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Pandemics, Expertise and Deliberation at the International Level

PEDRO A VILLARREAL

I. Introduction

On 22 and 23 January 2020, a group of 19 people gathered in a conference room in Geneva, Switzerland, some in person and some online, where a closed-door meeting was held. These people have a professional background in medicine, public health or closely related areas.[1] A couple of weeks prior, a new virus had been identified in humans in Wuhan, China, causing major epidemics throughout the country.[2] There were reports that people had been infected in other countries as well. Against this backdrop, the group of 19 had to deliberate on whether an emergency should be declared or not, and what type of health measures were the most appropriate for constraining the spread of the virus. It would serve as a warning for the international community of states, namely that there is a risk of cross-border spread of the virus requiring a coordinated response. Preliminary guidance on the best ways to deal with the threat was also at stake.

Yet the decision by these people also carried pitfalls. Unnecessarily sounding the alarm or recommending excessive measures might lead to a plethora of negative consequences, including fearmongering and an overreaction by authorities from other states. It could unnecessarily disrupt international travel and trade, triggering major economic damage and altering peoples' mobility.

The two-day meeting in Geneva did not yield a definitive result. For reasons initially undisclosed to the public, opinions on the matter were almost evenly split. A slight majority favoured refraining from raising the alarm, mostly because they considered that they didn't have sufficient information to reach a final outcome. Instead, the attendants requested additional data from Chinese authorities.

[1] See the list of attendants at the meeting at www.who.int/groups/covid-19-ihr-emergency-committee.

[2] C Wang, P Horby, F Hayden and G Gao, 'A novel coronavirus outbreak of global concern' (2020) 395 *The Lancet* 470, 470–71.

At a press conference, an announcement was circulated stating that the meeting would reconvene one week later.[3]

On the scheduled date for resuming the Emergency Committee's work, 30 January 2020, more information was available. The virus continued to spread to other countries. The members now unambiguously affirmed in unison: the spread of the new coronavirus should be declared a public health emergency of international concern. They issued this recommendation to the person with the authority to issue the formal declaration, the World Health Organization (WHO)'s Director-General. He correspondingly heeded the Committee's advice and issued the corresponding declaration, a legal power granted by the International Health Regulations (IHR) of 2005.[4] The world was now formally facing a public health emergency of international concern due to the spread of a new coronavirus.

The process of deliberation described above depicts the workings of the WHO's Emergency Committee. It is composed of a handpicked group of experts with the legal mandate to give advice to the Director-General. Although they do not have the ultimate say, in practice their views have been followed without exception.[5]

As proven by the catastrophic events of COVID-19 during 2020, the subject matter is unquestionably one of global concern. Yet the proceedings of the WHO's Emergency Committee raise key questions related to multiple political elements of the decision-making process. Given how Committee members are tasked with such a consequential matter, their engagement with the public at large begs for scrutiny. One of the major questions is whether democratic principles play any role at all. Considering the WHO is a specialised agency of the United Nations, and that its main foundational treaty – the Constitution of the WHO[6] – is the outcome of ratifications by Member States, the link to the public at large is more distant than that of national authorities. Consequently, they may seem not only physically, but also politically remote from most individuals in the world. Yet it is manifest how the ramifications of the subject matter of their deliberations may be felt in the most distant places.

This chapter aims at addressing certain elements of the process of deliberation within the WHO's Emergency Committees. The analysis focuses on the legal dimension, which undergirds deliberations as part of expert decision-making at the international level regarding health emergencies. One caveat is that, although the analytical starting point is legal, the subject of analysis is a consultative ad hoc body not fully equivalent to deliberation within adjudication. Therefore, the

[3] WHO, *Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)* 23 January 2020, 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).

[4] International Health Regulations (Geneva, 23 May 2005), Art 12.

[5] L Mullen et al, 'An analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations' (2020) 5 *BMJ Global Health* 1, 1–9.

[6] Constitution of the World Health Organization (New York, 22 July 1946).

descriptive and the normative premises should not be equated to those of other legal operators, such as judges. Instead, the current text tackles the internal deliberations of an ad hoc expert body which is not the ultimate decision-maker, but rather fulfills a consultative purpose.

II. Unpacking the Mandate of WHO Emergency Committees

WHO Emergency Committees exercise their mandate under the IHR, a legally binding instrument approved by the World Health Assembly in 2005 by its Member States – 194 in total. As they did not explicitly express their opposition ('opt out'), the contents of the IHR became binding for all of them.[7] Another two non-WHO members, Liechtenstein and the Holy See, adhered to the IHR later. The total stands at 196 states parties, which represents a very high degree of inclusiveness. Unlike other international treaties, no ulterior ratification procedure is required, as these regulations enter into force after a designated period of time – in the particular case at hand, after 18 months.[8]

Broadly speaking, the IHR poses three types of legal functions: (1) it creates obligations for states, particularly to notify diseases to the WHO[9] and enhance their national capacities for pandemic surveillance and response;[10] (2) it grants specific rights to persons, mainly travellers, vis-à-vis states, although these rights are not directly actionable under the IHR itself;[11] and (3) it gives the WHO and its ad hoc bodies a specific set of legal powers. For the purposes of this chapter, the focus on the legal mandate of the Emergency Committee means the third legal output is the guiding thread.

In terms of allocation of powers, the IHR's provisions enshrine the leading role of the WHO's Director-General in emergency decision-making.[12] S/he has the maximum authority – ie the last word – to declare a public health emergency of international concern and issue so-called temporary recommendations.[13] As a procedural requirement, before doing so s/he must summon an Emergency Committee and ask for its advice.[14] These are ad hoc bodies composed of

[7] Art 22 IHR.
[8] Art 59 IHR.
[9] Art 6 IHR.
[10] Art 5 IHR.
[11] Arts 32 and 40 IHR.
[12] On the key role of Director-Generals in steering the WHO's policies, T Hanrieder, *International Organization in Time. Fragmentation and Reform* (OUP, 2015) 143–44.
[13] Arts 12 and 15 IHR.
[14] GL Burci and C Feinäugle, 'The ILC's Articles Seen from a WHO Perspective' in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers, 2013) 187.

persons selected from a Roster of Experts which, in turn, is drafted by the WHO Director-General. While not explicitly mentioned in the IHR, the criteria for selecting such a Roster are formulated in WHO regulations and rules on the matter.[15]

The legal mandate of these Committees is further described as: providing views on whether a public health emergency of international concern should be declared; whether the latter ought to be terminated; and proposing temporary recommendations.[16]

Even though, legally speaking, Committees' advice may be disregarded as the Director-General may go her/his own way, in practice this has never occurred. Thus, the advisory body arguably enjoys a very high degree of deference.[17] Conversely, both the summoning and the composition of Emergency Committees fall within the discretion of the WHO Director-General. If s/he does not consider it is necessary to invoke a meeting, or if s/he deems a group of persons to be the most suitable and not others, there is no legal path to challenge this choice. Nevertheless, summoning an Emergency Committee, and declaring a public health emergency of international concern or issuing a particular set of temporary recommendations, is not necessarily an automatic process. On past occasions, Emergency Committees have explicitly recommended not to raise the alarm.[18] To a certain extent, this shows a degree of independence from the WHO Director-General's own assessments of the situation. Therefore, Emergency Committee members are not subject to any restraints related to a preferred outcome. Conversely, the main limitation for decision-making, as seen below, is related to the amount of information provided by the WHO Director-General and states parties.

Declaring an emergency does not lead to mandatory action from its addressees, ie states parties. But the effects of these declarations, as well as their omissions, have been documented in the past, with both hastiness and belatedness being a source of condemnation.[19]

As for the actual proceedings within Emergency Committee meetings, from the outset, the list of agenda items for the meetings is prepared by the WHO Director-General,[20] thus allowing her/him to choose what shall be discussed. Consequently, the Committee does not have a full, self-standing autonomy in how it processes the substantive input. Moreover, the state where the event in question has taken place must be notified of the meeting's date in advance.[21]

[15] WHO, *WHO Regulations for Expert Advisory Panels and Committees.*

[16] Art 48(1) IHR.

[17] Av Bogdandy and P Villarreal, 'Critical Features of International Authority in Pandemic Response. The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order' (2020) *MPIL Research Paper Series No. 2020-18,* 11, papers.ssrn.com/sol3/papers.cfm?abstract_id=3600058.

[18] L Mullen et al, 'An analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations' (2020) 5 *BMJ Global Health* 1, 1–9.

[19] A Kamradt-Scott, 'WHO's to blame? The World Health Organization and the 2014 Ebola outbreak in West Africa' (2016) 37 *TWQ* 401, 409.

[20] Art 49(2) IHR.

[21] Art 49(4) IHR.

The internal proceedings of Emergency Committee are, for the most part, not subjected to external scrutiny. As established in the corresponding rules of procedure, closed-door meetings are a general feature which can be sidelined by the Director-General.[22] As it is a matter of evolving practice, there would no legal impediments for shifting to public deliberations. It is rather a question of policy preferences.

III. Assessing WHO Emergency Committee Deliberations: Between Input and Output

When a collegiate body is entrusted with powers to interpret the application of norms to specific facts, it begs the question of how to assess the ensuing deliberative process. In line with institutional theories,[23] the normative focus can be divided into input and output. Though they are addressed separately, below it is argued how, in actual practice, these two dimensions operate jointly.

In terms of input, the composition of a body is a key determinant of whether the voices that ought to be taken into account are actually heard or not.[24] The lack of participation by major stakeholders is a central issue in representative democracies, where decisions affecting a number of people in very relevant ways are taken by a few. In the case of international organisations composed of states, their distance from individuals in terms of representation is further increased.[25]

As for output, the result of deliberation processes, ie the decision, is the main subject of analysis. It reflects how the role of expertise is taken by public authorities at all levels of governance as a means to justify their own decisions.[26] The question becomes whether such a decision manages to satisfy the expectations of the public at large regarding the goals set upon the body entrusted with legal powers. For instance, if a decision has the input of all relevant stakeholders, but leads to adverse or possibly even counterproductive consequences than what was originally attempted, there is an output deficit. Needless to say, as achieving a particular

[22] Rule 1, *WHO Rules of Procedure for Expert Committees*, Rule 1. The so-far opaque nature of internal WHO meetings has already criticised at length in M Eccleston-Turner and A Kamradt-Scott, 'Transparency in IHR emergency committee decision making: the case for reform' (2019) 4 *BMJ Global Health* e001618.

[23] See the seminal work by F Scharpf, *Governing in Europe: Effective and Democratic?* (1999) 7–9; on a typology of input and output legitimacy in the case of intergovernmental organizations, JA Sholte and J Tallberg, 'Theorizing the Institutional Sources of Global Governance Legitimacy' in J Tallberg, K Bäckstrand and JA Scholte (eds), *Legitimacy in Global Governance. Sources, Processes, and Consequences* (OUP, 2018), 58–65; on the need for input-based democracy in international organizations, C Kreuder-Sonnen, *Emergency Powers of International Organizations* (OUP, 2019) 202–03.

[24] V Rittberger and B Zangl, *International Organization. Polity, Politics and Policies* (Palgrave Macmillan, 2006) 60–61.

[25] S Marks, 'Democracy and international governance' in JM Coicaud and V Heiskanen (eds), *Legitimacy of International Organizations* (United Nations University Press, 2001) 50–52.

[26] S Jasanoff, *Science and Public Reason* (Routledge, 2012) 163.

result is dependent on multiple variables, often beyond decision-makers' control, normative output analyses requires an ex post empirical assessment which may not be immediately available when a decision is taken.

Both of these dimensions, input and output, converge in the case of the WHO Emergency Committees in concrete manners. The WHO's regulations on expert bodies explicitly describe the two core, and at times conflicting, goals related to deliberation in health emergencies at the international level: the need for efficient and expedited decision-making in the face of pressing circumstances, on one hand, and the need for incorporating a diversity of views capable of reflecting multiple local insights to the largest extent possible, on the other hand.[27] Here, two major requirements are stated by the IHR and the regulations: expertise and geographical representation. These two elements are understood in a relatively open matter, as there are no concrete criteria to fulfil.

In terms of expertise, the WHO Emergency Committee is an ad hoc body that shifts its composition each time it is summoned. Nevertheless, all Committees must be composed of persons with 'expertise and experience',[28] though it is not further specified how this can be ascertained. It reflects a technocratic setup, since a person is entitled to have a say if, and only if, s/he holds certain credentials. However, there is no clear-cut definition of expertise for the purposes of Committee Members' mandatory qualifications. The requirement of expertise would seem to exclude alleged 'laypersons', such as elected public officials or civil society representatives without technical credentials, from participating in the decision-making process. But more critical assessments have pointed towards both the oft-unclear distinction between 'experts' and 'non-experts', as well as the element of exclusion per se.[29] Research on expertise as a social construct has shown how there may be different, equally valid perspectives towards the epistemic bases that are given preference.[30] The degree of inclusion will depend on how broadly the question of the needed expertise is formulated.

The goal of broader geographical representation strives for enhanced inclusiveness. It may be posited that it somehow makes up for the initial exclusion created by the expertise clause. When combined with the latter, geographical diversity addresses the need for a more heterogenous composition of Emergency Committees. Such criterion falls in line with growing calls for diversification at the international level. Moreover, the geographical element is visible in the fact that states affected by a disease event have the right to propose their own expert to participate in the deliberations.[31] It reinforces the claim that the potential impact

[27] See above n 15.
[28] Art 48(2) IHR.
[29] D Innerarity, *The Democracy of Knowledge* (Bloomsbury 2013) 90–93.
[30] Jasanoff (n 26) 267–69.
[31] Art 48(2) IHR. According to data from 2020, though all regions of the world are represented in the WHO's IHR Roster of Experts, the highest number of state-appointed experts continues to be from Europe (41% of the global sum). WHO, *Annual report on the implementation of the International Health Regulations (2005). Report by the Director-General*, A73/14, 12 May 2020, para 25.

of decisions by the Emergency Committee on the interests of a state asks for ways to guarantee that the voice of addressees will be heard.

The element of geographical representativeness carries an epistemic relevance as well. It is a tenet of public health that knowledge from factual, on-the-ground circumstances is key for devising proper responses. Therefore, persons with a homogenous geographical origin would be at high risk of missing out central features of diverse settings, whilst taking their own epistemic standpoint for granted. This could result in myopic disregard of factual considerations relevant for public health insights.

In terms of how each Committee Member may weigh in the deliberations, although there is a Chair, there is no formal hierarchy between them. When it comes to the ultimate decision, it is a horizontal process that mostly takes place without a vote, rather through consensus.[32]

The decision itself has so far been unitary, as the Committee speaks to the public in 'one voice' and separate opinions are not set on the record.[33] Even though a divergence of views between members may be reflected on the resulting statement, it is unclear whether disagreements by one or a few of them with the final decision could prevent a decision from being taken. When coupled with the closed-door nature of their deliberations, Emergency Committees effectively operate as a 'black-box'[34] where no insight on their internal proceedings is provided.

IV. Inside the Black-Box: Technocracy and Health Emergencies

Since the entry into force of the IHR in 2005 and at the moment of writing, Emergency Committees have been summoned to face nine different disease events.[35] In turn, public health emergencies of international concern have been declared for six of those events, with accompanying temporary recommendations for every instance.[36] Afterwards, Emergency Committees meet regularly for a status update, since temporary recommendations expire after three months after they are issued.[37] If Emergency Committees are summoned but do not consider an emergency must be declared, they may nevertheless reconvene again if and when the WHO Director-General considers it necessary. In the aegis of COVID-19, the Emergency Committee met on a total of five occasions in 2020.[38]

[32] Rule 6, WHO Rules of Procedure for Expert Committees.

[33] J Heath, 'Global Emergency Power in the Age of Ebola' (2016) 57 *Harvard Intl LJ* 1, 17.

[34] M Eccleston-Turner and A Kamradt-Scott, 'Transparency in IHR emergency committee decision-making: the case for reform' (2019) 4 *BMJ Global Health* e001618.

[35] Mullen et al (n 5) 2.

[36] ibid.

[37] Art 15(3) IHR.

[38] www.who.int/groups/covid-19-ihr-emergency-committee.

The overview of the input and output elements of WHO Emergency Committees posed above can be used for a retrospective analysis of how deliberations have taken place. Expanding upon the metaphor of a 'black box', deliberations taking place within these Committees are based on the input provided by the WHO Director-General – who, in turn, relies heavily upon information furnished by states parties or, exceptionally, to unofficial sources. The deliberations lead to an outcome which must be communicated to all WHO states parties.[39]

The process is mired with opacity. The largest part of information furnished by states parties is generally unavailable to the public at large. Consequently, it is difficult to ascertain what type of data was used to justify a decision. This became ostensible during the first meeting of the Emergency Committee on the then-novel coronavirus in 23 January 2020, where the postponement of the decision until 30 January was based on insufficient information.[40] Yet there was no clear indication of what exactly the missing data was. Instead, the reasons were further expanded through external sources, ie once certain Committee members were interviewed by the media.[41]

As for the outcome, although the decision itself must be communicated, it is not the case of the reasons for its adoption. Here, institutional practice has evolved ever since the IHR entered into force. Since deliberation takes place behind closed-doors, a more extended exposition of the core reasons justifying a decision is all the more important, since deliberation take place behind closed doors. The decision's criteria of validity may not be appraised.

The first summoning of an Emergency Committee occurred at the onset of the H1N1 influenza pandemic in 2009. As there was no pre-established procedure, it fell upon the WHO Director-General, Margaret Chan, to decide how to deal with certain matters related to input and output. As the regulations were not explicit in the matter, a decision was made not to disclose the names of the Members of the Emergency Committee to shield them from potential external influence. Given the stakes at hand, namely that declaring an emergency could benefit pharmaceutical companies, it was deemed to be a reasonable solution. But the choice backfired, in so far as it raised suspicions of concealing potential conflicts of interest.[42] Moreover, considering the criticisms related to the decision to raise the alert,[43]

[39] Art 49(6) IHR.

[40] WHO, *Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, 23 January 2020, 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).

[41] A Joseph, 'WHO postpones decision on whether to declare China outbreak a global public health emergency', *STAT*, 22 January 2020, www.statnews.com/2020/01/22/who-postpones-decision-on-whether-to-declare-china-outbreak-a-global-public-health-emergency/.

[42] D Cohen and P Carter, 'Conflicts of interest. WHO and the pandemic flu "conspiracies"' (2010) 340 *BMJ* c2912.

[43] However, criticisms were raised both against the Emergency Committee's decisions as well as the WHO Director-General's own pandemic declaration, which are two different acts. P Villarreal, 'Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies' (2016) 7 *Goettingen Journal of International Law* 95, 129.

input choices on hiding Members' identities 'tainted' the output as well. The H1N1 episode attested the inextricable link between both dimensions, considering how shortcomings in one spill over to the other.

As for output, the H1N1 emergency declaration displayed the institutional learning curve in applying the IHR. The explanation given for why the decision was made did not clarify why the event fulfilled the legal definition of a public health emergency of international concern.[44] Since deliberations took place behind closed doors, there was no way to ascertain why the spread of the disease constituted a public health emergency of international concern. The legal reasoning related to the interpretation of the IHR's provisions were not sufficiently clear.

In subsequent occasions, despite explicit institutional or legal reforms, the names of members of the Emergency Committee have consistently been disclosed. In a similar vein, more detailed explanations became available on why certain situations did or did not merit declaring an emergency. This shows responsiveness by the WHO and its Director-General, deriving from the amount of discretion when modifying these practices.

Although the input dimension regarding the Emergency Committee has arguably improved after the H1N1 controversy, further criticisms on the output – or, rather, lack thereof – have nevertheless risen. At the beginning of the West African Ebola crisis in 2014, the WHO Director-General's decision not to summon an Emergency Committee after initial reports in March of that year was met with widespread criticism.[45] It is both an input- and output-related problem, referring both to the absence of a Committee deliberating in the first place (input), as well as to a decision which should have been issued earlier (output).

In a similar vein, the Ebola outbreak in the Democratic Republic of the Congo (DRC) of 2018–19 was the subject of stark disagreements amongst commentators in terms of the Emergency Committee's output, particularly its legal interpretation. In three of its meetings, the Committee advised the WHO Director-General not to declare a public health emergency of international concern.[46] The justification provided was not particularly convincing to legal analysts, as it seemed to have departed from the elements comprising the definition of a public health emergency of international concern.[47]

[44] WHO, *Swine influenza. Statement by WHO Director-General, Dr Margaret Chan*, 25 April 2009, www.who.int/mediacentre/news/statements/2009/h1n1_20090425/en/.

[45] WHO, *Implementation of the International Health Regulations (2005). Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response* (2016), A69/21, paras 99–103; S 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' (2015) 386 *The Lancet* 2204, 2210.

[46] A Kamradt-Scott, 'The International Health Regulations (2005). Strengthening Their Effective Implementation and Utilisation' (2019) 16 *IOLR* 242, 262–64.

[47] Art 1 IHR. See on this matter D Fidler, 'To Declare or Not to Declare: The Controversy Over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo' (2019) 14 *Asian Journal of WTO & International Health Law and Policy* 287.

The mandate to give advice on temporary recommendations for states regarding health measures is another instance where the interplay between input and output is at stake. These recommendations are supposed to reflect the expertise of the members of Emergency Committees. Wrongful guidance can undermine the WHO's own credibility as an authority in matters of health.[48] An overarching challenge is how to issue advice amidst a scenario of insufficient data related to a particular disease. Without the latter, reflecting best practices with sufficient accuracy is too tall an order. One notable example was the Zika epidemic in the Americas of 2016. Both the WHO Director-General's decision to declare an emergency itself, as well as the recommendations, reflected both known and unknown facts regarding the disease's effects.[49] For instance, as it was clear that human-to-human transmission was not a major source of contagion, no travel restrictions were recommended.[50]

As espoused below, insufficient scientific data was determinant in recommendations for states regarding COVID-19.

The elements described above shed light on the premises of expert deliberation, namely that the interpretation of available information ought to be undertaken by persons fulfilling a series of personal features. The potential of expertise is thus contingent upon having a robust input dimension consisting of finding 'the right persons' and gathering the best data. Otherwise, the cogs within the black box do not turn. In so far as existing procedures can ensure that both will be available, the decision-making process may be more resilient to criticisms in case of disagreements with the outcome.

V. COVID-19 and the Future of International Deliberation in Health Emergencies

In terms of magnitude, none of the previous public health emergencies of international concern declared by the WHO Director-General can be comparable to the COVID-19 pandemic. With a global death toll in the millions, its dramatic nature is hard to overstate. The dire outlook has put institutional decision-making processes at the international level in the spotlight. As the events were first reported in China, and later spread globally, a looming question is whether something could have been done differently.

[48] As established in Art 2 of the Constitution of the WHO.

[49] D Heymann, 'Zika virus and microcephaly: why is this situation a PHEIC?' (2016) 387 *The Lancet* 719.

[50] WHO, *WHO statement on the first meeting of the International Health Regulations (2005) (IHR 2005) Emergency Committee on Zika virus and observed increase in neurological disorders and neonatal malformations, 1 February 2016*, www.who.int/news/item/01-02-2016-who-statement-on-the-first-meeting-of-the-international-health-regulations-(2005)-(ihr-2005)-emergency-committee-on-zika-virus-and-observed-increase-in-neurological-disorders-and-neonatal-malformations.

The beginning of the pandemic was characterised by the WHO's particularly deferent approach towards the Chinese government.[51] Several possible explanations come to the fore. The organisation had to deal with the delicate balance between asserting its mandate as the international authority in global health, as well as procuring the necessary data for its own decision-making despite the absence of coercive powers.[52]

The episode also demonstrates how different viewpoints on deliberation may be at stake. While an increasing call for transparency and accountability at the international level is directly linked to the normative elements of authority,[53] it also risks falling out of tune with national-level processes where such practices are not as widespread. When facing settings of very limited guarantees of access to information at the national level, the pendulum shifts between promoting democratic principles through enhanced transparency and ensuring the participation of key stakeholders, namely Chinese authorities possessing first-hand information on the virus. Even though it is an international law obligation,[54] the institution tasked with collecting it, the WHO, lacks the means to enforce it.[55]

Insufficient information on the 'new' coronavirus shaped the recommendations issued by the WHO Director-General, on the advice of the Emergency Committee. A core purpose of the IHR is to serve as the legal instrument for devising health responses that are not more restrictive of international travel and trade than what is necessary.[56] Such an estimation can only be done on a case-by-case basis and by assessing the available medical-epidemiological data regarding a particular disease. Whereas some diseases may merit travel or trade restrictions due to their way of transmission, in others these measures have been considered to be counterproductive.[57]

In the case of COVID-19, a temporary recommendation issued at the beginning stood out, namely that all states should abstain from imposing any type of travel restriction.[58] No scientific-epidemiological evidence was quoted for justifying the decision, either because it was not available, due to considerations towards the Chinese government – which would have been the main country at the

[51] P Renninger, 'The "People's Total War on COVID-19": Urban Pandemic Management Through (Non-)Law in Wuhan, China' (2020) 30 *Washington International Law Journal* 63, 85 and 90.

[52] The dilemma is described in P Villarreal, 'The 2019–2020 novel coronavirus outbreak and the importance of good faith for international law' *Völkerrechtsblog*, 28 January 2020, voelkerrechtsblog.org/the-2019-2020-novel-coronavirus-outbreak-and-the-importance-of-good-faith-for-international-law/.

[53] M Zürn, M Binder and M Ecker-Ehrhardt, 'International Authority and its Politicization' (2012) 4 *International Theory* 69; S Quack, 'Expertise and authority in transnational governance' in R Cotterrell and M Del Mar (eds), *Authority in Transnational Legal Theory* (Edward Elgar, 2016) 365.

[54] Art 6 IHR.

[55] GL Burci, 'The Legal Response to Pandemics. The Strengths and Weaknesses of the International Health Regulations' (2020) 11 *Journal of International Humanitarian Legal Studies* 204, 216.

[56] Art 2 IHR.

[57] The Emergency Committee consistently advised against travel restrictions for limiting the spread of Ebola in West Africa. WHO, *Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, A69/21, 13 May 2016, para 69.

[58] See above n 40.

receiving end of such restrictions – or perhaps both.[59] Soon after the WHO issued this advice, a growing list of countries imposing some form of restriction to the cross-border mobility of persons grew exponentially. Eventually, even the Chinese government would impose restrictions of its own.[60] Impediments to travel became the rule, the absence thereof the exception.[61]

Research in the field of medicine and public health has provided empirical evidence on the effectiveness of COVID-19-related travel restrictions – though with several caveats, including their coexistence with other measures.[62] Only a few days after the recommendation had been issued, the WHO revised its formulation.[63] By the next meeting of the Emergency Committee on 30 April 2020, the temporary recommendation to refrain from any sort of travel restriction was modified, now having a more qualified wording.[64]

As time went by, the WHO's declaration of 30 January regarding travel was subjected to increasing scrutiny. National governments with the highest rates of success in mitigating the spread of the virus had also resorted to travel bans from countries with a high rate of virus transmission.[65] Even though deviating from the WHO's recommendations is not a violation of international law per se,[66] such a lack of observance by the addressees undermines the organisation's authority. Taken to the extreme, the goal of sharing 'best practices' may be undermined when these are not accepted as such.

Another hypothesis has to do with the role of non-scientific considerations. While public health and epidemiology should always be at the helm of recommendations issued under the IHR, the *lato sensu* political dimension of measures related to international travel and trade cannot be sidelined. States have a major interest in not being at the receiving end of these restrictions. They are likelier to stop cooperating with the system of disease surveillance if they perceive that the institution, on the basis of the underlying legal regime, does not pay heed to their

[59] 'America and China take their rivalry to the World Health Organisation' *The Economist*, 17 May 2020.

[60] D Fidler, 'COVID-19 and International Law: Must China Compensate Countries for the Damage?' *JustSecurity*, 27 March 2020, www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/.

[61] An account of travel restrictions imposed due to COVID-19 during the course of 2020, though without naming states imposing them, is visible in WHO, *Implementation of the International Health Regulations (2005). Report by the Director-General*, A74/17, 12 May 2021, para 21.

[62] M Chinazzi et al, 'The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak' (2020) 368 Science 395, 395–400.

[63] WHO, 2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan, 4 February 2020, 10.

[64] WHO, 'Statement on the third meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19)', www.who.int/news/item/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19).

[65] Notable examples include China, Taiwan, Singapore and New Zealand. See above n 62.

[66] But see a stronger formulation in R Habibi et al, 'Do not violate the International Health Regulations during the COVID-19 outbreak' (2020), 395 *The Lancet* 664, 664–66.

interests in the matter.[67] This concern is at the helm of the relationship between the WHO and its Member States.

Despite the stakes involved in temporary recommendations under the IHR, which legally require taking into account the interests of affected states in terms of input, the structures of accountability are not equivalent to those at the national level.[68] Being the result of state consent through its representatives,[69] the WHO's officials only indirectly respond to the population at large. As the entity with personality under international law, states overtake oversight functions, including political ones. They may vote every five years on the election of the Director-General,[70] thus having the possibility to steer institutional changes, particularly in the Secretariat. It is a mild form of accountability. Furthermore, although Staff Regulations foresee certain types of disciplinary action in case of wrongdoings,[71] there is no general framework for holding legal responsibility in case states are not satisfied with one of the decisions. If there are claims of a potential breach of international law obligations, a claim could be made that the WHO qua organisation could be legally responsible under the Articles on the Responsibility of International Organizations (ARIO).[72] But this would require reaching an even higher threshold of demonstrating the breach of a legal obligation attributable to the organisation.[73] As long as the procedure is respected, disagreements on the substance would seldom lead to ulterior legal consequences.

VI. Conclusion: Towards Enhanced Pandemic Deliberation at the International Level

When decision-making at the international level rests on the basis of expertise,[74] an ensuing challenge is how to uphold a minimum of democratic principles, a 'thin' conception. Conversely, a 'thick' idea of democracy would include, inter alia,

[67] See already P Dorolle, 'Old Plagues in the Jet Age' (1968) 4(5634) *British Medical Journal* 789, 792.

[68] S Wheatley, 'A Democratic Rule of International Law' (2011) 22 *EJIL* 525, 547–48.

[69] T Christiano, 'Is democratic legitimacy possible for international institutions?' in D Archibugi, M Koenig-Archibugi and R Marchetti (ed), *Global Democracy. Normative and Empirical Perspectives* (CUP, 2012) 80–81.

[70] Rule 108, World Health Assembly Rules of Procedure.

[71] Rules 1075.1 and 110.8, World Health Organization Staff Regulations and Staff Rules.

[72] The argument has been made in M Eccleston-Turner and S McArdle, 'The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak' in M Eccleston-Turner and I Brassington (eds), *Infectious Diseases in the New Millennium* (Springer Nature, 2020) 106–07.

[73] Article 4, Articles on the Responsibility of International Organizations (New York, 9 December 2011).

[74] W Wouter, 'The politics of expertise: applying paradoxes of scientific expertise to international law' in M Ambrus, K Arts, E Hey and H Raulus (eds), *The role of 'experts' in international and European decision-making processes* (CUP, 2014); O Jacob Sending, *The Politics of Expertise. Competing for Authority in Global Governance* (University of Michigan Press, 2015) 44–62.

both equal representation of, and public deliberation by decisions' addressees.[75] Since very few, if any, intergovernmental organisations fulfil this ideal type, the remaining task is how to adjust the normative expectations held towards their role. As the literature on the democratic deficit of international institutions has long underscored, calls for more robust mechanisms of participation therein are by no means recent.[76]

Considering the wide variety of Member States represented therein, a major hurdle is how to find a standard of democratic deliberation in the exercise of international organisations' legal powers that is acceptable to all of their members.[77] Arguments on the agnostic view of international law towards democracy emphasise the need for inclusiveness and non-interference with internal issues in light of sovereignty.[78] Countries lacking democratic credentials at the national level might think twice about joining international institutions adopting standards which they explicitly refuse for themselves.

While the logic of international law's agnosticism towards democracy refers mostly to national political procedures, a similar perspective can be used regarding the functioning of international organisations. As states are still largely the ones at the steering wheel, it begs the question of whether they would be willing to advocate for enhancing the democratic pedigree of international institutions, and to what extent.

Normative debates on pandemic deliberation at the international level face the conundrum of which models would be more acceptable for a larger number of states. Without their acquiescence, the entire global system of pandemic surveillance and response risks collapsing. The high level of inclusiveness leads to a difficult task for creating a sufficient majority supporting any reform. If the likelihood of countries 'opting out' of the IHR regime increases, more ambitious proposals may be discarded.

Lastly, formalising the proceedings of Emergency Committees by instituting rules of procedure would address some pitfalls but create others. It would contribute towards increasing the acceptability of Committees' decisions in the eyes of external observers. But, at the same time, it could lead to creating backdoor deliberations where members are able to sideline procedural constraints.[79] It might inhibit discussions in the pre-scheduled official meetings, as the participants

[75] C Kreuder-Sonnen and B Zangl, 'Which post-Westphalia? International organizations between constitutionalism and authoritarianism' (2015) 21 *European Journal of International Relations* 574–75.

[76] D Archibugi and D Held, 'Editors' Introduction' in D Archibugi and D Held (eds), *Cosmopolitan Democracy* (Polity Press, 1995) 13.

[77] JM Coicaud, 'International organizations, the evolution of international politics, and legitimacy' in JM Coicaud and V Heiskanen (eds), *Legitimacy of International Organizations* (United Nations University Press 2001) 520–21.

[78] T Ginsburg, 'Authoritarian International Law?' (2020) 114 *AJIL* 221, 226 and 259–60.

[79] S Chambers, 'Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation' (2004) 12 *The Journal of Political Philosophy* 389, 409–10.

might not express their views as openly.[80] At the very least, ensuring a franker debate amongst all Committee members and not only smaller groups enhances the value of their consensus. The IHR itself recognises the need to maintain confidentiality. Whatever the case, multiple arguments have been made in favour of increased consistency of the Emergency Committee's interpretation of the IHR, a matter concerning both input – regarding the need to incorporate legal expertise – and output – by issuing certain types of arguments justifying their decisions.[81]

Beyond the path chosen for upcoming improvements – either legal reforms or discretionary shifts in institutional policies – the COVID-19 pandemic has led to core questions of how to ensure that future responses at the international level will not be hampered by eschewed institutional processes. A more harmonious balance of the input and output dimensions of pandemic deliberation at the international level is long overdue.

[80] For empirical insights on this phenomenon, see D Statsavage, 'Does Transparency Make a Difference? The Example of the European Council of Ministers' in C Hood and D Heald (eds), *Transparency: The Key to Better Governance?* (Proceedings of the British Academy, vol 135, 2006) 165 and 177.

[81] See above, n 18.