible to determine the volume and specifics of a virus’ whereabouts at any given point in time. The severe lack of precision and evidence when determining the location and prevalence of any given virus means that it would be unprincipled to award a country sovereign rights. Additionally, the location in which a virus is ‘discovered’ in humans may not be the origin of the virus. The nature of medical research and its relationship with viruses is that interest is only sparked when the virus becomes a threat to human beings. The location it is associated with is usually where the virus crosses the species boundary, or where the greatest number of human beings are affected, and not actually where the virus first originated and developed. This was the case with the Spanish Flu pandemic, which is most commonly associated with Spain despite the virus being present in Germany before that, or the H5N1 Crisis, where Indonesia claimed sovereignty in 2007 despite the virus first being discovered by a zoologist in geese in China in 1996 (long before it was capable of infecting humans). This demonstrates that attempts to claim sovereignty over a virus may not be based on

36. Schechinger, ‘The 2013 Southeast Asia Haze: A Shared Responsibility?’, n. 49
37. These characteristics are shared by all global commons both positive and negative to some extent.
38. Schrijver, ‘Managing the Global Commons’ supra note 32.
39. C. Ayers, *Rethinking Sovereignty in the Context of Cyberspace* (Pennsylvania, United States of America: CreateSpace Independent Publishing Platform 2016).
40. E.S. Bailey, J.K. Fieldhouse, J.Y. Choi, et al., ‘A Mini Review of the Zoonotic Threat Potential of Influenza Viruses, Coronavirus, Adenoviruses, and Enteroviruses’, *Frontiers in Public Health* 6 (2018), p. 104.
41. CDC, ‘The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus’ (17 December 2019). Available at: https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html (accessed 27 January 2021).
42. CDC, ‘Highly Pathogenic Asian Avian Influenza A(H5N1) Virus’ (12 December 2018). Available at: https://www.cdc.gov/flu/avianflu/h5n1-virus.htm (accessed 27 January 2021).
true territorial sovereignty, since there may be no relation between the country claiming sovereignty and the origins of the virus.

Second, there are no successful attempts by any country to effectively exercise control over these organisms, because they either have proven to be practically ineffective (as is the case for atmospheric particles) or, where possible, are not recognised as legal by the rest of the international community and are thus legally impractical or impossible (such as attempts to colonise the Arctic Poles\textsuperscript{43}). Viruses fall under the former category, as demonstrated by state reactions to ‘Covid-19’. The current pandemic has made painfully clear that the best efforts of individual countries to stop the spread of viruses are, unfortunately, insufficient, as there are unpredictable and uncontrollable factors that make viruses hard to bring under human control. Every country currently battling the virus has had to enact some form of extreme measures.\textsuperscript{44} Nationwide lockdowns, for example, have been adopted by many countries, and while they have slowed down the rate of infection, they are unable to prevent the spread of the virus entirely given the fluidity at which viruses cross borders. Additionally, such measures, while viable in the short term for the immediate relief of healthcare systems, are unsustainable and detrimental to the political, economic and social functioning of a country, meaning that in the long term it is practically impossible to enact any form of control over the virus.\textsuperscript{45} Furthermore, these policies are an exercise of sovereign control over humans (recognised sovereign beings) and not of the virus itself, which further underlines the lack of control over viruses.

**Negative approach – Shared responsibility**

Viruses are also comparable to phenomenon that are regarded as the shared responsibility of all countries, such as pollution and climate change. The international community adopts a tiered approach towards such responsibilities.\textsuperscript{46} In the immediate aftermath of a harmful event (e.g. a polluting act), it may be possible to assign responsibility to one specific country and to hold them accountable for the harm caused. However, all countries must bear the responsibility of the long-term detriments of the occurrence and continuation of such harmful acts (e.g. prolonged or repeated polluting). Regardless

\textsuperscript{43} H. Gerhardt, et al., ‘Contested Sovereignty in a Changing Arctic’, *Annals of the Association of American Geographers* 100(4) (2010), pp. 992–1002. JSTOR. Available at: www.jstor.org/stable/40863618 (accessed 26 January 2021).

\textsuperscript{44} University of Cambridge, ‘How Different Countries Are Reacting to the COVID-19 Risk and Their Governments’ Responses’ (24 March 2020). Available at: https://www.cam.ac.uk/stories/wintoncovid1 (accessed 27 January 2021).

\textsuperscript{45} LSE, ‘Beating Covid-19: The Problem With National Lockdowns’ (24 April 2020). Available at: https://blogs.lse.ac.uk/europpblog/2020/03/26/beating-covid-19-the-problem-with-national-lockdowns/ (accessed 27 January 2021).

\textsuperscript{46} O. Quirico, ‘Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation’, *Netherlands International Law Review* 65(2) (2018), pp. 185–215.
of whether a country is actively causing harm (e.g. by polluting) or passively allowing harm to continue (e.g. by allowing said acts to continue or not contributing to clean up efforts), either results in the perpetuation and/or worsening of the problem (such as how individual acts of pollution have snowballed into climate change).

The same logic applies to viruses, and their potentially lethal threat exacerbates the problem. Some have attributed the initial rampant spread of Covid-19 to the Chinese Government’s non-disclosure of initial pneumonia cases in Wu Han. However, past February 2020, when countries were aware of the emerging threat, the continued spread of the virus across the globe became the responsibility of all countries. Despite the attempts of some politicians to place the blame on China alone, it is undeniable that a contributing factor to the continued and increased presence of the virus was due to the inaction and complacency of governments when they were first informed of the virus.

**Global public good**

A ‘public good’ is one that no person can be excluded from using, and where one person’s use of them does not prevent anyone else’s. A global public good is one whose use is transnational and cannot be limited to any particular country.

Given the highly reproductive rates of viruses, complimented by how easily bred they are in controlled environments (e.g. lab viruses), the use of viruses by one country will not deprive another of its use. Conversely, the more countries research the virus, the more the international community will benefit. In the early stages of any outbreak, a lack of knowledge greatly hinders the ability of governments to combat the disease. It is only when more information has been gathered that health bodies (both national and international) are able to more effectively target their policies to achieve the best results, and the earlier this information can be gathered, the better equipped society becomes in facing the virus. Thus, the international community can only benefit when more countries have controlled access to the virus, making viruses a global public good.

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47. *BBC News*, ‘Li Wenliang: Coronavirus Death of Wuhan Doctor Sparks Anger’ (7 February 2020). Available at: https://www.bbc.co.uk/news/world-asia-china-51409801 (accessed 27 January 2021).

48. F. Paddeu and F. Jephcott, ‘EJIL:Talk!’ (17 March 2020). Available at: https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/ (accessed 27 January 2021).

49. ‘Public goods are an economic concept, but the term has also been defined and used by the World Health Organization with in relation to global health. See R.D. Smith, ‘Global Public Goods and Health [Editorial]’, *Bulletin of the World Health Organization* 81(7) (2003), pp. 475–475. Available at: https://www.who.int/bulletin/volumes/81/7/Smith0703.pdf (accessed 26 January 2021).

50. Op. cit.

51. ‘Access’ refers to the ability to access samples and conduct research on those.

52. ‘Global Public Goods and Health: Concepts and Issues’ (8 December 2010). Available at: https://www.who.int/trade/distance_learning/gpg/gpg1/en/index1.html (accessed 27 January 2021).
Pathogenic viruses as the shared responsibility of the global community

It is necessary to consider the implications of categorising viruses under either the positive (common heritage) or negative (shared responsibility) descriptions, the effects this will potentially have on global health law and which classification may be more beneficial to the international community.

Viruses as a common heritage of men

If viruses were categorised positively as a common heritage of men, the most significant impact would be that all countries would be able to access samples of the virus regardless of where it is geographically. Individual governments would not be able to control access to virus samples as all countries would be equally entitled to it.\(^\text{53}\) Classifying viruses as a common heritage gives all countries the option and opportunity to conduct research and benefit from collecting virus samples but does not make it compulsory for them to do so.\(^\text{54}\)

Similar to the Arctics, viruses undoubtedly offer a multitude of research opportunities. However, to describe viruses in a positive light is inherently counter-intuitive. The debate over viral sovereignty has only ever been discussed in the context of epidemics, and the interest in virus samples has overwhelmingly been in the interest of combating the disease it brings. It is thus problematic, in principle, to consider viruses as a common ‘heritage’, as though they were actively being preserved for the benefit of future generations.

Viruses as a shared responsibility of men

If viruses were to be categorised as a shared responsibility of men, the duty to eradicate a pathogenic virus and prevent the spread of its disease would be shared by every member of the international community, and responsibility for the effects of a virus could not be expected to be borne by any sole country.\(^\text{55}\) Not only would it require all countries to be able to access samples, there would also be an expectation that countries must actively take measures to minimise the prevalence of the virus and take steps that would contribute to the overall aim of eventual eradication of the virus and any related diseases.\(^\text{56}\)

It is indisputable that diseases are a burden on humanity. It is also undeniable that the aims of all governments with regard to diseases have been to survive and eradicate them. However, countries are often complacent in their attitudes towards viruses,

\(^{53}\) This would be in theory. This article is not focusing on how such policy should occur in practice.

\(^{54}\) Schrijver, ‘Managing the Global Commons’ \textit{supra} note 32.

\(^{55}\) J. Paul, ‘All Nations Have a Responsibility’ (26 September 2007). Available at: https://www.globalpolicy.org/component/content/article/212/45339.html (accessed 27 January 2021).

\(^{56}\) Zhang Jun Mian, ‘Dealing With, Defeating Viruses Common Responsibility of Int’l Community: Chinese FM’ (19 March 2020). Available at: http://www.china.org.cn/world/2020-03/19/content_75833736.htm (accessed 27 January 2021).
with most governments only taking measures after the virus has shown some prominence within their own territory. The under-preparedness of Europe and the United States in response to Covid-19 can partly be attributed to delays in their early preparations to the disease, believing that (at least when the virus was predominantly in China) they would not be affected by its spread, especially when compared to the early response by neighbouring Asian countries (such as South Korea, Hong Kong and Singapore) which adopted extensive measures when news of the virus first began to emerge. This is not to say that Asian countries have not also made the same mistake, as their improved measures against Covid-19 are the direct result of fatalities from poor preparations and responses to past pandemics (2003 SARS outbreaks in Hong Kong and Singapore and 2015 MERS outbreak in South Korea). The mindset that a virus is a purely internal matter for each individual country to handle on its own is not viable. As an international community, the political, social, and economic interdependence that countries have with one another means that the potential rate of transmission for viruses is extremely high. All viruses can be caught and transmitted by any one person, and each virus has the capacity to lead to a pandemic. It is thus necessary that all countries have an impetus to contribute to the management of the virus.

More than that, the initial place of an outbreak is not the only factor contributing to the extent of damage that a virus can cause. As Covid-19 has shown, despite the outbreak originating in China, the continued spread and evolution of the virus can be understood in the context of global interconnectedness. The virus has spread to many countries across the world, highlighting the importance of international collaboration in response to pandemics. This is particularly evident in the early response of South Korea, Hong Kong, and Singapore, which quickly implemented strict measures to control the spread of the virus.

57. T. John and J. Frater, ‘Why Isn’t Europe Better Prepared for the Coronavirus Outbreak?’ CNN (6 March 2020). Available at: https://edition.cnn.com/2020/03/06/europe/europe-coronavirus-covid-19-intl/index.html (accessed 27 January 2021).
58. J. Keller, ‘Why the US Government Was Unprepared for COVID-19, According to a Biodefense Expert’ (20 March 2020). Available at: https://taskandpurpose.com/analysis/national-biodefense-strategy-coronavirus-covid-19 (accessed 27 January 2021).
59. K.J. Kennedy, ‘What Can the UK Learn From South Korea’s Response to COVID-19?’ (7 April 2020). Available at: https://chpi.org.uk/blog/what-can-the-uk-learn-from-south-koreas-response-to-covid-19/ (accessed 27 January 2021).
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attributed to other countries’ poor handling of the virus and scientific evidence. The emergence of the UK and South African variants of Covid-19 virus, which have proven to transmit more easily, further demonstrates how the origin of a virus is far from the only factor that contributes to the perpetuation of a pandemic. To assign sovereignty of a virus based on the origin of an outbreak fails to acknowledge the overall series of events that allows a virus to spread and evolve and thus does not accurately reflect the role that every country has in preventing and combating the continued existence of infectious diseases.

Finally, classifying viruses as a common responsibility may potentially prevent a practice of assigning blame to any particular country for a virus, which in turn will have positive effects on how countries act, both as an independent body and with other members of the international community. If viruses were conceived as sovereign, it would consequently lead to viral epidemics being regarded as the ‘fault’ of the country ‘exercising sovereignty over the virus’. Such attempts have already been made. Amidst the Covid-19 pandemic, various states from America have publicly sought legal compensation from the Chinese government, claiming that China ‘owed them’ for allowing the virus to spread. This later led to other national bodies, including lawmakers in Australia, as well as legal organisations like the International Council of Jurists and the Henry Jackson Society, to issue statements that insisted China be made accountable for its ‘responsibility’ for the virus in front of international organisation, including the United Nations Human Rights Council, the International Court of Justice and the permanent court of Arbitration in the Hague. In response, China has become

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increasingly defensive, thus heightening tensions between countries in a time when, more than ever, international diplomacy and cooperation is key. Not only does a culture of blame assignment hurt current efforts in combating viruses, but it also disincentivises states from cooperation in the future. After the SARS pandemic in 2003, China came under intense scrutiny from the international community for its refusal to share its findings connected to the virus and for its alleged cover up of the initial outbreak. In 2020, amidst the global Covid-19 pandemic, the world found itself in the exact same position once again. This begs the question – if states anticipate that they would be held legally responsible for viruses borne in their territories, surely more governments would suppress and silence early evidence of viruses in attempts to avoid legal and political scrutiny. China has repeatedly been accused of ‘cover ups’ in its handling of the SARS 2003 outbreak and Covid-19. If true, such may be construed as self-serving, but they would also be the result of the current attitude of blame assignment that international society adopts. It is unreasonable to expect countries to openly acknowledge outbreaks if they will only be greeted by legal battles and compensation claims.

Viral sovereignty worsens this problem by creating one of the two scenarios for the international community: Either states are afraid of the repercussions that viral sovereignty may bring about, and thus refuse to share their findings, even hiding their findings to avoid international scrutiny, despite the fact that effective handling of a virus requires early evidence and research of viruses to be shared widely and openly, or it is precisely because viruses are viewed as a sovereign matter that countries use this ‘sovereignty’ as a means of justifying the withholding of information with regard to a virus (as evidenced in 2003 when China was questioned about early cover-ups regarding the SARS virus, and the government argued that viral sovereignty meant that any information regarding the virus was a purely internal matter that the international community had no rights to interfere in).

Both these scenarios hinder any early attempts to combat a disease, which is why viruses cannot be regarded as a sovereign being. Classifying viruses as a shared responsibility of countries directly prevents both the aforementioned scenarios from occurring. It ensures that legal repercussions to any specific country are limited since liability for the spread of a virus is held by all countries. This removes the disincentive to share information, prevents countries from hiding behind the veil of sovereignty and requires them to cooperate in international efforts.

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Conclusion

As a global society, we have reached a crossroads – how we choose to proceed from Covid-19 will greatly affect the impacts and losses of future pandemics. Attempts to exercise viral sovereignty have resulted in overwhelmed healthcare systems, underprepared governments and extraordinary losses. If countries continue to insist on viral sovereignty, either by exercising exclusive rights over viruses or by trying to deflect their own failures by forcing the blame of outbreaks onto others, there is no doubt that history will repeat itself and that we will face the same, if not worse, consequences from future virus outbreaks.

An alternative approach to viral sovereignty is thus necessary, and the characterisation of viruses as the shared responsibility of all countries is the first necessary step to preventing the recurrence of such devastating losses. Such a characterisation would not only prevent countries where the virus originated from holding the international community hostage for the sake of national demands but also curb the culture of blame assignment, thereby promoting greater international cooperation in efforts to prevent and end pandemics.

As the international community becomes increasingly interconnected and interdependent, it also becomes easier for viruses to spread across borders. Any virus has the potential to cause harm on a global scale, and despite the best efforts of every country, it is unlikely that they will be unaffected when an outbreak occurs. Regardless of where a virus may first appear, where it may first become infectious to humans or where it mutates into a new gene, all countries will suffer the harms resulting from a virus’ continuous spread, and at the same time, all stand to gain from its eradication. As Professor Tasuku Honjo76 has commented during the ‘Covid-19’ pandemic:

At this stage, when all of our energies are needed to treat the ill, prevent the further spread of sorrow, and plan for a new beginning, the broadcasting of unsubstantiated claims regarding the origins of the disease is dangerously distracting.77

Viral sovereignty is the ultimate distraction from the fundamental goal at hand – the protection of human lives. As such, it is necessary for the prevention of future outbreaks and the preservation of global public health that viruses be regarded as the shared responsibility of the international community.

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