Who Has the Authority? Opportunities for Reform in Global Health Governance

By Luka Vujašković

I. Introduction

In the wake of the COVID-19 pandemic, the World Health Organization (WHO) and various member states expressed the need for an improved global response to pandemics and other global health threats.[1] In 2021, WHO, the World Health Assembly (WHA), and WHO's intergovernmental negotiating body (INB) proposed a new treaty that would address the unmet needs and pitfalls of global health governance that arose from COVID-19.[2] While negotiations are still ongoing, the proposed negotiating text of the WHO Pandemic Agreement sets out the objective to "prevent, prepare for and respond to pandemics, with the aim of comprehensively and effectively addressing the systemic gaps and challenges that exist in these areas, at national, regional and international levels."[3] Moreover, member states have agreed that the new treaty should be legally binding per the terms of WHO's constitution.[4] At the same time, member states have proposed amendments to reform existing legal instruments.[5] Namely, the International Health Regulations of 2005, which regulates the reporting of and response to public health emergencies of international concern (PHEIC) by member states, has been the focus of such

---

[1] WHO, *COVID-19 Shows why United Action is Needed for More Robust International Health Architecture*, WORLD HEALTH ORGANIZATION (Mar. 30, 2021) https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture [https://perma.cc/E35G-Q63Y] (last visited Jan. 15, 2024).
[2] Joshua Sharfstein, *The Movement for a Global Pandemic Treaty*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Jul. 15, 2022), https://publichealth.jhu.edu/2022/an-international-pandemic-treaty-could-improve-prevention-and-response [https://perma.cc/G7LR-9QYY].
[3] WHO, *Proposal for Negotiating Text of the WHO Pandemic Agreement*, art. 2 ¶ 1, A/INB/7/3 (Oct. 30, 2023), https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf [https://perma.cc/47CC-LXCJ].
[4] *See* Kerry Cullinan, *Future Pandemic Treaty Will be 'Legally Binding', Member States Resolve During 'Honeymoon' Negotiations*, HEALTH POLICY WATCH (Jul. 21, 2022), https://healthpolicy-watch.news/future-pandemic-treaty-will-be-legally-binding/ [https://perma.cc/5GCL-MNQU] (A legally binding treaty is adopted with a two-thirds majority. Provisions of a legally binding treaty comes into force for all member states when accepted in accordance with constitutional processes).
[5] Press Release, WHO, Governments Make Progress Towards Agreeing Amendments to the International Health Regulations (2005) (Oct. 7, 2023), https://www.who.int/news/item/07-10-2023-governments-make-progress-towards-agreeing-amendments-to-the-international-health-regulations-(2005)#:~:text=The%20IHR%2C%20in%20their%20version,by%20the%20COVID%2D19%20pandemic [https://perma.cc/6GU2-8EVQ].

efforts.[6] These proposed amendments and treaty signal an inflection point for WHO and global health governance, a result of the COVID-19 pandemic exposing the weaknesses and limitations of the current system, ushering in growing calls for its reform.

Weaknesses in WHO governance such as insufficient legal authority and financial resources, "call into question the continuing effectiveness of global health law and raise an imperative to develop a bold new pandemic treaty, strengthening WHO through political support, ample funding, and legal powers."[7] As such, two major questions for member states arise: (1) what authority should WHO have during global health emergencies, and (2) would expanded WHO authority ensure strengthened cooperation for global healthy security? Ultimately, WHO is permitted to expand its power if member states choose; however, member states will always retain some ability to express discretion in their respective implementation of reform measures, thus, challenging the aims of global cooperation and reinforcing the need for a unified global response.

Part II of this Note will discuss the legal framework afforded to WHO. It will explore the WHO Constitution and previous WHO instruments as a basis for determining the current authority afforded to the WHO. Part III will evaluate the lessons from the COVID-19 pandemic response and how they impact the debate on expanding WHO authority. Part IV will explore the different ways WHO authority can be adapted through reforms to existing legal instruments and drafting a new treaty altogether. It will also analyze legal instruments from other international organizations and national federal emergency powers, as examples of effective legal mechanisms that can be applied in the context of global health governance. Part V will discuss the key

---

[6] Revision of the International Health Regulations, Resolution WHA58.3, May 23, 2005, Fifty-Eighth World Health Assembly, https://apps.who.int/gb/ebwha/pdf_files/WHA58/WHA58_3-en.pdf [https://perma.cc/2HDQ-3MKF].
[7] Lawrence O. Gostin et al., *Developing an Innovative Pandemic Treaty to Advance Global Health Security*, 49(3) J. OF L., MED., & ETHICS 503, 505 (2021).

considerations for expanding WHO authority through these measures. This Note will conclude with how the current state of global health governance can be improved by further understanding the role of WHO during global health emergencies and taking advantage of the current political momentum for much needed reform.

II. Legal Framework of Global Health Governance

a. WHO Constitution and Organizational Structure

WHO, a United Nations (UN) agency, is an international organization with a legal mandate to "act as the directing and coordinating authority on international health work."[8] WHO governance takes place through the WHA, which is comprised of member states and is the supreme decision-making body; and the Executive Board, which gives effect to the decisions and policies of the WHA.[9] WHO is headed by the Director-General (DG), who is appointed by the WHA on the nomination of the Executive Board.[10] The DG leads the WHO Secretariat, which comprises the technical and administrative personnel of WHO.[11] To exercise its mandate, and thereby its authority, WHO relies on member states to participate in the WHA and cooperate with its collective decisions – something that proves difficult in practice.[12]

The legal framework for WHO's authority is set out in the parameters established in the WHO Constitution – which articulates the various powers of WHO.[13] The WHO Constitution provides various mechanisms to adopt conventions, agreements, regulations, and

---

[8] World Health Organization Constitution, 14 U.N.T.S. 185.
[9] *Governance*, WHO, https://www.who.int/about/accountability/governance [https://perma.cc/ZS8Y-AGEG] (last visited Jan. 15, 2024).
[10] *Id.*
[11] *Id.*
[12] Thomas Lange et al., *Counter-contestation in Global Health Governance: The WHO and its Member States in Emergency Settings*, 131 HEALTH POLICY (2023).
[13] World Health Organization Constitution, 14 U.N.T.S. 185.

recommendations to member states through Articles 19, 21, and 23.[14] In addition to these mechanisms, per Article 20, each member state can take action to accept the adoption or provide reasons of non-acceptance to the Director-General.[15] A treaty adopted under Article 19 provides WHO with its broadest powers, "allow[ing] the WHA to adopt agreements and [conventions] on any matter within WHO's competence and can include measures beyond the scope of Article 21."[16] Theoretically, WHO has the legal authority under its Constitution to implement a legally binding international instrument on any matter that falls under its mandate.

b. Existing Instruments: International Health Regulations 2005 and Framework Convention on Tobacco Control

WHO has previously adopted two treaties that are important to understand when evaluating how the organization exercises its powers in practice. These two treaties are the International Health Regulations of 2005 (IHR)[17] and the Framework Convention on Tobacco Control (FCTC)[18]. These treaties are noteworthy due to their subject matter and scope of legal competence.[19] The IHR is the main treaty the WHO uses to ensure countries are detecting and

---

[14] WORLD HEALTH ORG. CONST. art. 19, 14 U.N.T.S. 185. (Article 19 (conventions): The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes.); *id*. art. 21 (Article 21 (regulations): The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.); *id*. art. 23 (Article 23 (recommendations): The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization).

[15] WORLD HEALTH ORG. CONST. art. 20, 14 U.N.T.S. 185 (Article 20: Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement. Each Member shall notify the Director-General of the action taken, and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance. In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV).

[16] Jenny Lei Ravelo, *Majority of WHO Member States Want Legally Binding Pandemic Instrument*, DEVEX (Jul. 21, 2022), https://www.devex.com/news/majority-of-who-member-states-want-legally-binding-pandemic-instrument-103669 [https://perma.cc/A94N-TB7S].

[17] Revision of the International Health Regulations, Resolution WHA58.3, May 23, 2005, Fifty-Eighth World Health Assembly, https://apps.who.int/gb/ebwha/pdf_files/WHA58/WHA58_3-en.pdf [https://perma.cc/2HDQ-3MKF].

[18] WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166.

[19] Germán Velásquez & Nirmalya Syam, *A New WHO International Treaty on Pandemic Preparedness and Response: Can It Address the Needs of the Global South?*, *in* SOUTH CENTRE POLICY BRIEF NO. 93, 3-4 (2021).

responding to public health emergencies of international concern.[20] The IHR binds state parties pursuant to a procedure adopted under Article 21 of the WHO Constitution.[21] Regulations under Article 21 come into force automatically for all WHO member states, obligating them to reform domestic public health policy to comply with IHR provisions unless those states explicitly notify WHO's DG of any rejection or reservations.[22] Most of these regulations involve developing and improving core capacities to detect, assess, and respond to potential public health emergencies.[23] Furthermore, the IHR specifies the five following minimum core capacities that are required at the local, regional, and national levels: (1) detecting of unexpected morbidity and mortality; (2) reporting of essential information; (3) confirmation and assessment of the status of reported events; (4) notifying the WHO when required; and (5) responding effectively to contain and mitigate the event.[24] Since implementation, the IHR have been used to respond to six public health emergencies of international concern, including COVID-19, over the past fifteen years.[25]

While the IHR was negotiated under Article 21, the FCTC is the only binding convention negotiated under Article 19 of the WHO Constitution.[26] The implications of WHO utilizing this constitutional mechanism as opposed to any other are that the policies implemented to protect public health are substantially wider in scope and more protected from commercial and other vested interests.[27] More specifically, the provision under Article 5.3 of FCTC requires parties to

---

[20] Benjamin M. Meier et al., *The World Health Organization in Global Health Law,* 48 J. FOR L., MED., AND ETHICS 796, 797 (2020).
[21] *Id*. at 797-798.
[22] *Id*.
[23] Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264, 269 (2016).
[24] *Id*.
[25] Lawrence O. Gostin et al., *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 J. FOR L., MED., AND ETHICS 376, 377-78 (2020).
[26] Germán Velásquez & Nirmalya Syam, *A New WHO International Treaty on Pandemic Preparedness and Response: Can It Address the Needs of the Global South?*, 93 SOUTH CENTRE POLICY BRIEF, 4 (2021).
[27] *Id*.

protect policymaking and their implementation from vested interests of the tobacco industry.[28] Despite this stringent binding provision, the FCTC was adopted unanimously by WHA and has now been signed by 177 countries.[29] For this reason, some consider it to be "undoubtedly one of the greatest achievements of WHO in its entire history."[30] Nonetheless, there are still limitations with the FCTC; although many parts are legally binding, compliance by countries is still largely voluntary, resulting in insufficient tobacco control programs.[31] The lack of enforcement mechanisms is something that FCTC and IHR share.[32] Therefore, despite the legally binding aspects of both IHR and FCTC, some of the primary limitations facing WHO governance on global health security are based in a lack of accountability and enforcement mechanisms.[33]

III. Lessons from COVID-19

COVID-19 tested the core legal foundations of the global health system and provided the international community with lessons and takeaways for improving the system moving forward.[34] Some of the main takeaways are: (1) countries failing to adequately notify WHO of public health risks and declare a PHEIC; (2) insufficient coordination of national responses, and (3) a lack of global solidarity for infectious disease prevention, detection, and response.[35] As such, this fragmented response to global health emergencies drives a wedge further between high-income and low-income countries, resulting in a perpetual limitation on early, effective responses thus reinforcing the structural limitations of the capacity of international organizations

---

[28] *See* WHO Framework Convention on Tobacco Control art. 5.3, Jun. 16, 2003-Jun. 29, 2004, 2302 U.N.T.S. 166. (protecting against the tobacco industry's attempts to dilute and weaken effective and life-saving tobacco control legislation, Article 5.3 provides tobacco control advocates and governments an important tool to ensure that public health is prioritized over profits of the tobacco industry).
[29] Velásquez & Syam, *supra* note 26.
[30] *Id.*
[31] Thomas R. Frieden & Marine Buissonnière, *Will a global preparedness treaty help or hinder pandemic preparedness?*, 6 BMJ GLOB. HEALTH, no. 5, 2021, https://gh.bmj.com/content/6/5/e006297 [https://perma.cc/E2AM-SRMV].
[32] *Id*.
[33] Lawrence O. Gostin et al., *Developing an Innovative Pandemic Treaty to Advance Global Health Security*, 49 J. L., MED., & ETHICS 503, 505 (2021).
[34] Gostin et.al, supra note 25, at 376.
[35] *Id.* at 378.

to coordinate with nation states.[36] Moreover, WHO has been unable to rally global solidarity throughout the pandemic because it lacks the legal authority and financial resources to effectively coordinate the global public health response.[37] For this reason, precisely as a result of the COVID-19 experience, many member states are calling for reforms to include increased legal authority and financial resources to WHO.

Notwithstanding these limitations, there have been numerous positive takeaways from the COVID-19 pandemic that are worth noting, including the establishment of the Access to COVID-19 Tools Accelerator (ACT-Accelerator)[38], COVID-19 Global Vaccine Access Facility (COVAX)[39], COVID-19 Technology Access Pool (C-TAP)[40], and the mRNA vaccine technology transfer hub[41]. Collectively, these initiatives have allowed for the sharing of scientific research (especially genome sequences), technology, vaccines, and medicines, as well as the expansion of critical manufacturing capacity.[42] In addition to these more concrete steps, during this time member states proposed amendments to the IHR.[43] WHO could strengthen and expand on these positive outcomes by taking either incremental steps or making substantial reforms that fall squarely within its constitutional mandate.

IV. Reforming and Strengthening WHO

a. IHR Amendments

[36] Velásquez & Syam, *supra* note 26, at 3.
[37] Gostin et al., *supra* note 33, at 505 ("Without the ability to independently verify state reports, inspect conditions on the ground, or to hold states to account, WHO has at times floundered, drawing on 'soft' power [and moral pleas] to guide the global health response.").
[38] WHO, *The Access to COVID-19 Tools (ACT) Accelerator,* https://www.who.int/initiatives/act-accelerator [https://perma.cc/96CF-2XMG] (last visited January 11, 2024).
[39] WHO, *COVAX: Working for Global Equitable Access to COVID-19 Vaccines*, https://www.who.int/initiatives/act-accelerator/covax [https://perma.cc/MHN8-PVCH] (last visited January 11, 2024).
[40] WHO, *WHO COVID-19 Technology Access Pool*, https://www.who.int/initiatives/covid-19-technology-access-pool [https://perma.cc/YJ7S-YPVT].
[41] WHO, *The mRNA vaccine technology transfer hub*, https://www.who.int/initiatives/the-mrna-vaccine-technology-transfer-hub [https://perma.cc/P3X5-QHP7].
[42] *See* WHO, *How the ACT Accelerator is Making a Difference: Impact and Results*, https://www.who.int/initiatives/act-accelerator/impact-and-results [https://perma.cc/UF9C-BR27].
[43] Benjamin M. Meier et al., *A Global Health Law Trilogy: Transformational Reforms to Strengthen Pandemic Prevention, Preparedness, and Response*, 50(3) J. OF L., MED., & ETHICS 625, 626 (2022).

Key provisions of the IHR proved insufficient from the outset of COVID-19.[44] In particular, the provision requiring member states to report to WHO "timely, accurate, and sufficiently detailed information" about emerging diseases and outbreaks, as well as the provision requiring international assistance and cooperation.[45] There were delays in detection of, and response to, the novel outbreak of COVID-19, leading to the rapid spread of the disease globally.[46] The IHR in practice resulted in a lack of clear member state obligations, insufficient political will to adhere to public health guidance, and no accountability for violating the IHR.[47]

Its fundamental limitations are centered around insufficient communication, cooperation, enforcement, and compliance. In response to these limitations, member states have proposed targeted amendments to the IHR, including prompt and transparent reporting of PHEICs, sharing of scientific data and pathogen sequencing, and evidence-informed and rights-based public health measures.[48] Overall, the push for amending the IHR is informed by the concerns and practical barriers in controlling global health threats, and the need for increased trust, reciprocity, and consensus.[49] Even with amendments that allow for more aggressive enforcement and accountability mechanisms, in practice, the IHR is still confined to the original legal framework and will continue to face the limitations endemic to that kind of framework. Thus, strengthening WHO authority requires more than amending existing instruments – it requires something new.

b. WHO Pandemic Agreement

---

[44] Benjamin M. Meier et al., *The World Health Organization in Global Health Law,* 48 J. FOR L., MED., AND ETHICS 796, 798 (2020). (One such provision is Article 6 of the IHR: the obligation to notify the WHO within 24 hours after they identity any event that might constitute a public health emergency of international concern. While the provision itself was not insufficient, there was complete lack of compliance with little to no enforcement or accountability mechanisms in place to correct for it. Other provisions are Articles 5, 12, 43, and 44).

[45] Lawrence O. Gostin et al., *Developing an Innovative Pandemic Treaty to Advance Global Health Security*, 49(3) J. OF L., MED., & ETHICS 503, 505 (2021).

[46] *Id.* at 504.

[47] *Id.* at 504-05.

[48] Lancet Global Health Editorial, *The Future of the International Health Regulations*, 10 LANCET GLOB. HEALTH E927 (2022).

[49] *Id.*

The WHA decided "to establish…an intergovernmental negotiating body [INB] open to all member states and associate members to draft and negotiate a WHO…international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB."[50] Furthermore, the INB indicated that "a legally binding instrument could contain both legally binding and non-legally binding provisions, with the non-binding provisions being, for example, recitals, principles, recommendations or aspirations', and this practice is 'standard both in WHO and with other international instruments'."[51] If there is adoption under Article 19, it is important to note that the convention or agreement ultimately comes into force for each member state when accepted by it in accordance with their constitutional process.[52] This creates a potential barrier to enforcement if there is not enough political will and commitment from member states.

Currently, member states are negotiating a variety of issues that will be included in the WHO Pandemic Agreement.[53] The final text is expected to be completed during the 77th World Health Assembly in May 2024. While there is a lot of uncertainty during the ongoing negotiations, what is certain is that the WHO Pandemic Agreement is an opportunity for a transformation of global health governance by strengthening WHO more than ever before.

c. Borrowing from Other International Organizations and Instruments

---

[50] WHO, *Background information related to the identification by the Intergovernmental Negotiating Body of the provision of the WHO Constitution under which the instrument should be adopted*, A/INB/2/INF./1 (July 11, 2022), https://apps.who.int/gb/inb/pdf_files/inb2/A_INB2_INF1-en.pdf [https://perma.cc/N7PT-9VD8].

[51] *Id.* at ¶ 7 (Background information related to the identification by the Intergovernmental Negotiating Body of the provision of the WHO Constitution under which the instrument should be adopted); Kerry Cullinan, *Future Pandemic Treaty Will be 'Legally Binding', Member States Resolve During 'Honeymoon' Negotiations*, HEALTH POLICY WATCH (Jul. 21, 2022), https://healthpolicy-watch.news/future-pandemic-treaty-will-be-legally-binding/ [https://perma.cc/7QJM-YLWU].

[52] World Health Organization Constitution, *supra* note 14.

[53] PATRICK BUTCHARD, WHAT IS THE WHO PANDEMIC TREATY?, 15-16 (House of Commons Research Briefing 2023), https://researchbriefings.files.parliament.uk/documents/CBP-9550/CBP-9550.pdf [https://perma.cc/E7WJ-5T73].

Global health experts have looked to other international institutions and instruments for inspiration and guidance in reforming global health governance.[54] The Montreal Protocol, considered one of the more successful international instruments since its adoption in 1987, is chief among them.[55] It regulated the production and consumption of ozone depleting substances (ODS) by phasing down the consumption and production of different ODS in a step-wise manner.[56] This proved to be successful not only for mitigating the effects of stratospheric ozone depletion and climate change, but also for international cooperation and commitment.[57] Another noteworthy achievement is the establishment of the Multilateral Fund for the Implementation of the Montreal Protocol which provided robust, long-term, and sustainable financing for capacity building in developing country parties to the protocol so that their annual consumption and production would meet the measures of the protocol.[58]

While the Montreal Protocol is a successful example of an effectively drafted multilateral international agreement, a major reason for its success is the unprecedented level of cooperation and commitment shown by the international community.[59] Another significant reason for the protocol's successful implementation has been its compliance procedure.[60] Countries work with a UN agency to prepare an action plan to return to a state of compliance, and resources from the Multilateral Fund are available for achieving compliance.[61] The level of cooperation and commitment from member states is directly related to the non-punitive and solidary nature of the

---

[54] WHO, *Informal, Focused Consultation on Legal Matters*, https://inb.who.int/home/informal-focused-consultations [https://perma.cc/MT4S-NF7E].
[55] Ian Rae, *Saving the Ozone Layer: Why the Montreal Protocol Worked*, THE CONVERSATION (Sept. 9, 2012), https://theconversation.com/saving-the-ozone-layer-why-the-montreal-protocol-worked-9249 [https://perma.cc/DXN3-V7XC].
[56] *About Montreal Protocol*, UN ENVIRONMENT PROGRAMME (2021), https://www.unep.org/ozonaction/who-we-are/about-montreal-protocol [https://perma.cc/Q3WG-F4BH].
[57] Paul W. Barnes et al., Letter to the Editor, *The Success of the Montreal Protocol in Mitigating Interactive Effects of Stratospheric Ozone Depletion and Climate Change on the Environment*, 27 GLOB. CHANGE BIOLOGY 5681, 5682 (2021).
[58] *See supra* note 56.
[59] Ian Rae, *Saving the Ozone Layer: Why the Montreal Protocol Worked*, THE CONVERSATION (Sept. 9, 2012), https://theconversation.com/saving-the-ozone-layer-why-the-montreal-protocol-worked-9249 [https://perma.cc/NYH6-NDYV].
[60] *Id.*
[61] *Id.*

compliance procedure.[62] Thus, the success of the proposed WHO reforms rides on achieving a compliance procedure that fosters cooperation and commitment of member states and other relevant stakeholders.

Another example of effective enforcement mechanisms and compliance procedures comes from the Paris Agreement, the leading international instrument that is used to fight climate change.[63] The Paris Agreement Implementation and Compliance Committee (PAICC) was established under Article 15 of the Agreement, and its role is to facilitate implementation of and promote compliance with the provisions of the Agreement.[64] The PAICC is guided by principles in the agreement so that it functions in a "manner that is transparent, non-adversarial and non-punitive and paying attention to the respective national capabilities and circumstances of Parties."[65] It is "carefully designed to enhance the effectiveness of the Agreement and the proper functioning of it and to enhance trust and confidence among Parties that should enable them to comply with and to implement the Agreement."[66] WHO may consider establishing a similar committee that could improve the lack of compliance and enforcement by having a centralized structure that can coordinate, guide, and support countries in various technical matters during PHEICs.

d. National Emergency Powers in Federal Systems

Some reforms look to strengthen WHO during PHEICs through the granting of emergency powers.[67] Under federal systems, like the United States, emergency powers are set

---

[62] *Id.*
[63] UNFCC, Key Paris Agreement Implementation and Compliance Work Initiated (Jun. 26, 2020), https://unfccc.int/news/key-paris-agreement-implementation-and-compliance-work-initiated [https://perma.cc/AB28-KBSP].
[64] UNFCC, Paris Agreement Implementation and Compliance Committee (PAICC), https://unfccc.int/PAICC [https://perma.cc/9V8Y-XXXT].
[65] *Id.*
[66] UNFCC, Key Paris Agreement Implementation and Compliance Work Initiated (Jun. 26, 2020), https://unfccc.int/news/key-paris-agreement-implementation-and-compliance-work-initiated [https://perma.cc/2FKX-DTAN].
[67] Belinda Bennett & Terry Carney, *Public Health Emergencies of International Concern: Global, Regional, and Local Responses to Risk*, 25(2) MED. L. REV. 223, 235 (2017).

aside for the federal government to intervene when it is apparent that state governments do not have the capability under their power to address the national emergency.[68] The Stafford Act allows for the President to declare a major disaster or emergency if an event is beyond the combined response capabilities of the State governments.[69] This primarily pertains to FEMA and federal disaster authorities, but there are other examples related to public health.[70] This demonstrates how at the nation-state level, a large, federal system, while still deferring and providing public health authority to the states, accounts for exceptional circumstances by granting authority through federal powers.

Article 12(3) of the IHR grants WHO the institutional power to declare a PHEIC in state's territory against the express wishes of that state party.[71] However, such a PHEIC declaration does not grant WHO additional funding and merely allows WHO to issue temporary recommendations which could go ignored by the state party.[72] Depending on the severity of the outbreak, such back and forth between state parties and WHO could result in devastating public health consequences.[73] This is particularly concerning when there is active transboundary harm occurring.

Perhaps WHO can deepen its role during a PHEIC, by being granted emergency powers that go beyond issuing recommendations in exceptional, disaster-like circumstances. While the likelihood of such powers being granted is very small, there is still value in discussing the

---

[68] *See* 42 U.S.C. § 5170 - Procedure for Declaration.
[69] *See* Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121.
[70] ADMINISTRATION FOR STRATEGIC PREPAREDNESS AND RESPONSE, https://aspr.hhs.gov/AboutASPR/ProgramOffices/Pages/ProgramOffice.aspx [https://perma.cc/644F-3TTJ] (last visited Jan 13, 2024, 9:42 PM).
[71] Pedro Villareal et al., *The World Health Organization's Emergency Powers*, 19 INT'L ORGS. L. REV. 71 (2022).
[72] *Id.*
[73] *Id.*

possibility of such a system that allows for actions to be taken under circumstances that go beyond the capabilities of national governments.

V. Key Considerations

a. Applying the Reforms in Practice

Reforms strengthening WHO authority mainly involve proposals related to surveillance, reporting, and governance.[74] Recognizing the scope and purpose of each proposal and characterizing them properly is essential for WHO to effectively utilize the relevant legal framework to adopt these proposals. The following discussion outlines how WHO can be strengthened through political support, ample funding, and legal powers.

Reforms regarding surveillance and reporting should be directed towards the IHR amendments because the IHR has near-universal adherence as the governing international legal instrument for monitoring and responding to global health security threats. Despite the limitations arising out of the Article 21 framework, this strategy is advantageous for many reasons because the IHR is an established international agreement on these precise issues and it is, for the most part, legally-binding on all member states. More specifically, should these reforms be adopted, they would automatically enter into force for all member states within a prescribed period, unless a state explicitly rejects the amendments or submits a reservation to them.[75] As such, WHO has the legal authority to pursue these kinds of reforms via amendment of

---

[74] Lawrence O. Gostin, *9 Steps to End COVID-19 and Prevent the Next Pandemic: Essential Outcomes From the World Health Assembly*, JAMA HEALTH FORUM (June 10, 2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2781169 [https://perma.cc/E54L-SVNX]; Lawrence O. Gostin et al., *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 J. L. MED. & ETHICS 376, 378 (2020) (Lawrence Gostin has organized these proposals in to the following steps/categories: (1) Prevent Zoonotic Spillover; (2) Rapid Identification and Response; (3) Create a System for Biosafety and Biosecurity Oversight; (4) Empower WHO; (5) Elevate Pandemic Response to High Political Levels; (6) Embed Equity in Planning and Response; (7) Suspend IP Rights and Transfer Tech; (8) Create an International Pandemic Financing Facility; (9) Support Health Workers; (10) Enhance surveillance and mandatory reporting; (11) Transparent PHEIC Deliberations; and (12) Rapidly and publicly monitor state measures. These can be further divided into the following categories: surveillance/reporting (2, 10-12) and governance (1, 3-9)).

[75] Benjamin M. Meier et al., *A Global Health Law Trilogy: Transformational Reforms to Strengthen Pandemic Prevention, Preparedness, and Response*, 50 J. L. MED. & ETHICS 625, 626 (2022).

an already-existing treaty. However, there are still issues of compliance and enforcement that would remain unaddressed. Therefore, reforms of governance are likely required to make significant improvements to global health security.

The WHO Pandemic Agreement provisions will serve to address these governance reforms and other unmet needs. Moreover, the new treaty, through the Article 19 framework, can establish a new legal landscape in global health security and usher in stronger and more robust global health law, paralleling the development of international environmental law. Like climate change, global health issues are increasingly areas of special concern for the world, especially in the wake of COVID-19. As such, the political will for advances in global health law is certainly present. This grants WHO with an opportunity to push for substantial reforms to governance that are squarely within its legal authority.

Initiatives already established by WHO are available to be strengthened through more funding and empowerment. Some of the proposed reforms are to transform ACT-Accelerator, COVAX, and the mRNA vaccine technology transfer hub into permanent end-to-end delivery systems for vaccines, diagnostics, and other essential supplies, along with new inclusive governance involving individuals from low-and-middle-income countries.[76] The "transformed platform would accelerate research and development to achieve equitable access to lifesaving tools."[77]

Other proposed reforms involve the suspending of intellectual property rights and transfer technologies. C-TAP is a temporary "mechanism for sharing intellectual property, knowledge, and data on health technologies for combatting COVID-19" – some call for it to be made

---

[76] Lawrence O. Gostin, *9 Steps to End COVID-19 and Prevent the Next Pandemic: Essential Outcomes From the World Health Assembly*, JAMA HEALTH FORUM (June 10, 2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2781169 [https://perma.cc/E54L-SVNX].
[77] *Id.*

permanent.[78] While this requires World Trade Organization involvement and faces political challenges from certain high-income countries, all of these proposed reforms fall within the authority of WHO. In fact, under Article 5.3 of the FCTC, parties to the agreement (which include 177 countries after unanimous adoption by the WHA) are required to protect policymaking and their implementation from vested interests.[79] By looking to its successful treaty provisions in the past as a proof-of-concept, WHO can not only strengthen its established initiatives by making them permanent, but also protect them from vested interests by adopting language from the FCTC.

The most substantial reform will come from the establishment of new international mechanisms and initiatives. By looking at international environmental law, WHO can push for major reforms that are rooted in international law. The following proposals provide the basis for a major shift in global health law: a Global Disease and Epidemiological Surveillance Hub; a Global Health Implementation and Compliance Committee; a Global Health Threats Council; and an International Pandemic Financing Facility.

The Global Disease and Epidemiological Surveillance Hub is described by Pedro Villareal as, "an international organization capable of processing [epidemiological] reports without a national agenda, or at least not openly, [that] can fulfill an essential technical role in the middle of an emergency."[80] Providing rationale, Villareal explains that a global disease surveillance system that depends on governments sharing their sensitive data directly with each other results in a jigsaw of reports by states.[81] Plus, "any geopolitical hostilities could prove fatal

---

[78] *Id.*
[79] WHO Framework Convention on Tobacco Control, art. 5.3, Jun. 16, 2003-Jun. 29, 2004, 2302 U.N.T.S. 166.
[80] Pedro Villareal, *COVID-19 Symposium: "Can They Really Do That?" States' Obligations Under the International Health Regulations in Light of COVID-19 (Part I)*, OPINIO JURIS (Mar. 31, 2020), http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/ [https://perma.cc/P5PD-AH4X].
[81] *Id.*

for pandemic preparedness." Having "a 'neutral hub' in the form of the WHO makes sense to avoid this."[82]

A Global Health Implementation and Compliance Committee would serve as a committee to ensure implementation and compliance of the provisions of both the IHR and the WHO Pandemic Agreement. The PAICC serves this role in the context of the Paris Agreement and does so in a way "that is transparent, non-adversarial and non-punitive [–] paying attention to the respective national capabilities and circumstances of Parties" to the agreement.[83] The Hub and the Committee could be established as provisions under Article 19. Using the PAICC as a model, WHO can galvanize political support in establishing these organizations by carefully designing them in a way that enhances trust and confidence among member states.

The proposed Global Health Threats Council would not be established by the new treaty, but rather by the UN General Assembly. However, the new treaty can reference the Council and recommend support from member states. The role of the Council would be, "to ensure that high level political leadership and attention to pandemic prevention, preparedness and response are sustained over time, […] and be an inclusive and legitimate voice of authority with the ability to utilize both accountability mechanisms and provide access to financing to ensure preparedness as well as response at the national, regional and global levels."[84] This would address the concerns regarding enforcement, accountability, and compliance, however, there would be no legally-binding obligation to support its establishment because it falls within the authority of the UN General Assembly. In the event of its establishment, the new treaty could require member states to cooperate with the Council through a provision under Article 19.

---

[82] *Id.*
[83] UNFCC, *supra* note 64.
[84] *Terms of Reference for the Global Health Threats Council*, THE INDEP. PANEL: FOR PANDEMIC PREPAREDNESS & RESPONSE (last visited Jan. 13, 2024), https://recommendations.theindependentpanel.org/main-report/07-terms-of-reference/ [https://perma.cc/D5MU-N4HL].

The International Pandemic Financing Facility is a proposed financial mechanism "capable of rapidly financing pandemic response."[85] The facility would have a broad mandate to fund not only pandemic response but also to contain smaller outbreaks and address conditions that spread infections, such as poor sanitation.[86] As the Montreal Protocol Multilateral Fund has demonstrated successfully, having a financing mechanism available for achieving compliance is something that would substantially help lower-income member states in building up their core capacity. Something similar has been established in the form of the World Bank's Financial Intermediary Fund (FIF) for pandemic preparedness.[87] However, this is not under the leadership of WHO and falls outside of their authority, despite having a technical leadership role.[88] Established as a provision under Article 19, the Financing Facility would fall under WHO leadership and would provide WHO full discretion to distribute funds in a manner that is more aligned with their mandate.

Though a majority of member states want a legally binding pandemic instrument,[89] there are many concerns and criticisms regarding the new treaty that are important to note. The most shared concern regards national sovereignty.[90] Generally, the Global North and high-income countries typically do not want the imposition of obligations from international organizations, as they seek to protect their positions of influence.[91] On the other hand, the Global South and low-

---

[85] Lawrence O. Gostin, *9 Steps to End COVID-19 and Prevent the Next Pandemic: Essential Outcomes From the World Health Assembly*, JAMA HEALTH FORUM 1, 3 (2021), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2781169 [https://perma.cc/G933-4KK4].
[86] *Id.* ("A Pandemic Financing Facility could unleash major resources to fuel national and global responses to novel diseases, which could rapidly bring outbreaks under control before they cross borders.").
[87] Press Release, World Bank, New Fund for Pandemic Prevention, Preparedness and Response Formally Established, World Bank Press Release No: 2023/014/HD (Sept. 9, 2022).
[88] *Id.*
[89] Jenny Lei Ravelo, *Majority of WHO Member States Want Legally Binding Pandemic Instrument*, DEVEX (Jul. 21, 2022), https://www.devex.com/news/majority-of-who-member-states-want-legally-binding-pandemic-instrument-103669 [https://perma.cc/6DUJ-9VP5].
[90] *Informal, Focused Consultation on Legal Matters* (World Health Organization web stream Sept. 21, 2022), https://inb.who.int/home/informal-focused-consultations [https://perma.cc/T5LG-FCGG].
[91] *Id.*

and-middle-income countries are sensitive to the legacy of imperialism and colonialism and are generally reluctant and skeptical of obligations from international organizations.[92] While these are genuine and important concerns, the nature of global health security, much like climate change, is that it cannot be adequately addressed at the nation-state level. For that reason, in recognizing these concerns, WHO must design its reforms in a way that emphasizes aggressive international cooperation while maintaining the integrity of national sovereignty.

Other shared concerns regard the scope of the institutional arrangements and implementation mechanisms.[93] In other words, countries of varying degrees of global influence, are concerned about the magnitude of centralization in WHO. Countries with more global influence do not necessarily want WHO to have centralized decision-making, while countries with less global influence might want centralized decision-making to protect elements of equity.[94] By acknowledging other member states and stakeholders, and coordinating with other initiatives, WHO will need to engage in robust discussions to ensure that an aggressive new treaty can be adopted.

There are several reforms that have been raised thus far. Of those reforms presented, the more concrete and specific ones that seek to improve global health governance should be embraced and prioritized the most because of the higher likelihood of success of adoption and cooperation. As was seen with the previous treaties, there are problems with the execution and enforcement of global health law that need to be improved. Namely, compliance and accountability mechanisms, among others. By prioritizing more concrete and specific proposals, exercising what is within their authority, and borrowing from the successes found outside of

[92] *Id.*
[93] *Id.*
[94] *Id.*

global health, WHO has an opportunity to make substantial reforms and much-needed improvements to the existing global health legal infrastructure.

b. Political Feasibility

As discussed above, WHO has the legal authority to act under its Constitution and create a legally binding agreement on any matter within WHO's competence.[95] Therefore, it has an opportunity to make substantial and needed reforms and improvements to the existing global health legal infrastructure. To do so, it must be efficient and clear with its framework in the months and years ahead. What can be achieved through amendments to IHR, should be, and thus the new treaty should complement the IHR and the proposed amendments. However, the new treaty should stand on its own and address the unmet needs still plaguing global health security.

On the one hand, COVID and the subsequent response from WHO member states and non-state actors, alike, demonstrated the limitations of the current governance structure in global health. This collective experience opens the door to controversial yet serious discussions about the role of WHO in the overall governance structure and what its authority is or should be. More specifically, in the context of PHEICs, arguments and proposals are made to expand WHO authority and make it more independent so as to act beyond its boundaries in order to fulfill its mandate.

On the other hand, this raises serious concerns from many others because of the implications on national sovereignty and/or the influence certain member states may have on the current governance structure. As such, a contentious debate is underway about how to approach this topic and whether it has a place in the current objectives that are being sought by the global health community. Specifically, some argue that even though pursuing WHO expansion is not a

[95] Ravelo, *supra* note 89.

realistic objective, there are merits to having debates about whether further WHO expansion is technically feasible as a matter of international law. Others argue that this is a mere distraction and, in fact, will undermine the ongoing efforts to negotiate amendments to the IHR and a new pandemic instrument. The limitations of relying on the nation-state during international public health emergencies underlies the need to at least have ongoing discussions about the role of WHO in exceptional circumstances. However, ultimately these reforms will have to be pragmatic and politically feasible under the current system for concrete change to happen.

c. Opening the Door for a Global Administrative Law Approach

While reforms must account for the current political reality, the door should remain open for more innovative ideas. In his book *The Law of Global Governance*, Eyal Benvenisti discussed the concept of global administrative law as a burgeoning area of law that could improve issues in global governance.[96] Furthermore, scholarship on international public law and international public authority frequently opines on the potential of global administrative law.[97] The underlying premise of global administrative law is based on the notion that global governance is achieved through administrative action, and that such action relies on the increasing use of administrative-law type mechanisms.[98] It allows for the pursuit of public interests by international institutions while allowing for those institutions to be held accountable through due process.[99]

---

[96] *See generally* EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014) (arguing that global governance bodies should be subject to constraints analogous to the checks domestic agencies experience by way of judicial review).
[97] *See* Armin von Bogdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 No. 1 THE EUR. J. OF INT'L L. 115, 116 (2017) (noting the demand for regulation often discussed in academic writing).
[98] *Global Administrative Law*, INST. FOR INT'L L. AND JUST. (last visited Jan. 13, 2024), https://www.iilj.org/gal/ [https://perma.cc/79DT-4ELG] (In particular, these administrative-law mechanisms include transparency, participation, accountability, and review).
[99] *See* Bogdandy, *supra* note 97, at 115, 130.

WHO is considered an international organization that operates under the legal principles of administration when it assesses global health risks and issues warnings.[100] This is important if more robust reforms are being discussed. If WHO authority during a PHEIC, what otherwise could be referred to as "emergency powers," is expanded – then a compromise could be that with expanded powers comes the option to hold WHO legally responsible for failing to exercise emergency powers as well as improper exercise of emergency powers.[101] Though this discussion remains academic and theoretical in nature, this concept could soon be the foundation for a new regime not just in global health law, but international law as a whole.

VI. Conclusion

There is clear pressure from states and the public for WHO to take action in the wake of COVID-19. This piece explains what reforms WHO is legally authorized to pursue, what those proposals entail, and how global health governance will change as a result. WHO can use COVID-19 to rally the international community behind necessary reforms to gain the level of cooperation and coordination that was seen with climate instruments and agreements. These agreements and instruments pushed for cooperation and coordination but in a way that was non-punitive and non-adversarial. WHO may proceed with significant reforms under Article 19, and therefore, take on the moment with a push for a reformed global health legal infrastructure. The concerns regarding sovereignty and political influence will always be present and member states can always make reservations. However, the need for action is too high, and thus, clear leadership and guidance by WHO that is neutral and fair, but strong enough to ensure cooperation and coordination, will pave the way for much needed reform.

---

[100] BENEDICT KINGSBURY & MEGAN DONALDSON, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW: GLOBAL ADMINISTRATIVE LAW ¶ 15 (2011).

[101] *See* Mark Eccleston-Turner & Pedro A. Villarreal, *The World Health Organization's Emergency Powers: Enhancing Its Legal and Institutional Accountability*, 19 Int'l Orgs. L. Rev. 63, 73 (2022).