

# ADMINISTRATIVE LAW RULES AND PRINCIPLES IN DECISIONMAKING OF THE WORLD HEALTH ORGANIZATION DURING THE COVID-19 PANDEMIC

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## INTRODUCTION

On December 31, 2019, the detection of pneumonia of unknown cause in Wuhan City, Hubei Province of China was reported to the World Health Organization (WHO) Country Office in China.<sup>1</sup> A month later, on January

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1. World Health Org. [WHO], *Novel Coronavirus (2019-nCoV) Situation Report-1*, at 1 [Jan. 21, 2020] [hereinafter *Situation Report-1*], <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf>.

30, 2020, the WHO's Director-General, Tedros Adhanom Ghebreyesus, declared this outbreak of COVID-19 a Public Health Emergency of International Concern (PHEIC).<sup>2</sup> Just over a year later, as of March 2, 2021, the WHO<sup>3</sup> has reported 114,140,104 confirmed cases of COVID-19, and the heartbreaking loss of 2,535,520 people.

Only on July 6, 2020, about six months after China's notification of the new disease, the United States notified the United Nations (UN) Secretary-General,<sup>4</sup> in three sentences, of its withdrawal from the WHO, effective on July 6, 2021.<sup>5</sup> This contribution focuses, however, on an analysis of WHO decisionmaking and the way administrative rules and principles work to regulate the WHO's administrative action regarding the COVID-19 pandemic. As this Article explains, the WHO Director-General's powers are mostly based upon an international agreement, the International Health Regulations (IHR).<sup>6</sup> The World Health Assembly (Assembly or WHA) adopted the latest version on May 23, 2005<sup>7</sup> on the basis of Articles 21(a) and 22 of the Constitution of the WHO,<sup>8</sup> and entered into force on June 15, 2007.

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2. Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) (Jan. 30, 2020) [hereinafter WHO Director-General's Statement], [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-(2019-ncov)).

3. *WHO Coronavirus Disease (COVID-19) Dashboard*, WHO, <https://covid19.who.int/> (Mar. 2, 2021).

4. The Secretary-General of the United Nations (UN) is the depository for the WHO. See Matthew Lee, *US Notifies UN of Withdrawal from World Health Organization*, ASSOCIATED PRESS (July 7, 2020), <https://apnews.com/article/9dc4077f95d183649ca24a32a18abf01>.

5. See e.g., UN Secretary-General, Depository Notification Regarding United States of America's Withdrawal from the World Health Organization, effective July 6, 2020 (July 14, 2020), <https://treaties.un.org/doc/Publication/CN/2020/CN.302.2020-Eng.pdf>; see also TIAJI SALAAM-BLYTHER ET AL., CONG. RSCH. SERV., R46575, U.S. WITHDRAWAL FROM THE WORLD HEALTH ORGANIZATION: PROCESS AND IMPLICATIONS 7 (2020), <https://crsreports.congress.gov/product/pdf/R/R46575>; Lawrence O. Gostin et al., *US Withdrawal from WHO Is Unlawful and Threatens Global and US Health and Security*, 396 LANCET 293 (2020); Allyn L. Taylor & 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 INSIGHT (June 5, 2020), <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>; José E. Alvarez, *The WHO in the Age of the Coronavirus* (N.Y. Univ. Sch. of L. Pub. Pol'y & Legal Theory Paper Series, Working Paper No. 20-30, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3659572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659572).

6. WHO, INTERNATIONAL HEALTH REGULATIONS 1 (3d ed. 2005).

7. *Id.*

8. *Id.*

Severe Acute Respiratory Syndrome (SARS), the first global public health emergency of the twenty-first century, created important momentum.<sup>9</sup>

Much of the WHO's activity falls within the ambit of the proposed subject matter of this Article. As of December 3, 2020, the WHO has published more than 100 documents during the coronavirus pandemic,<sup>10</sup> and surely more will be published. The Director-General of the WHO has not only declared the outbreak a PHEIC<sup>11</sup>—"the crucial governance activity of the International Health Regulations"<sup>12</sup>—and a pandemic,<sup>13</sup> but he has also issued temporary recommendations as well. More than half of the published documents are technical guidance<sup>14</sup> on issues such as how to find and test cases; how to provide safe and appropriate care for people depending on the severity of their illness; how to trace and quarantine contacts; how to prevent transmission from one person to another; how to protect health care workers; and how to help communities to respond appropriately.<sup>15</sup> Several of these guidance documents not only communicate with public authorities of the Member States of the WHO but also directly with companies and the general public.<sup>16</sup> A closer look at these technical guidance documents shows how much normative and regulatory influence they have on national, subnational, and supranational regional authorities, as well as citizens. They give guidance on health measures such as quarantining;<sup>17</sup> social

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9. James W. LeDuc & M. Anita Barry, *SARS, the First Pandemic of the 21st Century*, EMERGING INFECTIOUS DISEASES (Nov. 2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3329048/>. See generally David Bishop, *Lessons from SARS: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations*, 36 GEO. J. INT'L L. 1173 (2005) (providing background on how more robust economic support for countries will encourage a global fight against infectious disease).

10. *A Guide to WHO's Guidance on COVID-19*, WHO (July 17, 2020), <https://www.who.int/onevs-room/feature-stories/detail/a-guide-to-who-s-guidance>.

11. *Id.*; see also WHO Director-General's Statement, *supra* note 2.

12. Lawrence O. Gostin et al., *The International Health Regulations 10 Years On: The Governing Framework for Global Health Security*, 386 LANCET 2222, 2222 (2015).

13. Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, Opening Remarks at the Media Briefing on Covid-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

14. See *Country & Technical Guidance - Coronavirus Disease (COVID-19)*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance-publications> (last visited Mar. 2, 2021).

15. *A Guide to WHO's Guidance on COVID-19*, *supra* note 10.

16. *Id.*

17. *Considerations for Quarantine of Contacts of COVID-19 Cases*, WHO 1–5 (2020), <https://apps.who.int/iris/rest/bitstreams/1296389/retrieve>.

distancing;<sup>18</sup> refusing entry or departure of international travelers;<sup>19</sup> and the closing of schools,<sup>20</sup> public transport, and workplaces.<sup>21</sup>

Additionally, the WHO advises the public, such as giving travel advice, communicating with healthcare workers, and actively engaging in social media.<sup>22</sup> WHO teams monitor social media and work with technology companies to get ahead of potential waves of misinformation.<sup>23</sup> The Open WHO platform<sup>24</sup> offers more than 130 free online courses about COVID-19 in forty-one languages,<sup>25</sup> including courses for healthcare workers and other frontline responders. As of December 2020, more than four million people have enrolled in this platform.<sup>26</sup>

This overview illustrates that we are examining the activity of a regulatory body at the global level. But do administrative law rules and principles indeed apply to administrative decisionmaking by an international organization such as the WHO? And if not, should they be applied to increase the legitimacy and accountability of the WHO? This Article argues that the WHO needs to refine its own internal “administrative law” principles to promote transparency, accountability, participation, respect for human rights, and principles of global

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18. See *Overview of Public Health and Social Measures in the Context of COVID-19*, WHO 1–3 (2020), <https://apps.who.int/iris/rest/bitstreams/1278127/retrieve> (discussing public health measures undertaken in response to COVID-19, including social distancing measures).

19. *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, WHO (Feb. 29, 2020), <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

20. See generally *Considerations for School-Related Public Health Measures in the Context of COVID-19*, WHO 1 (2020), <https://www.who.int/publications/i/item/considerations-for-school-related-public-health-measures-in-the-context-of-covid-19> (discussing considerations schools must take into account during the pandemic, including closures).

21. See, e.g., *Considerations for Public Health and Social Measures in the Workplace in the Context of COVID-19*, WHO 1 (2020), <https://www.who.int/publications/i/item/considerations-for-public-health-and-social-measures-in-the-workplace-in-the-context-of-covid-19>.

22. *Public Health Considerations While Resuming International Travel*, WHO (July 30, 2020), <https://www.who.int/news-room/articles-detail/public-health-considerations-while-resuming-international-travel>; see also *Immunizing the Public Against Misinformation*, WHO (Aug. 25, 2020), <https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation> (noting how the WHO “has been working closely with social media and technology companies” not only to stay up-to-date on disseminating information related to COVID-19 but also to prevent the spread of misinformation).

23. *Immunizing the Public Against Misinformation*, *supra* note 22.

24. *Welcome to OpenWHO*, OPENWHO, <https://openwho.org/> (last visited Mar. 2, 2021).

25. *Id.*

26. *Courses*, OPENWHO, <https://openwho.org/courses> (last visited Mar. 2, 2021).

justice, proportionality, and subsidiarity. In fact, examining this issue requires discussing global administrative law.<sup>27</sup>

The administrative decisionmaking discussed here is a form of global emergency governance and the execution of global emergency powers, which is a new challenge for international law.<sup>28</sup> The WHO has dealt with

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27. See generally Sebastián López Escarcena, *Contextualizing Global Administrative Law*, 21 GONZ. J. INT'L L. 57, 57 (2017) (describing that a better term for international law would be global administrative law); SABINO CASSESE, RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 1 (2016) (noting that global administrative law “has a double relationship—one with national governments, one with global regulatory regimes”); PAUL CRAIG, UK, EU AND GLOBAL ADMINISTRATIVE LAW: FOUNDATIONS AND CHALLENGES 9 (2015) (explaining that the three levels of administrative law—global, regional, and national—are already vertically integrated); Sabino Cassese, *Global Administrative Law: The State of the Art Symposium: Through the Lens of Time: Global Administrative Law After 10 Years*, 13 INT'L J. CONST. L. 465, 465 (2015); Christoph Möllers, *Ten Years of Global Administrative Law*, 13 INT'L J. CONST. L. 469, 469 (2015) (discussing the achievements and shortcomings of the field of global administrative law); Edoardo Chiti, *Where Does GAL Find Its Legal Grounding?*, 13 INT'L J. CONST. L. 486, 486–87 (2015) (discussing four legal conceptions for functional and normative understandings of global administrative law); Richard B. Stewart, *The Normative Dimensions and Performance of Global Administrative Law*, 13 INT'L J. CONST. L. 499, 499–500 (2015) (discussing the normative contributions of global administrative law to global regulations and administration); VALUES IN GLOBAL ADMINISTRATIVE LAW 1–12 (Gordon Anthony et al. eds, 2011) (providing several perspectives on what global administrative law encompasses); Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009) (evaluating what counts as “law” in global administrative law); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319 (2009) (examining several forms of global administration pertaining to international organizations); David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law Part I: Definitional Issues in Global Administrative Law*, ACTA JURIDICA, 2009, at 3; Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15; Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 973 (2005); Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT'L L. & POL. 973 (2005); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP., Summer/Autumn 2005, at 63; David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 127; Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 319; *A Global Administrative Law Bibliography*, 68 LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 357 (2005) (listing an overview of literature on global administrative law until 2004).

28. J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1, 1 (2016); see also Kingsbury & Casini, *supra* note 27, at 321; Joost Pauwelyn & Ayelet Berman,

earlier outbreaks, such as SARS,<sup>29</sup> Ebola,<sup>30</sup> Swine flu,<sup>31</sup> and the Zika virus,<sup>32</sup> but never a pandemic and health crisis of this magnitude.<sup>33</sup> During the Ebola virus crisis, critics asserted that the WHO's response strategy was too slow and deferential to regional and local authorities.<sup>34</sup> In the Swine

*Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis*, 6 INT'L ORGS. L. REV. 499, 500 (2009). See generally Roman Goldbach et al., *Global Governance of the World Financial Crisis?*, 2 GOETTINGEN J. INT'L L. 11 (2010) (providing an explanation of the world financial crisis on a global scale).

29. J.S. MacKenzie et al., *The WHO Response to SARS and Preparations for the Future*, in LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK 42 (Stacey Knobler et al. eds., 2004); David L. Heymann, *The International Response to the Outbreak of SARS in 2003*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1127 (2004); David Bishop, *Lessons from SARS: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations*, 36 GEO. J. INT'L L. 1173 (2005); David L. Heymann et al., *SARS Legacy: Outbreak Reporting is Expected and Respected*, 381 LANCET 779 (2013); *Severe Acute Respiratory Syndrome (SARS)*, WHO, [https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab\\_1](https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1) (last visited Mar. 2, 2021).

30. *Ebola Outbreak 2014 – Present: How the Outbreak and WHO's Response Unfolded*, WHO (Jan. 2016), <https://www.who.int/csr/disease/ebola/response/phases/en/>; see also *Ebola Virus Disease*, WHO, [https://www.who.int/health-topics/ebola/#tab=tab\\_1](https://www.who.int/health-topics/ebola/#tab=tab_1), (last visited Mar. 2, 2021); Caroline Sell, Note, *Ebola and Emerging Infectious Diseases in Armed Conflict: Contemporary Challenges in Global Health Security Laws and Policies*, 29 MINN. J. INT'L L. 187 (2020).

31. Director-General, WHO, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009*, at 49, A64/10 (May 5, 2011), [https://apps.who.int/gb/ebwha/pdf\\_files/WHA64/A64\\_10-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf)

32. *WHO's Response to Zika Virus and Its Associated Complications*, WHO 4 (2016), <https://www.who.int/publications/i/item/who-s-response-to-zika-virus-and-its-associated-complications>.

33. See generally Armin von Bogdandy & Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis* 1–2 (Max Planck Inst., MPIL Research Paper No. 2020–07, 2020), <https://ssrn.com/abstract=3561650> (discussing international law during the COVID-19 pandemic); Stewart Patrick, *When the System Fails*, 99 FOREIGN AFFS., July/Aug. 2020, at 40, 50 (discussing the unilateral approach of states and the costs of global dysfunction); Jennifer Nuzzo, *To Stop a Pandemic: A Better Approach to Global Health Security*, 100 FOREIGN AFFS., Jan./Feb. 2021, at 36, 36.

34. See e.g., Suerie Moon, et al., *Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 LANCET 2204, 2207 (2015); David P. Fidler, *Epic Failure of Ebola and Global Health Security*, 21 BROWN J. WORLD AFFS., Spring/Summer 2015, at 179; Gian Luca Burci & Jakob Quirin, *Introductory Note to World Health Organization and United Nations Documents on the Ebola Outbreak in West Africa*, 54 INT'L LEGAL MATERIALS 532, 534 (2015); Lawrence O. Gostin, et al., *Toward a Common Secure Future: Four Global Commissions in the Wake of Ebola*, 13 PLOS MED. 1 (May 19, 2016); Tsung-Ling Lee, *Making International Health Regulations Work: Lessons from the 2014 Ebola Outbreak*, 49 VAND. J. TRANSNAT'L L. 931, 932–33 (2016); WHO, REPORT OF THE EBOLA INTERIM ASSESSMENT PANEL (2015), <http://who.int/csr/res>

flu pandemic, however, the WHO's "rule-bound" approach led to "worldwide overreaction."<sup>35</sup>

It comes as no surprise that the way the WHO has dealt with the current COVID-19 pandemic has met criticism as well. Some points of criticism are the lack of openness and transparency of decisionmaking procedures,<sup>36</sup> and the lacking possibilities of a tailor-made stepping scale of measures due to the very broad design of the PHEIC.<sup>37</sup> Additionally, there have been calls to revise the IHR after officials identify all of the lessons learned.<sup>38</sup> David N. Durrheim *et alia* not only point to the lack of transparency of the Emergency Committee process but also that the Emergency Committee uses "'irrelevant considerations, undue influence and political interference' and delaying declaration [of a PHEIC] when International Health Regulations criteria have

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ources/publications/ebola/report-by-panel.pdf; WHO, *2014 Ebola Virus Disease Outbreak and Follow-up to the Special Session of the Executive Board on Ebola*, A68/A/CONF./5 (May 23, 2015), [http://apps.who.int/gb/ebwha/pdf\\_files/WHA68/A68\\_ACONF5-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA68/A68_ACONF5-en.pdf); NAT'L ACAD. OF MED., *THE NEGLECTED DIMENSION OF GLOBAL SECURITY: A FRAMEWORK TO COUNTER INFECTIOUS DISEASE CRISES* (2016), <http://www.nap.edu/catalog/21891>.

35. Oswald Jansen, *Increasing the Legitimacy of the World Health Organization*, REGUL. REV. (Apr. 22, 2020), <https://www.theregview.org/2020/04/22/jansen-increasing-legitimacy-world-health-organization/>; J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1, 31–32 (2016); Pedro A. Villarreal, *Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies*, 7 GOETTINGEN J. INT'L L. 95, 97 (2016).

36. Jansen, *supra* note 35; INDEP. OVERSIGHT & ADVISORY COMM., WHO HEALTH EMERGENCIES PROGRAMME, INTERIM REPORT ON WHO'S RESPONSE TO COVID-19 JANUARY-APRIL 2020, at 4–5 (2020) [hereinafter IAOC INTERIM REPORT], <https://www.who.int/publications/m/item/interim-report-on-who-s-response-to-covid---january---april-2020>.

37. See Gostin *et al.*, *supra* note 12, at 2225; *see also* Alvarez, *supra* note 5.

38. Allyn L. Taylor *et al.*, *Solidarity in the Wake of COVID-19: Reimagining the International Health Regulations* 396 LANCET 82 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7304947/>; *see, e.g.*, Gian Luca Burci, *The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations*, 11 J. INT'L HUMANITARIAN LEGAL STUDS., at 13–14 (2020), <https://doi.org/10.1163/18781527-01102003>; Chang-Fa Lo, *The Missing Operational Components of the IHR (2005) from the Experience of Handling the Outbreak of COVID-19: Precaution, Independence, Transparency and Universality*, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 4 (2020); Gian Luca Burci & Mark Eccleston-Turner, *Preparing for the Next Pandemic: The International Health Regulations and World Health Organization During COVID-19*, 2 Y.B. INT'L DISASTER L. 259, 259–60 (2021); LUCIA MULLEN *ET AL.*, AN ANALYSIS OF INTERNATIONAL HEALTH REGULATIONS EMERGENCY COMMITTEES AND PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN DESIGNATIONS 1–2 (2020).

been met.”<sup>39</sup> They also opine that the PHEIC process requires “urgent reform.”<sup>40</sup> They propose:

[A] multilevel PHEIC process with each level defined by objective epidemiological criteria and paired with specific readiness actions. Level 1 PHEIC alerts should indicate a high risk outbreak in a single country, with the potential for international spread requiring concerted public health efforts to contain and manage it locally. Level 2 PHEIC should imply that multiple countries have had importations and that limited spread has occurred in those countries. Level 3 PHEIC would indicate large clusters in multiple countries, with evidence of ongoing local transmission. This tiering would provide less ambiguous risk signaling, while also encouraging earlier, proportionate public health measures when they are most effective.<sup>41</sup>

This is in line with one of the recommendations of the Independent Oversight and Advisory Committee (IOAC) in its report from November 4, 2020, to the resumed WHA.<sup>42</sup>

Many global administrative law scholars have critical thoughts on the IHR. According to Professor Morten Broberg at the University of Copenhagen, the IHR “suffers from a number of weaknesses.”<sup>43</sup> Ching-Fu Lin focuses on the allegations that some State Parties and the Director-General did not act in conformity with the IHR.<sup>44</sup> According to him, an adequate dispute-settlement commission should be added to the IHR.<sup>45</sup> Lawrence O. Gostin *et alia* also points to the limited authority the WHO has to ensure state compliance with the IHR, “including constrained ability to independently

39. David N. Durrheim et al., *When Does a Major Outbreak Become a Public Health Emergency of International Concern?* 20 LANCET INFECTIOUS DISEASES 887, 888 (2020).

40. *Id.*

41. *Id.*

42. Indep. Oversight & Advisory Comm., WHO Health Emergencies Programme, *Looking Back to Move Forward*, at 13, A73/10 (Nov. 4, 2020) [hereinafter *Looking Back to Move Forward*], [https://www.who.int/docs/default-source/dco/independent-oversight-and-advisory-committee/a73-10-en-ioac-report.pdf?sfvrsn=d2bcf955\\_1&download=true](https://www.who.int/docs/default-source/dco/independent-oversight-and-advisory-committee/a73-10-en-ioac-report.pdf?sfvrsn=d2bcf955_1&download=true).

43. Morten Broberg, *A Critical Appraisal of the World Health Organization’s International Health Regulations (2005) in Times of Pandemic: It Is Time for Revision*, 11 EUR. J. RISK REGUL. 202, 205 (2020).

44. Ching-Fu Lin, *COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?*, 13 CONTEMP. ASIA ARB. J. 269, 271 (2020).

45. *Id.*; Michael A. Becker, *Do We Need an International Commission of Inquiry for Covid-19? Part I*, EJIL: TALK! (May 18, 2020), <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-i/> (considering the establishment of an international commission of inquiry to address these kinds of issues); ROOJIN HABIBI ET AL., THE STELLENBOSCH CONSENSUS ON LEGAL NATIONAL RESPONSES TO PUBLIC HEALTH RISKS 28 (2020); MARGHERITA CINÀ ET AL., THE STELLENBOSCH CONSENSUS ON THE INTERNATIONAL LEGAL OBLIGATION TO COLLABORATE AND ASSIST IN ADDRESSING PANDEMICS: CLARIFYING ARTICLE 44 OF THE INTERNATIONAL HEALTH REGULATIONS 10–11 (2020).



verify official state reports.”<sup>46</sup> José E. Alvarez draws our attention to the overreliance of the WHO on soft law techniques, and “the absence of ‘name and shame’ techniques, [or] sanctions of any kind, for WHO members that ignore or openly defy their legal obligations under the IHR is a problem that needs fixing.”<sup>47</sup> The analysis Eyal Benvenisti undertook brought him to the conclusion that:

The criticisms leveled at the World Health Organization (WHO) since the onset of the Covid-19 global pandemic in early 2020 are fundamentally misguided. Undoubtedly, in this instance, the organization failed to meet its overarching objective—the attainment . . . [to] the highest possible level of health.’ . . . [] [T]hese errors of judgment, betray a more fundamental flaw: the very design of the WHO is not fit for purpose in relation to the challenges it faces.<sup>48</sup>

Contrarily, Armin von Bogdandy and Pedro A. Villarreal point at the successes of the WHO:

[I]t seems safe to assume that, without the framework provided by the WHO, the various responses by the many countries under high pressure would be even more diverse and the degree of uncertainty would be even higher. Though on a more low-profile manner than we might wish as international lawyers, the WHO seems successful in remaining a relevant technical actor for fighting the pandemic.<sup>49</sup>

Calls to change the IHR date back to before the current pandemic, though.<sup>50</sup> At the WHA’s meeting on May 19, 2020, members passed a “landmark”<sup>51</sup> resolution calling for a comprehensive evaluation of the international response to the pandemic, including the functioning of IHR.<sup>52</sup>

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46. Gostin et al., *supra* note 5, at 295.

47. Alvarez, *supra* note 5, at 9.

48. Eyal Benvenisti, *The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic 1* (Univ. of Cambridge Faculty of L. Legal Studs. Rsch. Paper Series, No. 24/2020, 2020), [https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.law.cam.ac.uk/Documents/Blogs/ssm-eyal\\_benvenisti\\_300620.pdf](https://www.lcil.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.lcil.law.cam.ac.uk/Documents/Blogs/ssm-eyal_benvenisti_300620.pdf).

49. von Bogdandy & Villarreal, *supra* note 33, at 25.

50. See Gostin et al., *supra* note 12, at 2225 (stating that several high-level panels reviewed the International Health Regulations (IHR) and urged reforms following the Ebola epidemic).

51. Press Release, WHO, Historic Health Assembly Ends with Global Commitment to COVID-19 Response (May 19, 2020), <https://www.who.int/news/item/19-05-2020-historic-health-assembly-ends-with-global-commitment-to-covid-19-response>.

52. See WHO, Seventy-Third World Health Assembly Resolution, *COVID-19 Response*, at 7, A73/CONF./1 Rev. 1 (May 18, 2020) (directing the Director-General to: “[i]nitiate, at the earliest appropriate moment, and in consultation with Member States, a stepwise process of impartial, independent and comprehensive evaluation, including using existing mechanisms, as appropriate, to review experience gained and lessons learned from the WHO-coordinated international health response to COVID-19, including (i) the effectiveness of the mechanisms at WHO’s disposal; (ii) the functioning of the IHR and the status of implementation of the relevant

Following this resolution, the WHO Director-General established the fourth IHR Review Committee on September 8, 2020.<sup>53</sup> This Committee will cooperate with the IOAC for the WHO Health Emergencies Programme<sup>54</sup> and the Independent Panel for Pandemic Preparedness and Response (IPPR).<sup>55</sup>

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recommendations of previous IHR Review Committees; (iii) WHO's contribution to United Nations-wide efforts; and (iv) the actions of WHO and their timelines pertaining to the COVID-19 pandemic, and make recommendations to improve global pandemic prevention, preparedness, and response capacity, including through strengthening, as appropriate, WHO's Health Emergencies Programme").

53. See Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, Opening Remarks at the at the International Health Regulations Review Committee (Sept. 8, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-international-health-regulations-review-committee> (stating that the Director-General was establishing the fourth IHR Review Committee and noting that the three previous Review Committees were the Review Committee on the functioning of the IHR and on Pandemic Influenza (H1N1), the Review Committee on Second Extensions for establishing national public health capacities and on IHR implementation, and the Review Committee on the role of the IHR in the Ebola outbreak and response); see also *IHR Review Committee*, WHO REG'L OFF. FOR EUR., <https://www.euro.who.int/en/health-topics/health-emergencies/international-health-regulations/event-reporting-and-review/ihr-review-committee> (last visited Mar. 2, 2021). This Committee had open meetings on September 8 and 9 and October 23, 2020. See *Report of the First Meeting of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WHO (Sept. 23, 2020), [https://www.who.int/publications/m/item/first-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-\(2005\)-during-the-covid-19-response](https://www.who.int/publications/m/item/first-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-(2005)-during-the-covid-19-response); *Report of the Second Meeting of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WHO (Oct. 23, 2020), [https://www.who.int/publications/m/item/second-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-\(2005\)-during-the-covid-19-response](https://www.who.int/publications/m/item/second-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-(2005)-during-the-covid-19-response).

54. See *Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme [IOAC]*, WHO, [https://www.who.int/about/who\\_reform/emergency-capacities/oversight-committee/en/](https://www.who.int/about/who_reform/emergency-capacities/oversight-committee/en/) (last visited Mar. 2, 2021).

55. See Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, Opening Remarks at the Member State Briefing on the COVID-19 Pandemic Evaluation – 9 July 2020, WHO (July 9, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-opening-remarks-at-the-member-state-briefing-on-the-covid-19-pandemic-evaluation---9-july-2020>. This Panel was installed on July 9, 2020. *Id.* In November 2020, the World Health Assembly (Assembly or WHA) resumed and the Independent Panel for Pandemic Preparedness and Response (IPPR) is preparing to present an interim report. *Id.*; see also *Seventy-Third World Health Assembly*, WHO, <https://www.who.int/about/governance/world-health-assembly/seventy-third-world-health-assembly> (last visited Mar. 2, 2021) (reflecting that WHA resumed session on November 14, 2020). The substantive, final report will be presented at the meeting of the Assembly in May 2021. Dir.-Gen., Opening Remarks, *supra*.

It is highly challenging to write an Article like this during these extraordinary times. Following the WHO's administrative actions combatting a global pandemic while it rages can be compared to trying to follow a sports match played on several fields with many moving targets. At the same time, these types of problems make administrative law richly dynamic and exciting.

This contribution focuses on the administrative law rules and principles applicable to administrative decisionmaking by the WHO during the COVID-19 health emergency. Part I introduces the WHO—how it is structured and what powers it has been given under certain legal instruments. Part II analyzes in more detail the way the WHO has used these legal instruments in the battle against COVID-19. Part III identifies relevant principles of global administrative law and applies them to the WHO's activities.

## I. STRUCTURE AND POWERS OF THE WORLD HEALTH ORGANIZATION

The WHO is a specialized agency of the UN,<sup>56</sup> established on April 7, 1948.<sup>57</sup> Representatives of sixty-one Member States adopted the WHO Constitution at the International Health Conference held from June 19 to July 22, 1946.<sup>58</sup> Membership in the WHO is open to all states,<sup>59</sup> and currently the WHO has 194 Member States. Its global headquarters are in Geneva.<sup>60</sup> Six regional offices cover the following regions: Africa in Brazzaville, Congo;<sup>61</sup> Eastern Mediterranean in Cairo, Egypt;<sup>62</sup> Europe in Copenhagen, Denmark;<sup>63</sup> Pan American Health Organization/Region of the Americas (PAHO) in Washington D.C.;<sup>64</sup> South-East Asia in New Delhi,

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56. U.N. Charter art. 57, ¶¶1–2.

57. *See About WHO*, WHO, <https://www.who.int/about> (last visited Mar. 2, 2021).

58. *See WHO*, BASIC DOCUMENTS 1 n.1 (49th ed. 2020).

59. Constitution of the World Health Organization, art. 3, *opened for signature* July 22, 1946, 14 U.N.T.S. 185 (entered into force April 7, 1948).

60. *Reaching the World Health Organization, Geneva, Switzerland*, WHO, <https://www.who.int/genomics/directions/en/> (last visited Mar. 2, 2021).

61. *See generally About Us*, WHO REG'L OFF. FOR AFR., <https://www.afro.who.int/about-us/en> (last visited Mar. 2, 2021) (providing details on the WHO office in Africa).

62. *See generally Contact Us*, WHO REG'L OFF. FOR THE E. MEDITERRANEAN, <http://www.emro.who.int/contact-us.html> (last visited Mar. 2, 2021).

63. *See generally Contact Us*, WHO REG'L OFF. FOR EUR., <http://www.euro.who.int/en/media-centre/contact-us> (last visited Mar. 2, 2021) (detailing the address of the European WHO office in Copenhagen).

64. The United States was one of the eleven founding countries. *See generally History of PAHO*, PAN AM. HEALTH ORG., <https://www.paho.org/en/who-we-are/history-paho> (last visited Mar. 2, 2021) (stating that the Pan American Health Organization (PAHO) was established 118 years ago and began its life as the International Sanitary Bureau, which was created at the First General International Sanitary Convention of the American Republics on

India;<sup>65</sup> and Western Pacific in Manila, Philippines.<sup>66</sup> Seven thousand people from more than 150 countries work in its 150 country offices, in its six regional offices, and in its headquarters in Geneva.<sup>67</sup>

Article 2 of the WHO Constitution provides for a long list of functions of the WHO.<sup>68</sup> These functions include: to act as the directing and coordinating authority on international health work; to “propose conventions, agreements and regulations, and make recommendations with respect to international health matters”; to establish international nomenclatures of public health practices; to “standardize diagnostic procedures”; and to establish international standards for “food, biological, pharmaceutical and similar products”; but also to “assist [g]overnments, upon request, [to strengthen their] health services,” to furnish of technical assistance, to provide of necessary aid in emergencies, and to provide “health services and facilities to special groups.”<sup>69</sup> Also included in the list of functions is preventing accidental injuries; improving “nutrition, housing, sanitation, recreation, economic [and] working conditions, and other aspects of environmental hygiene”; “promot[ing] maternal and child health and welfare”; “promot[ing] and conduct[ing] research in the field of health”; and “promoting co-operation among scientific and professional groups which contribute to the advancement of health.”<sup>70</sup> Last but not least, the WHO was created “to provide information, counsel and assistance” and “to assist in developing an informed public opinion “among all peoples on matters of health.”<sup>71</sup>

Since the establishment of the WHO, the WHA has had seventy-three sessions,<sup>72</sup> including two in 2020: a session spanning from May 18–19, 2020, and a resumed session on November 9–14, 2020.<sup>73</sup> This Assembly is the decisionmaking body of the WHO and is attended by delegations from all Member States consisting of no more than three delegates per Member State

December 2, 1902).

65. See generally *About WHO in the South-East Asia Region*, WHO SE. ASIA, <https://www.who.int/southeastasia/about> (last visited Mar. 2, 2021) (explaining the structure of the WHO in South-East Asia).

66. See generally *About WHO in the Western Pacific*, WHO W. PAC., <https://www.who.int/westernpacific/about> (last visited Mar. 2, 2021) (providing background on the WHO’s activities in the Western Pacific).

67. See *Who We Are*, WHO, <https://www.who.int/about/who-we-are> (last visited Mar. 2, 2021).

68. Constitution of the World Health Organization, *supra* note 59, art. 2.

69. *Id.*

70. *Id.*

71. *Id.* art. 2(q)–(r).

72. See *Previous Meetings*, WHO, <https://apps.who.int/gb/index.html> (last visited Mar. 2, 2021).

73. See *Seventy-Third World Health Assembly*, *supra* note 55.

“chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member.”<sup>74</sup> The Assembly determines the policies of the WHO, names the thirty-four Member States “entitled to designate a person to serve on the Board,” “appoint[s] the Director-General,” establishes committees and other institutions, and “review[s] and approve[s] the budget.”<sup>75</sup>

The WHA has the “authority to adopt conventions or agreements.”<sup>76</sup> Adoption requires a two-thirds vote of the Assembly.<sup>77</sup> After the WHA adopts a convention or agreement, it must be accepted in accordance with a Member State’s constitutional process to become effective for that state.<sup>78</sup> Next to this power to adopt international agreements, the Assembly has the power to adopt regulations on a few specific subjects, such as sanitary and quarantine requirements to “prevent the international spread of disease,”<sup>79</sup> and make recommendations to the Member States.<sup>80</sup> The IHR are an important example of such a regulation and international agreement. Unlike international agreements, a regular minatory can adopt regulations,<sup>81</sup> and enter into force after Member States are given due notice and do not reject the regulation or make a reservation in time.<sup>82</sup>

The Executive Board<sup>83</sup> acts as the executive body of the Assembly and consists of thirty-four “technically qualified” members for a three-year term, who are designated by the selected Member States.<sup>84</sup> In addition to the list of functions provided for in the constitution, such as the power to “take emergency measures” and to “authorize the Director-General to take the necessary steps to combat epidemics,”<sup>85</sup> the WHA delegates powers to the Executive Board.<sup>86</sup> The WHA and the Executive Board have their own rules of procedure.<sup>87</sup>

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74. Constitution of the World Health Organization, *supra* note 59, art. 11.

75. *Id.* art. 18, 24.

76. *Id.* art. 19.

77. *Id.*

78. *Id.*

79. *Id.* art. 21.

80. *Id.* art. 23.

81. *Id.* art. 60.

82. *Id.* art. 22.

83. See generally *Executive Board*, WHO, <https://www.who.int/about/governance/executive-board> (last visited Mar. 2, 2021) (explaining how the Executive Board functions).

84. Constitution of the World Health Organization, *supra* note 59, art. 24–25.

85. *Id.* art. 28(i)

86. *Id.* art. 29.

87. WHO, *Rules of Procedure of the World Health Assembly*, in BASIC DOCUMENTS, *supra* note 58, at 173–206, *Rules of Procedure of the Executive Board of the WHO*, in BASIC DOCUMENTS, *supra* note 58, at 207–24.

The Secretariat is the third organ of the WHO mentioned in the constitution.<sup>88</sup> It consists of the Director-General and technical and administrative staff.<sup>89</sup> The Director-General is not only the chief technical and administrative officer but also the ex officio Secretary of the WHO, the Executive Board, and of all the commissions and committees, which are functions he may delegate.<sup>90</sup>

The WHA establishes committees and other institutions, such as the International Health Regulations Review Committee, outlined in Article 50 of the IHR. The Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme is a committee that the Director-General installed on May 5, 2016.<sup>91</sup> The Independent Panel for Pandemic Preparedness and Response (IPPR) was installed on July 9, 2020.<sup>92</sup>

Currently, two emergency committees are active: the COVID-19 IHR Emergency Committee<sup>93</sup> and the Poliovirus IHR Emergency Committee.<sup>94</sup> Previous emergency committees include the emergency committees on

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88. Constitution of the World Health Organization, *supra* note 59, art. 9 (detailing the three working bodies of the WHO, denoting the Secretariat as the third).

89. *Id.* art. 30–37 (highlighting the articles of the constitution that describe the role of the Secretariat, the Director-General, and their functions).

90. *Id.* art. 32.

91. Indep. Oversight Advisory Comm., WHO Health Emergencies Programme, *Note for the Record: First Meeting of the Committee* 1–2 (May 5, 2016), [https://www.who.int/docs/default-source/dco/independent-oversight-and-advisory-committee/ioac-report-1st-meeting.pdf?sfvrsn=4cd71017\\_1](https://www.who.int/docs/default-source/dco/independent-oversight-and-advisory-committee/ioac-report-1st-meeting.pdf?sfvrsn=4cd71017_1) (containing the record from the first meeting of the IOAC where the members discussed the Committee’s founding and the terms the Committee would operate within).

92. Press Release, WHO, Independent Evaluation of Global COVID-19 Response Announced (July 9, 2020), <https://www.who.int/news/item/09-07-2020-independent-evaluation-of-global-covid-19-response-announced>; INDEP. PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE, <https://theindependentpanel.org/> (last visited Mar. 2, 2021) (detailing the mission of the IPPR); *Terms of Reference*, INDEP. PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE, [https://theindependentpanel.org/wp-content/uploads/2020/10/TheIndependentPanel\\_TermsOfReference.pdf](https://theindependentpanel.org/wp-content/uploads/2020/10/TheIndependentPanel_TermsOfReference.pdf) (defining the terms of reference).

93. See generally *Statement on the Fourth Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of the Coronavirus Disease (COVID-19)*, WHO (Aug. 1, 2020) [hereinafter *Statement on the Fourth Meeting*], [https://www.who.int/news-room/detail/01-08-2020-statement-on-the-fourth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-\(covid-19\)](https://www.who.int/news-room/detail/01-08-2020-statement-on-the-fourth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)) (describing the proceedings of the COVID-19 IHR Emergency Committee).

94. See *Statement of the Twenty-fifth Polio IHR Emergency Committee*, WHO (June 23, 2020), <https://www.who.int/news/item/23-06-2020-statement-of-the-25th-polio-ihr-emergency-committee>.

Zika Virus,<sup>95</sup> Yellow fever,<sup>96</sup> Middle East Respiratory Syndrome (MERS-CoV),<sup>97</sup> H1N1,<sup>98</sup> Ebola Virus Disease in West Africa (2014–2015),<sup>99</sup> Ebola Virus Disease in the Democratic Republic of the Congo (Kivu and Ituri),<sup>100</sup> and Ebola Virus Disease in the Democratic Republic of the Congo (Equateur).<sup>101</sup> Article 48 of the IHR provides the legal basis for these emergency committees.<sup>102</sup>

### A. Network

The WHO is obliged to cooperate and coordinate its activities with other competent intergovernmental organizations and international bodies in the implementation of the IHR, “including through the conclusion of agreements and other similar arrangements.”<sup>103</sup> An example of such a cooperation is seen in the UN Crisis Management Team between the WHO, the Office for the Coordination of Humanitarian Affairs (OCHA), the International Maritime Organization (IMO), UNICEF, the International

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95. See *Fifth Meeting of the Emergency Committee under the International Health Regulations (2005) Regarding Microcephaly, Other Neurological Disorders and Zika Virus*, WHO (Nov. 18, 2016), [https://www.who.int/news/item/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-\(2005\)-regarding-microcephaly-other-neurological-disorders-and-zika-virus](https://www.who.int/news/item/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-(2005)-regarding-microcephaly-other-neurological-disorders-and-zika-virus).

96. See *Second Meeting of the Emergency Committee Under the International Health Regulations (2005) Concerning Yellow Fever*, WHO (Aug. 31, 2016) [https://www.who.int/news/item/31-08-2016-second-meeting-of-the-emergency-committee-under-the-international-health-regulations-\(2005\)-concerning-yellow-fever](https://www.who.int/news/item/31-08-2016-second-meeting-of-the-emergency-committee-under-the-international-health-regulations-(2005)-concerning-yellow-fever).

97. See *WHO Statement on the Tenth Meeting of the IHR Emergency Committee Regarding MERS*, WHO (Sept. 3, 2015), <https://www.who.int/news/item/03-09-2015-who-statement-on-the-tenth-meeting-of-the-ihr-emergency-committee-regarding-mers>.

98. See Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, Opening Remarks at Virtual Press Conference Regarding H1N1 in Post-pandemic Period (Aug. 10, 2010), <https://www.who.int/news/item/10-08-2010-h1n1-in-post-pandemic-period>.

99. See *Ebola Virus Disease in West Africa (2014-2015) IHR Emergency Committee*, WHO, [https://www.who.int/groups/ebola-virus-disease-in-west-africa-\(2014-2015\)-ihr-emergency-committee](https://www.who.int/groups/ebola-virus-disease-in-west-africa-(2014-2015)-ihr-emergency-committee) (last visited Mar. 2, 2021).

100. See *Final Statement on the 8th Meeting of the International Health Regulations (2005)*, WHO (June 26, 2020), <https://www.who.int/news/item/26-06-2020-final-statement-on-the-8th-meeting-of-the-international-health-regulations>.

101. See *Ebola Virus Disease in the Democratic Republic of the Congo (Equateur) IHR Emergency Committee*, WHO, <https://www.who.int/groups/ebola-virus-disease-in-the-democratic-republic-of-the-congo-equateur-ihr-emergency-committee> (last visited Mar. 2, 2021).

102. WHO, *supra* note 6, art. 48.

103. See *id.* art. 14; see also Constitution of the World Health Organization, *supra* note 59, art. 70 (requiring Organizations to work closely with other intergovernmental organizations).

Civil Aviation Organization (ICAO), the World Food Program (WFP), and the Food and Agricultural Organization of the United Nations (FAO), as well as the World Bank and several UN Secretariat departments.<sup>104</sup> Examples of agreements to cooperate are the agreements with UN specialized agencies, and agreements with the Commission of the African Union and the Pan American Health Organization.<sup>105</sup>

The WHO may, on matters within its competence, “make suitable arrangements for consultation and cooperation with non-governmental international organizations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental.”<sup>106</sup> As far as non-state actors are concerned, the WHO applies the Overarching Framework of Engagement with Non-State Actors (FENSA)<sup>107</sup> to partner with countries, the UN system, international organizations, civil society, foundations, academia, and research institutions.<sup>108</sup> The Director-General designates over 800 institutions in more than eighty countries to carry out activities in support of WHO-programs—called collaborating centers<sup>109</sup>—and the WHO hosts organizations in four Hosted Partnerships.<sup>110</sup>

### B. *International Health Regulations (2005)*

The WHO’s administrative action discussed here is mainly based upon the powers that are provided for in the IHR.<sup>111</sup> SARS, the first global public health emergency of the twenty-first century,<sup>112</sup> created important momentum to adopt

104. See *United Nations Crisis Management Policy Activation for 2019-nCoV Crisis Draft Terms of Reference*, WHO, <https://www.globalprotectioncluster.org/wp-content/uploads/200214-TOR-for-COVID-19-UN-Crisis-Management-Team-FINAL.pdf>.

105. See WHO, *supra* note 58, at 41–43, 57–60, 61–65, 75–77, 85–91.

106. Constitution of the World Health Organization, *supra* note 59, art. 71,

107. See World Health Assembly, *Framework of Engagement with Non-State Actors*, at 1–2 WHA69.10 (May 28, 2016), [https://apps.who.int/gb/ebwha/pdf\\_files/wha69/a69\\_r10-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/wha69/a69_r10-en.pdf).

108. See e.g., *Partnerships and Collaborative Arrangements with WHO Involvement*, WHO, [https://www.who.int/docs/default-source/documents/partnerships/partnerships-collaborative-arrangements-with-who-involvement.pdf?sfvrsn=e8856ac4\\_6](https://www.who.int/docs/default-source/documents/partnerships/partnerships-collaborative-arrangements-with-who-involvement.pdf?sfvrsn=e8856ac4_6) (May 2019).

109. *Collaborating Centres*, WHO, <https://www.who.int/about/partnerships/collaborating-centres> (last visited Mar. 2, 2021). The United States is home to eighty-three different WHO collaborating centers. See S. Res. 653, 116th Cong. (2020).

110. See *Hosted Partnerships*, WHO, <https://www.who.int/about/partnerships/hosted-partnerships> (last visited Mar. 2, 2021).

111. See WHO, *supra* note 6. The latest version was adopted on May 23, 2005 by the WHA on the basis of Articles 21(a) and 22 of the Constitution of the WHO, and entered into force on June 15, 2007. *Id.*

112. *Severe Acute Respiratory Syndrome (SARS)*, WHO, <https://www.who.int/health-topics/severe-acute-respiratory-syndrome> (last visited Mar. 2, 2021).



this version of the regulations. This set of rules originated from the Fourth WHA in 1951, the International Sanitary Convention of Rio de Janeiro (1887) or the text of the Sanitary Convention from the Lima Congress (1888).<sup>113</sup>

China complied with the IHR obligation to notify the WHO in an unusual public health event which may constitute a public health emergency of international concern by reporting the detection of a pneumonia of unknown cause in Wuhan to the WHO China Country Office (a National IHR Focal Point).<sup>114</sup> According to the subsequent situation reports, the Chinese authorities continued to inform the WHO about their findings and the health measures implemented.<sup>115</sup>

Apparently, the Director-General and China, as well as Thailand, Japan, Korea, and Singapore, agreed that a public health emergency of international concern existed<sup>116</sup> already on January 22, 2020 (the day of the first situation report), as the Director-General called for a meeting of the Emergency Committee.<sup>117</sup> According to the IHR definition, a PHEIC “means an extraordinary event which is determined . . . (i) to constitute a public health risk to other states through the international spread of disease and (ii) to potentially require a coordinated international response.”<sup>118</sup>

The Emergency Committee consists of experts selected by the Director-General from the IHR Expert Roster.<sup>119</sup> The views of the Emergency Committee are not binding.<sup>120</sup> The Committee did not unanimously agree on whether the outbreak met the criteria for a PHEIC.<sup>121</sup> On January 22 and 23,

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113. WHO, *supra* note 6, at 1.

114. *See id.* art. 6 ¶ 1 (stating each State Party shall notify the WHO by way of the National IHR Focal Point of all events which may constitute a public health emergency of international concern).

115. *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of the Novel Coronavirus (2019-nCoV)*, WHO (Jan. 30, 2020) [hereinafter *Statement of Second Meeting*], [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-\(2019-ncov\)](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)).

116. WHO, *supra* note 6, art. 12 ¶ 2 (describing the course of action if the Director-General considers that a public health emergency of international concern is occurring).

117. *Statement on the First Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of the Novel Coronavirus (2019-nCoV)*, WHO (Jan. 23, 2020), [https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

118. WHO, *supra* note 6, at 9.

119. *Id.* art. 47, 48 ¶ 2.

120. *See id.* art. 49 ¶ 5.

121. *See UN Health Emergency Committee to Re-Convene on Global Threat Posed by China Coronavirus*, UN NEWS (Jan. 22, 2020), <https://news.un.org/en/story/2020/01/1055821> (reporting

2020, the Committee called meetings to provide the requisite vote that the outbreak was an urgent situation.<sup>122</sup> A week later, the Committee convened again and finally agreed unanimously that the outbreak met the criteria for a PHEIC.<sup>123</sup> Only then did the Director-General declare the outbreak a PHEIC, the sixth one in the WHO's history.<sup>124</sup>

The PHEIC declaration occurred well after most public health experts concluded that the COVID-19 outbreak posed a major international threat.<sup>125</sup>

The Emergency Committee accompanied the declaration of the PHEIC with temporary recommendations.<sup>126</sup> According to the second paragraph of Article 15 of the IHR, the Committee may include health measures to be implemented by the state party experiencing the PHEIC, or by another state party, "regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent the international spread of disease and avoid unnecessary interference with international traffic."<sup>127</sup>

Insofar as these recommendations concern persons, they may include advice, such as implementing quarantine or other health measures for suspect persons and refusing entry of unaffected persons to affected areas.<sup>128</sup> When the Director-General issues temporary recommendations, he shall consider not only the views of the states parties that are directly concerned but also the advice of the Emergency Committee, scientific principles, evidence and information, relevant international standards and instruments, and "health measures that, on the basis of a risk assessment appropriate to the circumstances, are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection."<sup>129</sup>

Each state party is obliged to respond promptly and effectively to a PHEIC and must maintain the capacity to do that, according to the WHO guidelines.<sup>130</sup> The IHR provides for the possibility upon the request of a state

uncertainty about how to proceed and the intention to meet at a future date to determine whether coronavirus is a PHEIC).

122. *Id.* (discussing the two-day meeting in Geneva where the WHO determined whether the Novel coronavirus is a Public Emergency of International Concern).

123. *Statement on the Second Meeting*, *supra* note 115.

124. WHO Director-General's Statement, *supra* note 2.

125. Durrheim et al., *supra* note 39.

126. *See Statement on the Second Meeting*, *supra* note 115 (providing specific advice to China and more general advice to other countries).

127. WHO, *supra* note 6, art. 15 ¶ 2.

128. *Id.* at art. 18 ¶ 1.

129. *Id.* at art. 17.

130. *Id.* at art. 13 ¶ 1.

party to the WHO to provide technical guidance and assistance, and to mobilize international teams of experts for on-site assistance.<sup>131</sup>

The general IHR-provisions on the implementation of health measures by states parties show the importance of WHO recommendations. These measures shall be initiated and completed without delay, and states parties are only allowed to implement health measures in accordance with national law and obligations of international law, if they achieve the same or greater level of health protection and are consistent with the IHR.<sup>132</sup> States have to base their determinations on whether to implement these health measures upon any available specific guidance or advice from WHO (next to scientific principles and evidence of a risk to human health as well as information of the WHO).<sup>133</sup>

According to the IOAC, the urgency with which member states took action based on the COVID-19 PHEIC varied both in terms of the timing and the comprehensiveness of public health measures in response to COVID-19. The IOAC states:

This raises questions about whether Member States view a PHEIC declaration as a sufficiently clear trigger. The IOAC notes that the design of the PHEIC is very broad, covering everything from a limited regional outbreak such as Ebola in West Africa to a large global pandemic that touches every country. Following the present crisis, it may be useful to review and update the IHR to reflect lessons from the pandemic. The IOAC encourages Member States to consider whether: a stepped level of alerts and galvanization of response measures should be added to the IHR; to enhance the openness and transparency of the Emergency Committee process; and to review whether the IHR-nominated focal points in governments are able to adequately raise the alarm to ministers within their governments when a PHEIC is declared.<sup>134</sup>

The WHO has issued several temporary recommendations regarding COVID-19 that the addressee states have not consistently complied with. According to Broberg, experience from previous epidemics shows that the IHR “suffers from a number of weaknesses.”<sup>135</sup> So far, the WHO has declared a PHEIC on five occasions, and according to Broberg, they have demonstrated “the shortcomings of the instruments available to the WHO.”<sup>136</sup> A faster, more coordinated response “may have prevented most of the 11,000 deaths directly attributed to Ebola, as well as the broader economic, social, and health

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131. *Id.* at art. 13 ¶¶ 4, 6.

132. *Id.* at art. 43 ¶ 1.

133. See J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L. J. 1, 23–25 (2016) (detailing the “technically nonbinding,” but still binding character of temporary recommendations).

134. IOAC INTERIM REPORT, *supra* note 36.

135. Broberg, *supra* note 43.

136. *Id.* at 206.

crisis that ensued from the epidemic.”<sup>137</sup> According to Broberg, examinations show that “as a general rule, states only half-heartedly” follow the WHO’s recommendations.<sup>138</sup> And he continues:

There are three principal reasons to explain this lack of mobilisation. Firstly, several Member States simply do not have the requisite resources to follow the rules. Secondly, certain states are either unable or unwilling to quickly notify the WHO of disease outbreaks. Thirdly, WHO Member States may introduce travel and trade restrictions of their own, even if these initiatives may be unnecessary or may conflict with the recommendations of the WHO.<sup>139</sup>

The IOAC wrote in its report “Looking Back to Move Forward” of November 4, 2020:

The West Africa Ebola virus disease crisis raised issues related to the declaration of a public health emergency of international concern [], highlighting the international community’s lack of understanding of the meaning of a PHEIC. The Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response discussed the possibility of an intermediate level of declaration, but the determination of a PHEIC has remained a binary decision. The IOAC considers it opportune to introduce a graded system with clear criteria and practical implications for countries, to make it possible to alert and engage the wider international community at an earlier stage in a health crisis.<sup>140</sup>

In the same report this Committee recommends:

[A] graded PHEIC system with clear criteria and practical implications for countries be introduced, under the guidance and based on the recommendations of the IHR Review Committee, to facilitate preparedness, preventive action, and dedication of resources at the early stage of outbreaks, which could avert any escalation. The PHEIC grading must be tied to a set of binding actions under the IHR provisions.<sup>141</sup>

This system looks very similar to the process of three PHEIC levels envisaged by Durrheim *et alia*, described above. In his annual report on the implementation of the IHR, the Director-General mentions a technical consultation on November 7–8, 2019, where experts pointed at the need to explore options for alerting the global community about events that do not meet the PHEIC criteria but may nonetheless require an urgent escalated public health response.<sup>142</sup>

In relation to the lacking possibilities of the WHO to ensure state compliance, the IOAC recommends: “peer-review mechanisms, platforms[,] and incentives be launched and anchored to the governing bodies structure

137. *Id.*

138. *Id.*

139. *Id.*

140. *Looking Back to Move Forward*, *supra* note 42, ¶ 41.

141. *Id.* at ¶ 42.

142. *Id.*

in order to ensure transparency, avoid politicization, and promote the IHR and Member States' compliance therewith."<sup>143</sup>

## II. THE WHO'S HANDLING OF COVID-19

On December 31, 2019, the WHO Country Office in China detected pneumonia of unknown cause in Wuhan, China.<sup>144</sup> On January 30, 2020, the outbreak was declared a PHEIC, and since February 11, 2020, the disease caused by the coronavirus (SARS-CoV-2) has been called COVID-19.<sup>145</sup>

At the meetings of the Emergency Committee on January 22 and 23, 2020,<sup>146</sup> despite 571 confirmed cases of COVID-19 in China and ten in Thailand, Japan, Korea, and Singapore,<sup>147</sup> the members had divergent views on whether this situation would constitute a PHEIC or not. Several members thought it was too early to declare a PHEIC, "given its restrictive and binary nature."<sup>148</sup> All members agreed on the urgency of the situation though. The advice to the Director-General at that time was:

In the face of an evolving epidemiological situation and the restrictive binary nature of declaring a PHEIC or not, WHO should consider a more nuanced system, which would allow an intermediate level of alert. Such a system would better reflect the severity of an outbreak, its impact, and the required measures, and would facilitate improved international coordination, including research efforts for developing medical counter measures.<sup>149</sup>

One week later, on January 30, 2020, two days after visiting China, the Director-General declared COVID-19 a PHEIC,<sup>150</sup> following the advice of the Emergency Committee<sup>151</sup> that the outbreak met the criteria for a PHEIC. At that time, there were 7,818 confirmed cases, and 170 people had lost their

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143. *Id.*

144. *See Situation Report-1, supra* note 1.

145. *Statement on the Second Meeting, supra* note 115.

146. *See Statement on the First Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WHO (Jan. 23, 2020) [hereinafter *Statement on First Meeting*], [https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

147. *See WHO, Novel Coronavirus (2019-nCoV) Situation Report-3*, at 1 (Jan. 23, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200123-sitrep-3-2019-ncov.pdf?sfvrsn=d6d23643\\_8](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200123-sitrep-3-2019-ncov.pdf?sfvrsn=d6d23643_8).

148. *Statement on the First Meeting, supra* note 146.

149. *Id.* The proposal of the IOAC to introduce in the IHR "a stepped level of alerts and galvanization of response measures" seems to be in line with this advice. IOAC INTERIM REPORT, *supra* note 36, at 4.

150. *Statement on the Second Meeting, supra* note 115.

151. *See id.*

lives.<sup>152</sup> There were eighty-two cases in eighteen countries outside China, including Germany, Japan, Vietnam, and the United States.<sup>153</sup> At the same time, the Director-General issued temporary recommendations.<sup>154</sup>

On February 3, 2020, the WHO published the strategic preparedness and response plan for the coronavirus.<sup>155</sup> On March 30, 2020, the WHO published an update on the country preparedness and response status for COVID-19 based on self-assessments by states with the State Parties Annual Reporting (SPAR) tool.<sup>156</sup> This shows an operational readiness index (of 1–5) per country according to WHO SPAR benchmark capacity levels.

On February 12, 2020, the UN activated the WHO-led Crisis Management Team, which brings together UN specialized agencies, such as WHO, the Office for the Coordination of Humanitarian Affairs (OCHA), the International Maritime Organization (IMO), UNICEF, the International Civil Aviation Organization (ICAO), the World Food Program (WFP), and the Food and Agricultural Organization of the United Nations (FAO), as well as the World Bank and several UN Secretariat departments.<sup>157</sup> At that time, there were 45,171 confirmed cases globally, 441 of which were reported in twenty-four countries outside China.<sup>158</sup>

On March 11, 2020, the Director-General characterized the outbreak as a pandemic.<sup>159</sup> At that time, more than 118,000 cases were registered in 114 countries and 4,291 people had lost their lives.<sup>160</sup> Two days later, the COVID-19 Solidarity Response Fund<sup>161</sup> was formed, and on March 25,

152. WHO Director-General's Statement, *supra* note 2.

153. *Coronavirus Disease 2019 (COVID-19) Situation Report-10*, WHO (Jan. 30, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=d0b2e480\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=d0b2e480_2)

154. *Id.*

155. WHO, *COVID-19 Strategic Preparedness and Response Plan* (Mar. 2, 2020), <https://www.who.int/docs/default-source/coronaviruse/srp-04022020.pdf>

156. WHO, *COVID-19 Strategic Preparedness and Response Plan 1* (Mar. 30, 2020), [https://www.who.int/docs/default-source/coronaviruse/covid-19-srp-country-status-30march2020.pdf?sfvrsn=3207d662\\_1&download=true](https://www.who.int/docs/default-source/coronaviruse/covid-19-srp-country-status-30march2020.pdf?sfvrsn=3207d662_1&download=true).

157. *United Nations Crisis Management Policy Activation for 2019-nCoV Crisis Draft Terms of Reference*, WHO (Feb. 14, 2020), <https://www.globalprotectioncluster.org/wp-content/uploads/200214-TOR-for-COVID-19-UN-Crisis-Management-Team-FINAL.pdf>.

158. *Coronavirus Disease 2019 (COVID-19) Situation Report-23*, WHO (Feb. 12, 2020), <https://apps.who.int/iris/bitstream/handle/10665/330992/nCoVsitrep12Feb2020-eng.pdf?sequence=1&isAllowed=y>.

159. *See* Dir.-Gen., *supra* note 13.

160. *Id.*

161. *Coronavirus Update: New WHO Fund, Guterres Calls for 'Prudence, Not Panic,'* UN NEWS (Mar. 13, 2020), <https://news.un.org/en/story/2020/03/1059421>.

2020, the UN launched a \$2 billion dollar bid to fight COVID-19: the COVID-19 Global Humanitarian Response Plan.<sup>162</sup>

On April 7, World Health Day 2020,<sup>163</sup> the coronavirus disease had caused 1,279,722 confirmed cases and 72,614 confirmed deaths in 211 countries, areas, or territories.<sup>164</sup> As of March 2, 2021, the world reached a heartbreaking number of 114,140,104 worldwide confirmed cases of COVID-19, including 2,535,520 deaths, reported to WHO.<sup>165</sup>

So far, during the coronavirus pandemic, the Director-General of the WHO has not only declared the outbreak a PHEIC,<sup>166</sup> which he characterized as a pandemic six weeks later, but he also issued temporary recommendations. The Director-General issued technical guidance, with several interim guidance documents—totaling more than 100 documents.<sup>167</sup> On August 16, 2020, the WHO published the 209th situation report.<sup>168</sup> Since then, the public has received weekly epidemiological updates and weekly operational updates. As of March 2, 2021, there have been thirty weekly epidemiological updates and twenty-seven weekly operational updates.<sup>169</sup>

The IHR Emergency Committee for COVID-19 held its first meeting on January 22 and 23, 2020, and has now met four times (January 30, 2020, April

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162. See U.N. Off. for the Coordination of Humanitarian Affs., *Global Humanitarian Response Plan COVID-19*, at 1, 38–42, <https://www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf>.

163. See *Funds, Programmes, Specialized Agencies and Others*, UN., <https://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html> (last visited Mar. 2, 2021).

164. *Coronavirus Disease 2019 (COVID-19) Situation Report-78*, WHO (Apr. 7, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200407-sitrep-78-covid-19.pdf?sfvrsn=bc43e1b\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200407-sitrep-78-covid-19.pdf?sfvrsn=bc43e1b_2).

165. *WHO Coronavirus Disease (COVID-19) Dashboard*, *supra* note 3.

166. *Statement on the Second Meeting*, *supra* note 115.

167. See *Country & Technical Guidance – Coronavirus Disease (COVID-19)*, WHO <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/guidance-for-schools-workplaces-institutions> (detailing the number of technical guidance documents available) (last visited Mar. 2, 2021).

168. *Coronavirus Disease (COVID-19) Situation Report-209*, WHO (Aug. 16, 2020), <https://apps.who.int/iris/bitstream/handle/10665/333897/nCoVsitrep16Aug2020-eng.pdf?sequence=1&isAllowed=y>.

169. *Coronavirus Disease (COVID-19) Weekly Epidemiological Update and Weekly Operational Update*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (last visited Mar. 2, 2021).

30, 2020, August 1, 2020,<sup>170</sup> and November 2020.)<sup>171</sup> The meeting on April 30, 2020, included an expanded membership “to reflect the nature of the pandemic and the need to include additional areas of expertise.”<sup>172</sup> The meetings on May 1 and August 1, 2020, resulted in guidance documents with a long list of recommendations and suggestions to both the WHO and all states parties,<sup>173</sup> which the Director-General issued as temporary recommendations.

Several of these guidance documents were communicated to not only public authorities of the Member States of the WHO but also directly with companies and the general public. An examination of the WHO’s technical guidance documents reflects their influence on both a national and international level, ranging from impacts on governing bodies to ordinary citizens, with guidance that addresses health measures all persons should take. Additionally, the WHO actively disperses advice for the public and health workers by utilizing social media, pushing WHO Health Alerts via WhatsApp<sup>174</sup> and Viber,<sup>175</sup> and publishing online media briefings. WHO gave a Medical Product Alert<sup>176</sup> to warn the public of falsified medical products that claim to prevent, detect, treat, or cure COVID-19. The WHO publishes weekly situations reports on its website.<sup>177</sup> To supplement these administrative types of action, the WHO undertook operational actions, such as a technical mission to Egypt, WHO missions (such as the ones to

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170. See *COVID-19 IHR Emergency Committee*, WHO, <https://www.who.int/groups/covid-19-ih-er-emergency-committee> (last visited Mar. 2, 2021) (noting the Committee meeting dates).

171. *Committee to Review Global Treaty on Response to Health Emergencies*, UN NEWS (Aug. 27, 2020), <https://news.un.org/en/story/2020/08/1071132>.

172. *Timeline: WHO’s COVID-19 Response*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline> (Nov. 21, 2020).

173. See *Statement on the Third Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Coronavirus Disease (COVID-19)*, WHO (May 1, 2020), [https://www.who.int/news-room/detail/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-\(covid-19\)](https://www.who.int/news-room/detail/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)) (listing the broad recommendations).

174. *WHO Health Alert Brings COVID-19 Facts to Billions via WhatsApp*, WHO, <https://www.who.int/news-room/feature-stories/detail/who-health-alert-brings-covid-19-facts-to-billions-via-whatsapp> (Aug. 21, 2020).

175. *WHO Coronavirus Info*, RAKUTEN VIBER, <https://chats.viber.com/coronavirusinfo> (last visited Mar. 2, 2021).

176. WHO, Medical Product Alert No. 3/2020, at 1, RPOQ/REG/ISF/Alert N°3.2020 (Mar. 31, 2020), [https://www.who.int/docs/default-source/essential-medicines/drug-alerts20/no3-2020-falsified-mp-forcovid-en.pdf?sfvrsn=cd866001\\_16](https://www.who.int/docs/default-source/essential-medicines/drug-alerts20/no3-2020-falsified-mp-forcovid-en.pdf?sfvrsn=cd866001_16).

177. *Coronavirus Disease (COVID-19) Weekly Epidemiological Update and Weekly Operational Update*, *supra* note 169.



Azerbaijan<sup>178</sup> and Iraq),<sup>179</sup> the deployment of a rapid response team to Italy,<sup>180</sup> and the WHO-China Joint Mission on Coronavirus Disease 2019.<sup>181</sup> If the WHO were a regulatory agency on a national level (or even on a supranational regional level, like the European Union), it would be governed by general rules and principles of administrative and constitutional law, and therefore human and fundamental rights would apply.

However, the WHO is an international organization. More precisely, the WHO is one of the fifteen specialized agencies of the UN, in which almost every state in the world is represented.<sup>182</sup> The law of global governance applies to the WHO. Do international (or global) administrative law rules and principles apply to the activities of the WHO? And if so, are they strong enough?

### III. ADMINISTRATIVE LAW RULES AND PRINCIPLES

As we have seen, the WHO's administrative action is an important example of the execution of global emergency power.<sup>183</sup> The revision of the IHR in 2005 gave the Director-General of the WHO broad emergency powers to fight against disease outbreaks.<sup>184</sup> As we have seen, the decision to declare a PHEIC and the decision to issue temporary recommendations with health measures heavily leaned on the advice of experts, with little involvement of the representatives of states in the Assembly.<sup>185</sup> This illustrates that emergency power is no longer the sole province of states here,

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178. *Azerbaijan Steps Up COVID-19 Preparedness and Readiness Measures, Welcoming WHO Mission*, WHO REG'L OFF. FOR EUR. (Dec. 2, 2020), <http://www.euro.who.int/en/countries/azerbaijan/news/news/2020/3/azerbaijan-steps-up-covid-19-preparedness-and-readiness-measures,-welcoming-who-mission>.

179. *WHO and Iraq: Stepping up Detection and Response*, WHO (Mar. 15, 2020), <https://www.who.int/news-room/feature-stories/detail/who-and-iraq-stepping-up-detection-and-response>.

180. *WHO Rapid Response Team Concludes Mission to Italy for COVID-19 Response*, WHO REG'L OFF. FOR EUR. (June 3, 2020), <https://www.euro.who.int/en/countries/italy/news/news/2020/3/who-rapid-response-team-concludes-mission-to-italy-for-covid-19-response>.

181. *WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, WHO (Feb. 28, 2020), [https://www.who.int/news-room/feature-stories/detail/who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/news-room/feature-stories/detail/who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)); see also *Strategic Preparedness and Response Plan*, WHO (Aug. 26, 2020), [https://www.who.int/images/default-source/health-topics/coronavirus/screenshot-2020-08-28-at-11-16-37.png?sfvrsn=9df7cc47\\_2](https://www.who.int/images/default-source/health-topics/coronavirus/screenshot-2020-08-28-at-11-16-37.png?sfvrsn=9df7cc47_2) (illustrating the WHO's Strategic Preparedness and Response Plan within countries and across regions).

182. *Funds, Programmes, Specialized Agencies and Others*, *supra* note 163.

183. Heath, *supra* note 28.

184. WHO, *supra* note 6, art. 12.

185. *IHR Procedures Concerning Public Health Emergencies of International Concern (PHEIC)*, WHO, <https://www.who.int/ihr/procedures/pheic/en/> (last visited Mar. 2, 2021).

or even of an international assembly or executive council.<sup>186</sup> This demands compensation in the application of procedural and substantive principles, such as transparency, accountability, participation, respect for human rights, requirements of global justice, and proportionality and subsidiarity to contribute to the legitimacy of the WHO's administrative action. Some would use the wording of the "rule of law in the global space."<sup>187</sup>

A brief analysis of the WHO's decisionmaking process not only shows that these principles are indeed active but also that improvements are feasible and evaluation is necessary.

If we look at the decisionmaking procedure of the PHEIC and the temporary recommendation, we see some of these principles at work. There is some transparency with the Emergency Committee's decisionmaking procedure, as the composition of this Committee is published as well as their conclusions and advice.<sup>188</sup> However, details not published include the selection of members and their invitation to attend to meetings, the agenda and information given to Committee members by the Director-General, and the meeting's presenters or their respective contributions. Also, considering the duration of the discussions of the Committee, the summary of the different opinions—"[s]everal members considered that it is still too early to declare a PHEIC, given its restrictive and binary nature"—does not reveal much of the discussions and opinions.<sup>189</sup> Proportionality and subsidiarity seemed to have played an important role in the discussions at the meetings on January 22 and 23, as the restrictive and binary nature of a PHEIC was stressed repeatedly. The advice to the WHO clearly shows the WHO's struggle in imposing these kinds of measures:

In the face of an evolving epidemiological situation and the restrictive binary nature of declaring a PHEIC or not, WHO should consider a more nuanced system, which would allow an intermediate level of alert. Such a system would better reflect the severity of an outbreak, its impact, and the required measures, and would facilitate improved international coordination, including research efforts for developing medical counter measures.<sup>190</sup>

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186. *Id.*

187. *See, e.g.,* Marco Macchia, *The Rule of Law and Transparency in the Global Space*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 262 (Sabino Cassese ed. 2016); *see also* SABINO CASSESE, *THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW* (2012).

188. *See COVID-19 IHR Emergency Committee*, *supra* note 170 (listing the members of the Emergency Committee); *e.g., Statement on the Fourth Meeting*, *supra* note 93 (detailing the proceedings from the August 2020 meeting of the Emergency Committee).

189. *Statement on First Meeting*, *supra* note 146.

190. *Id.*

The principles of proportionality and subsidiarity, which are at the core of this policy issue, also seem to reflect the discussions about how the WHO dealt with the 2014 Ebola-outbreak (too slow, as the WHO's strategy was to defer to regional and local authorities), and the Swine flu (global overkill/worldwide overreaction).<sup>191</sup> One of the biggest questions of the necessary evaluation of the WHO response on the COVID-19 outbreak should be whether deference to regional and local authorities after China's notification on December 31, 2019, was a wise choice at that time. Starting from the assumption—which is under discussion lately—that this notification was indeed prompt, it took four weeks before the outbreak was declared a PHEIC. Now that we are in the middle of the COVID-19 pandemic, we realize just how long four weeks is. At the same time, of course, we should realize that we know now more than we did then.

The IHR explicitly provides for the possibility of the Director-General of the WHO to make his own decision: “The Director-General shall make the final determination on these matters.”<sup>192</sup> It seems this possibility is especially available when there is no unanimously agreed-upon advice. Although this Article believes it is practice for the Director-General and the Emergency Committee to speak with one voice, this Article would argue that the principle of accountability requires the Director-General to explain why the non-unanimous advice of the Emergency Committee deterred him from invoking his responsibility to decide. Especially considering the speed of the COVID-19's developments,<sup>193</sup> a week's delay caused by this decision of the Director-General should be understood in the context of the arguments the Director-General had at that time not to follow his assessment—as he deemed a meeting of the Emergency Committee necessary—but to follow one opinion of several members the Emergency Committee instead of the another.

Although essential, international human rights and the fundamental freedoms of persons are only an explicit part of the regulation of health measures by administrative authorities of state parties. Article 32 of the IHR on the treatment of travelers offers an example. It reads as follows:

In implementing health measures under these Regulations, States Parties shall treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:

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191. See Heath, *supra* note 28, at 27–33 (arguing that the WHO's policy of deference to states during recent health crises is exemplary of its undisciplined approach to its own emergency power).

192. WHO, *supra* note 6, art. 49 ¶ 5.

193. See generally *Covid-19 Basics*, HARV. MED. SCH., <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics> (Jan. 27, 2021) (noting the rapid speed at which COVID-19 developments are arising).

- (a) treating all travelers with courtesy and respect;
- (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travelers; and
- (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travelers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.<sup>194</sup>

This Article would argue that international human rights and fundamental freedoms could be explicitly included in the WHO's considerations to impose temporary recommendations. Although it mainly concerns party state implementation of health measures, international organizations, such as the Council of Europe,<sup>195</sup> the EU Agency for Fundamental Rights (FRA),<sup>196</sup> the UN Commissioner for Human Rights,<sup>197</sup> and the Organization of American States,<sup>198</sup> and Amnesty International,<sup>199</sup> published documents reflecting their concerns. This Article argues the consequences of WHO recommendations for human rights at the implementation by state parties should be explicitly considered.

## CONCLUSION

Previous pandemics and emergencies already prompted proposals to improve the IHR of the declaration of a PHEIC and the issuance of recommendations. Most of these proposals are related to the level of states' timely or untimely compliance with these recommendations. Amending the IHR with the possibility of a tailor-made stepping scale of measures, which is currently lacking due to the very broad design of the PHEIC,

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194. WHO, *supra* note 6., art. 32.

195. Council of Eur., *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States*, SG/Inf(2020)11 (Apr. 7, 2020), <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

196. Press Release, Eur. Union Agency for Fundamental Rts., Protect Human Rights and Public Health in Fighting COVID-19 (Apr. 8, 2020), [https://fra.europa.eu/sites/default/files/fra\\_uploads/pr-2020-covid-rights-impact\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/pr-2020-covid-rights-impact_en.pdf).

197. *COVID-19 Guidance*, OFF. OF THE UN HIGH COMM'R FOR HUM. RTS. (May 13, 2020), [https://www.ohchr.org/Documents/Events/COVID-19\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf).

198. Press Release, Org. Am. States, OAS Launches Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas (Apr. 7, 2020), [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-032/20](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-032/20).

199. Deprose Muchena, *COVID-19 as an Emergency Human Rights Issue*, AMNESTY INT'L (Apr. 1, 2020, 7:22 PM), <https://www.amnesty.org/en/latest/news/2020/04/covid19-as-an-emergency-human-rights-issue/>.

would be an important improvement. At the same time, this means that the WHO will have to make choices that are more political than just technical, as it has to choose between alternative measures and has to apply proportionality standards.

The gravity of the consequences of the decisionmaking involved in declaring a PHIEC shows the need for legitimacy-improving procedures. Not only is greater openness and transparency of decisionmaking procedures required but also the WHO needs to refine its own internal “administrative law” to promote transparency, accountability, participation, respect for human rights, and principles of global justice, and proportionality and subsidiarity.