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COVID-19 PANDEMIC, THE WORLD HEALTH ORGANIZATION, AND GLOBAL HEALTH POLICY

Cosmas Emeziem*

ABSTRACT

The emergence and quick spread of the COVID-19 pandemic has shifted the focus and dynamics of the debates about global health, international law, and policy. This shift has overshadowed many of the other controversies in the international sphere. It has also highlighted the tensions that often exist in international affairs—especially in understanding the place and purpose of international institutions, vis-à-vis states, in the general schema of public international law. Central to the international response to the current pandemic is the World Health Organization (WHO)—a treaty-based organization charged with the overarching mandate of ensuring “the highest possible level of health” for all peoples.¹ Interestingly, the WHO has also become entangled in a foreign policy spat between China and the United States of America. This work explores the public international law aspects of the

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¹ Constitution of the World Health Organization [WHO] art. 1, June 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 [hereinafter WHO Const.].

WHO and why we should focus on its primary policy mandate and avoid unduly heaving the institution into perennial strategic policy games of states. It argues against turning such an illustrious institution, charged with a peculiar mandate, into an arena of zero-sum competitions amongst states. The hope is that this paper will provide crucial insights and assist legal and policy experts in understanding the organization, insulating it from unnecessary strategic games of powerful states, and ensuring the continued and effective delivery of global health policy² through the WHO.

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² In the last two decades, global health has expanded rapidly in the face of international community's needs to respond to transborder communicable diseases, such as the flu and other forms of potentially disruptive health challenges. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8–11 (2005); Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21 *THIRD WORLD Q.* 795, 804 (2000). Also, global health governance is part of the larger schema of global governance, which has become more expansive since the end of the cold war. SLAUGHTER, *supra* note 2, at 15–16, 42; Weiss, *supra* note 2, at 804. In the health sector of global governance, questions regarding access to medicine and intellectual property rights, such as drug patents, are central to the work of the World Health Organization, the World Trade Organization, the World Intellectual Property Organization, and many others. Rochelle Cooper Dreyfuss & César Rodríguez-Garavito, *The Battle Over Intellectual Property Laws and Access to Medicines in Latin America: A Primer on Global Administrative Law, Intellectual Property, and Political Contestation*, in *BALANCING WEALTH AND HEALTH: THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA* 1–2 (Rochelle C. Dreyfuss & César Rodríguez-Garavito eds., 2014). More to this is the heated debate about access to vaccines and how this is entangled with the existing regime of intellectual property rights under the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

I. INTRODUCTION AND BACKGROUND

The COVID-19 pandemic³ has opened a floodgate of dialogues⁴ and reflections⁵ about disaster,⁶ medicine,⁷ infectious diseases,⁸ human rights, and the World Health Organization (WHO)⁹ as an international organization *vis-à-vis* its

³ According to the Johns Hopkins Coronavirus Resource Center, COVID-19 has killed more than 2,900,000 people globally. *Coronavirus Resource Center*, JOHNS HOPKINS UNIV. MED., <https://coronavirus.jhu.edu> (last visited Mar. 29, 2021). There have also been more than 130,000,000 confirmed cases of the virus globally. *Id.* The devastation is immense, and the harm caused to socioeconomic opportunities is yet to be fully articulated. See generally Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AM. J. INT'L L. 687 (2020).

⁴ See, for example, Miriam Tedeschi, *The Body and the Law Across Borders During the COVID-19 Pandemic*, 10 DIALOGUES HUM. GEOGRAPHY 178, 178 (2020), which discusses various theories concerning international travel amid COVID-19.

⁵ See generally Univ. Essex Sch. L. & Hum. Rts. Ctr., Covid-19, Law and Human Rights: Essex Dialogues (Carla Ferstman & Andrew Fagan eds., 2020), <http://repository.essex.ac.uk/28002/1/COVID-19%5ELJ%20LAW%20%5EL0%20HUMAN%20RIGHTS%20%20ESSEX%20DIALOGUES%20%201%20July%202020.pdf>.

⁶ See generally Punidha Kaliaperumal et al., *Application of Health-Care Networking in COVID-19: A Brief Report*, SOC'Y FOR DISASTER MED. & PUB. HEALTH PREPAREDNESS (Oct. 12, 2020), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B977C1FC14134CA1B906120D651E2627/S1935789320003791a.pdf/application_of_healthcare_networking_in_covid19_a_brief_report.pdf.

⁷ See generally Daniel J. Barnett et al., *Reexamining Health-Care Coalitions in Light of COVID-19*, SOC'Y FOR DISASTER MED. & PUB. HEALTH PREPAREDNESS (Nov. 4, 2020), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DA09040D640630301F6A96F187CFE6F2/S1935789320004310a.pdf/reexamining_healthcare_coalitions_in_light_of_covid19.pdf.

⁸ See generally Rosario M. Isasi & Thu Minh Nguyen, *The Global Governance of Infectious Diseases: The World Health Organization and the International Health Regulations*, 43 ALBERTA L. REV. 497 (2005).

⁹ See generally CHARLES CLIFT, CHATHAM HOUSE, WHAT'S THE WORLD HEALTH ORGANIZATION FOR? (2014); David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1086–89, 1099–1103, 1107–15 (1998); and Benjamin Mason Meire et al., *The World Health Organization in Global Health Law*, 48 J. L., MED. & ETHICS 796 (2021), for further discussion on the many roles and responsibilities of the World Health Organization.

overarching mandate in global health policy.¹⁰ It has affected every aspect of human endeavor¹¹—including the operation of international organizations such as the WHO.¹² International Organizations (IOs) or institutions are set up by states¹³ and garbed with mandates to carry out specific duties within the international system.¹⁴ These organizations are treaty-based

¹⁰ For commentary concerning the criticisms of the World Health Organization and the global response to the COVID-19 pandemic, see Lauren Tonti, *The International Health Regulations: The Past and the Present, But What Future?* HARV. INT'L L. J., Apr. 9, 2020, <https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/>; Jason Hoffman & Maegan Vazquez, *Trump announces end of US relationship with World Health Organization*, CNN (May 29, 2020, 7:17 PM), <https://www.cnn.com/2020/05/29/politics/donald-trump-world-health-organization/index.html>; Zachary Cohen et al., *Trump administration begins formal withdrawal from World Health Organization*, CNN (July 8, 2020, 4:53 AM), <https://www.cnn.com/2020/07/07/politics/us-withdrawing-world-health-organization/index.html>; Press Release, White House, Off. Press Sec'y, President Donald J. Trump is Demanding Accountability from the World Health Organization (Apr. 15, 2020) (on file with U.S. Dep't of State archives); Thomas J. Bollyky & David P. Fidler, *It's Time for an Independent Coronavirus Review: The World Health Organization and Its Member States Must Learn From Their Mistakes*, FOREIGN AFFAIRS (Apr. 24, 2020), <https://www.foreignaffairs.com/articles/china/2020-04-24/its-time-independent-coronavirus-review>; and Lawrence O. Gostin, Roojin Habibi & Benjamin Mason Meier, *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 (2020).

¹¹ See, e.g., Amin R. Yacoub & Mohamed S. El-Zomor, *Would COVID-19 Be the Turning Point in History for the Globalization Era? The Short-Term and Long-Term Impact of COVID-19 on Globalization* (Apr. 6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570142 (discussing social, political, legal and economic impacts of COVID-19 on globalization); Maureen A. Weston, *COVID-19's Lasting Impact on the Sports Industry: Financial, Legal, and Innovation*, 61 SANTA CLARA L. REV. 121 (2020) (analyzing financial, legal, and other impacts of COVID-19 on the sports industry).

¹² See generally EDUARDO MISSONI, GUGLIELMO PACILEO & FABRIZIO TEDIOSI, *GLOBAL HEALTH GOVERNANCE AND POLICY* 83–126 (2019), for background information regarding the origins, structure, and functions of various international organizations, including the World Health Organization, and their relation to global health.

¹³ José E. Alvarez, *International Organizations and Their Exercise of Sovereign Powers*, 101 AM. J. INT'L L. 674, 674 (2007) (book review).

¹⁴ Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 1010 (2013); see Jan Klabbbers, *Reflections on Role Responsibility: The Responsibility of International Organizations for*

organizations with mandates¹⁵ that are spelled out in their charters or constitutive instruments.¹⁶ These mandates often determine the spheres of activities to which they must restrict themselves, subject to the overriding superintendence of Member States.¹⁷ In other words, these organizations are special-purpose instruments¹⁸ and platforms through which the international community conceives, designs, and implements

Failing to Act, 28 EUR. J. INT'L L., 1133, 1135 (2017); Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 242 (2004). Sometimes, the term "international organization" is also colloquially used to describe non-governmental organizations, such as Amnesty International and Transparency International, that do not enjoy the same status as the International Organizations like the United Nations (UN) or its Specialized Agencies, such as the WHO, that are created by states with treaty instruments. While organizations like Amnesty International are registered as charities, in different jurisdictions, IOs like WHO are constituted by states through treaties, (constitutions, charters, agreements) and thus have international legal personality. This work's focus is on those institutions constituted by states. See generally Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006), for further explanation on non-governmental organizations and their relationship with international organizations.

¹⁵ See Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORGS. L. REV. 319, 330 (2009).

¹⁶ Catherine Brölmann, *Specialized Rules of Treaty Interpretation: International Organizations*, in OXFORD GUIDES FOR TREATIES 507, 509 (Duncan B. Hollis ed., 2012); see also Peter Quayle, *Treaties of a Particular Type: The ICJ's Interpretative Approach to the Constituent Instruments of International Organizations*, 29 LEIDEN J. INT'L L. 853, 869–70 (2016) (discussing the International Court of Justice's interpretation of the United Nations Charter in adjudicating disputes); Raleigh C. Minor, Professor of Int'l L., Univ. of Va., Address at the Eleventh Ann. Meeting of the Am. Soc'y of Int'l L.: International Organization: Constitution of a Legislative Body (Apr. 26–28, 1917), in 11 PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. AT ITS ANN. MEETING, 1917, at 56, 63–64 (proposing the idea that IOs be empowered to enact binding legislation in certain specified areas). These constitutive acts can also be referred to as constitutions, charters, and agreements.

¹⁷ Jan Klabbers, *The Paradox of International Institutional Law*, 5 INT'L ORGS. L. REV. 151, 165 (2008); Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L. J. 325, 345 (2016).

¹⁸ See Daugirdas, *supra* note 17, at 342–57, who highlights the vertical relationship between international organizations and states such that they are vehicles for the carryout of the intentions of constitutive states.

policies that have a common purpose for all members.¹⁹

Before World War II and the consequent establishment of the UN System,²⁰ few IOs had a worldwide mandate. They included such organizations as the League of Nations,²¹ the Universal Postal Union (UPU),²² and the International Telecommunications Union (ITU).²³ These organizations

¹⁹ See, for example, Andreas Rasche & Georg Kell, *Introduction: the United Nations Global Compact – Retrospect and Prospect*, in UNITED NATIONS GLOBAL COMPACT: ACHIEVEMENTS, TRENDS AND CHALLENGES 1, 4 (Andreas Rasche & Georg Kell eds., 2010), regarding the United Nation's Global Compact, which is a "call to companies to voluntarily align their operations with ten universal principles in the areas of human rights, labour standards, the environment and anti-corruption."

²⁰ MARTIN HILL, *THE UNITED NATIONS SYSTEM: COORDINATING ITS ECONOMIC AND SOCIAL WORK* 11 (1978).

²¹ For background information on the League of Nations, see generally J. L. Brierly & P.A. Reynolds, *The League of Nations*, in 12 NEW CAMBRIDGE MODERN HISTORY: THE SHIFTING BALANCE OF WORLD FORCES 242, 242–68 (C. L. Mowat ed., 2d ed. 1968); *The League of Nations*, 1 INT'L ORG. 141, 141–42 (1947); WILLIAM G. ROSS, *WORLD WAR I AND THE AMERICAN CONSTITUTION* 319–66 (2017); Manley O. Hudson, *Membership in the League of Nations*, 18 AM. J. INT'L L. 436, 436–58 (1924); and F. H. HINSLEY, *POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES* 309–22 (1963).

²² See generally Logan Nagle, *Going Postal: President Trump and the United States' Tumultuous Current Relationship with the Universal Postal Union, and Its Effect on the International Shipment of Opioids*, 8 PENN STATE J. L. & INT'L AFFS. 264, 268, 278–81, 304–11 (2020); and Douglas Howland, *Japan and the Universal Postal Union: An Alternative Internationalism in the 19th Century*, 17 SOC. SCI. JAPAN J. 23, 26–28, 32–36 (2014), for discussions of the history of the Universal Postal Union (UPU), the costs and benefits of being a UPU Member Country, and the UPU's relationship with both the United States and Japan.

²³ For background and insight into the structure and makeup of the International Telecommunication Union, see generally Hugo H. Siblesz, *The International Telecommunication Union and its Legal Structure*, 36 NETH. INT'L L. REV. 364, 364–75 (1989); and J. Henry Glazer, *The Law-Making Treaties of the International Telecommunication Union Through Time and in Space*, 60 MICH. L. REV. 269, 271–73, 279–84 (1962). Even then, many of these pioneer institutions in international law and governance were constituted by European states at inception. DAVID MACKENZIE, *A WORLD BEYOND BORDERS: AN INTRODUCTION TO THE HISTORY OF INTERNATIONAL ORGANIZATIONS* 90 (2010); VICTOR-YVES GHEBALI, *THE INTERNATIONAL LABOUR ORGANISATION: A CASE STUDY ON THE EVOLUTION OF U.N. SPECIALIZED AGENCIES* 20–21 (Roberto Ago & Nicolas Valticos eds., 1989); Pitman B. Potter, Editorial Comment, *The United Nations Charter and the Covenant of the League of Nations*, 39 AM. J. INT'L

enjoyed widespread acceptance and support despite their humble beginnings. The post-1945 era of international law and policy has seen a definitive shift in the nature, number, and reach of international organizations.²⁴ There has been a manifest expansion of these organizations—both in number and subjects of influence.²⁵ In a way, the evolution and expansion of international institutions, “the move to institutions,”²⁶ must be seen as one of the most phenomenal iterations of international law development in the 20th century.²⁷ In that century, they became very relevant in helping humanity achieve some common goals, including international peace and security,²⁸

L. 546, 548–51 (1945).

²⁴ Kal Raustiala, *Institutional Proliferation and the International Legal Order*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 293, 315 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); MALCOLM N. SHAW, INTERNATIONAL LAW 1282–84 (6th ed. 2008); see also Antony Anghie, *International Financial Institutions*, in THE POLITICS OF INTERNATIONAL LAW 217, 229–35 (Christian Reus-Smit ed., 2004) (examining the shift in international financial institutions over time). Many types of institutions have been set up and given mandates in different spheres of international law and policy. The United Nations and its Specialized Agencies are prominent in this regard.

²⁵ See Jan Klabbbers, *The EJIL Forward: The Transformation of International Organizations Law*, 26 EUR. J. INT’L L. 9 (2015), which explores how the theory of functionalism explains the transformation of international organizations in international law.

²⁶ See generally David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 860 (1987).

²⁷ See generally José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324 (2006).

²⁸ See, for example, IAN HURD, INTERNATIONAL ORGANIZATIONS: POLITICS, LAW, PRACTICE 82–86 (3d ed. 2017), which discusses the Security Council, an organ of the United Nations charged with the obligation to maintain international peace and security. See U.N. Charter arts. 39–51.

trade,²⁹ nuclear arms,³⁰ food, and healthcare.³¹ The rapidity of their growth simultaneously added layers of complexity³² to the array of activities and functions that necessitated these organizations' establishment.³³

Against the backdrop of the interdependence of states and societies in our globalized world, IOs have become even more crucial in the overall architecture of global consensus building and policy.³⁴ The entrenchment of IOs is now a common fixture of the international law and policy landscape. Illustrative of this is the role that the WHO has played in the current effort to contain and stop the COVID-19 pandemic.³⁵ Even before the current pandemic, the WHO has been working with member states and many professional bodies to develop a reliable framework for managing and generally combating infectious

²⁹ See Gabrielle Marceau, *From the GATT to the WTO: The Expanding Duties of the Legal Affairs Division in Non-Panel Matters*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO* 244, 244–63 (Gabrielle Marceau ed., 2015), who explains the transition of the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO), and the subsequent strategic and ethical improvements which helped shape modern international trade.

³⁰ Leonard C. Meeker, Assistant Legal Advisor, Dep't of State, Address at the Am. Soc'y of Int'l L. at Its Fifty-First Ann. Meeting: The International Atomic Energy Agency (Apr. 25–27, 1957), in 51 *PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. ANN. MEETING*, 1957, at 155, 155–58; Eric C. Stein, Univ. of Mich. L. Sch., Address at the Am. Soc'y of Int'l L. at Its Fifty-First Ann. Meeting: The New International Atomic Energy Agency (Apr. 25–27, 1957), in 51 *PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. AT ITS ANN. MEETING*, 1957, at 158–70.

³¹ JOSÉ E. ALVAREZ, *THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW* 216 (2017).

³² See generally Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 *ANN. REV. L. & SOC. SCI.* 329, 329–49 (2018).

³³ JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 9 (2005).

³⁴ Alexander Betts, *Regime Complexity and International Organizations: UNHCR as a Challenged Institution*, 19 *GLOB. GOVERNANCE* 69, 71 (2013).

³⁵ Even before Covid-19, scholars had already started articulating the development of international health law and the role of the WHO in formulating policies and instigating the crystallization of norms and practices in this area, which cannot be over emphasized. See Brigit Toebes, *International Health Law: An Emerging Field of Public International Law*, 55 *INDIAN J. INT'L L.* 299, 305–08 (2015); Jennifer Prah Ruger, *Normative Foundations of Global Health Law*, 96 *GEO. L. J.* 423, 424 (2008).

diseases.³⁶ Thus, the WHO's role in the current pandemic arises from the fact that no single nation,³⁷ no matter how rich or powerful, is capable of solving the pandemic problem without collaboration³⁸ with other states.³⁹ It requires a high level of committed cooperation between states and IOs, which may sometimes generate diplomatic⁴⁰ frictions.⁴¹ Therefore, it is

³⁶ DAVID P. FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* 59 (1999); Tsion Berhane Ghedamu & Benjamin Mason Meier, *Assessing National Public Health Law to Prevent Infectious Disease Outbreaks: Immunization Law as a Basis for Global Health Security*, 47 J. L., MED. & ETHICS 412, 413 (2019).

³⁷ See Matiangai Sirleaf, *Responsibility for Epidemics*, 97 TEX. L. REV. 285, 298 (2018), who highlights the critical question of responsibility for epidemics in international law and explains why no single state alone can cope with the increased incidents of epidemics.

³⁸ Dominique Vervoort, Xiya Ma & Jessica G. Y. Luc, *COVID-19 Pandemic: A Time for Collaboration and a Unified Global Health Front*, 33 INT'L J. QUALITY HEALTH CARE 1, 2–3 (2021); see also Gian Luca Burci, *Health and Infectious Disease*, in OXFORD HANDBOOK ON THE UNITED NATIONS 679, 683–87 (Thomas G. Weiss & Sam Daws eds., 2d ed. 2018) (detailing the shortcomings of individual organizations in combatting previous pandemics, which led to a transfer of responsibility from solely the WHO to other international organizations to complement one another and ensure future support for early stages of outbreak response).

³⁹ Press Release, Secretary-General, Stronger Multilateralism Needed as Pandemic Reveals 'Increasingly Interdependent, Increasingly Fragile' World, Secretary-General Tells Economic and Social Council, U.N. Press Release SG/SM/20178 (July 17, 2020); see also World Health Organization [WHO], Report by the Director-General, *Communicable Disease Prevention and Control: New, Emerging, and Re-emerging Infectious Diseases*, at 3, WHO Doc. A48/15 (Feb. 22, 1995) (stressing the importance of a global plan and strengthening global surveillance).

⁴⁰ Heath as diplomacy is a strong theme within the larger legal academy in America. This is hardly surprising considering the American approaches to international law, which is foreign relations oriented. This exceptionalism applies across the board to all aspects of international law. See generally RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. (AM. L. INST. 2017). Fidler considers the shift that has happened in recent years in terms of international health policy to be revolutionary. See David P. Fidler, *Health as Foreign Policy: Between Principle and Power*, 6 WHITEHEAD J. DIPL. & INT'L RELS. 179, 180–82 (2005). For more on American approaches to international law, see MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914* (2004); HATSUE SHINOHARA, *US INTERNATIONAL LAWYERS IN THE INTERWAR YEARS: A FORGOTTEN CRUSADE* (2012); and David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L. J. 417 (1994).

⁴¹ The little spat between the People's Republic of China and the United States Government is a case in point. See Li Yuan, *Ousting U.S. Reporters*,

imperative to refocus the public's mind on the policy foundations and institutional framework of the WHO. That way, it will be easy to show the need to avoid zero-sum strategic games⁴² within the institution. It is hoped that participants in global health policy will be able to eschew zero-sum games and concentrate on the international and imperative duty of ensuring the highest possible standard of health for humankind.⁴³

II. FOUNDATIONS, AND PRINCIPLES OF THE WORLD HEALTH ORGANIZATION

As a treaty-based institution, the WHO is also recognized under Articles 57 and 63 of the UN Charter as a Specialized Agency of the UN.⁴⁴ It was established in 1946 and became fully

China Signals Confidence in Its Own Message, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/business/china-media-reporters-eject.html>; Andrew Jacobs, Michael D. Shear & Edward Wong, *U.S.-China Feud Over Coronavirus Erupts at World Health Assembly*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2020/05/18/health/coronavirus-who-china-trump.html>; Michael D. Shear & Andrew Jacobs, *W.H.O. Members Reject Trump's Demands but Agree to Study Its Virus Response*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/05/19/us/politics/trump-who-coronavirus.html>.

⁴² International Organizations are also exposed to the politics of international law and general international relations. These organizations play a role in who gets what and how that is done amongst nations. This can implicate issues that touch on the most vital aspects of human wellbeing, such as health and transnational management of pandemics. Hence the need to emphasize theories of cooperation rather than zero-sum power politics among nations. For general insights on theories of international law which permeate the adjacent subject of international organizations, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 UNIV. CHI. L. REV. 1113 (1999); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); and Moshe Hirsch, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT'L L. & POL'Y 75 (1998).

⁴³ WHO Const., *supra* note 1, art. 1.

⁴⁴ See Gustav Pollaczek, *The United Nations and Specialized Agencies*, 40 AM. J. INT'L L. 592, 610 (1946). The text of Article 57, which falls under Chapter IX of the UN Charter, which deals with International Economic and Social Cooperation, provides that "[t]he various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into

operational in 1948, pursuant to a series of consultations, diplomatic regulations, and due ratification of its constitution by Member States. The WHO conceptualizes health as being more than just bodily infirmity; it connotes total wellbeing and happiness of all peoples.⁴⁵ This overarching conceptualization of health animates proactive measures that help in investigating potential health challenges and the onset of diseases and drives the agenda for solutions and social engagements. Beyond the clinical work of combating diseases, the WHO also coordinates and channels efforts aimed at public enlightenment and public health enhancement.⁴⁶ The WHO's constitution and other instruments acknowledge "the highest attainable standard of health" as a basic fundamental right "without distinction [regarding] race, religion, political belief, [and] economic or social condition."⁴⁷

The WHO enjoys a widespread membership.⁴⁸ This coming together of states for the common purpose of global health support and governance traces its roots to the International Health Conference held in New York in 1946.⁴⁹ Since then, the WHO has provided states with the necessary platform for solving critical cross-border and transnational health problems such as the COVID-19 pandemic.⁵⁰ In recent years, the WHO

relationship with the United Nations in accordance with the provisions of Article 63." U.N. Charter art. 57, ¶ 1. "Such agencies thus brought into relationship with the United Nations are [generally] referred to as specialized agencies." *Id.* ¶ 2.

⁴⁵ WHO Const., *supra* note 1, pmbl.

⁴⁶ Jennifer Prah Ruger & Derek Yach, *The Global Role of the World Health Organization*, GLOB. HEALTH GOVERNANCE, Apr. 2009, at 1, 2.

⁴⁷ WHO Const., *supra* note 1, pmbl. These WHO principles align with the Universal Declaration of Human Rights (UDHR). See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

⁴⁸ See generally Niels Blokker, *International Organizations and Their Members*, 1 INT'L ORG. L. REV. 139 (2004), for a discussion on the role of members of international organizations.

⁴⁹ Walter R. Sharp, *The New World Health Organization*, 41 AM. J. INT'L L. 509, 509 (1947).

⁵⁰ See Antoine de Bengy Puyvallée & Sonja Kittelsen, "Disease Knows No Borders": Pandemics and the Politics of Global Health Security, in PANDEMICS, PUBLICS, AND POLITICS: STAGING RESPONSES TO PUBLIC HEALTH CRISES 59, 60–61, 63–64 (Kristian Bjørkdahl & Benedicte Carlsen eds., 2019). For one example, see WHO, HANDBOOK FOR PUBLIC HEALTH CAPACITY-BUILDING

has pivoted towards playing a more significant role in combating infectious diseases,⁵¹ and this has yielded a strong collaboration across states when diseases like Ebola⁵² or COVID-19 emerge.⁵³ It has also continued to facilitate global health policy⁵⁴ without distinction regarding race, religion, region, or nationality.⁵⁵ The

AT GROUND CROSSINGS AND CROSS-BORDER COLLABORATION (2020).

⁵¹ See, for example, David P. Fidler, *Influenza Virus Samples, International Law, and Global Health Diplomacy*, 14 EMERGING INFECTIOUS DISEASES 88 (2008), which addresses the WHO's response to issues of international virus sample sharing; Lawrence Gostin, *The International Health Regulations and Beyond*, 4 LANCET: INFECTIOUS DISEASES 606, 606–07 (2004), which highlights the WHO's proposed revisions of the International Health Regulations; FIDLER, *supra* note 36, at 25, which notes the effectiveness of the WHO's creation and promulgation of the International Sanitary Regulations; and Christopher-Paul Milne, *Racing the Globalization of Infectious Diseases: Lessons from the Tortoise and the Hare*, 11 NEW ENG. J. INT'L & COMPAR. L. 1, 34–35 (2004), which promotes the adoption and support of WHO's biosecurity guidelines.

⁵² World Health Organization [WHO], Report by the Director-General, *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*, ¶¶ 6, 9–10, WHO Doc. A69/21 (May 13, 2016); Bruce J. Plotkin & Maxwell C. Hardiman, *Infectious Disease Surveillance and the International Health Regulations*, in INFECTIOUS DISEASE SURVEILLANCE 62, 64–74 (Nkuchia M. M'ikanatha et al. eds., 2d ed. 2013).

⁵³ See generally David P. Fidler, *International Law and Global Health*, 48 KAN. L. REV. 1, 3 (1999); David Fidler, *Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health*, DEP'T OF HEALTH & DEV. FOR THE WORLD HEALTH ORG. [WHO] (2002), https://apps.who.int/iris/bitstream/handle/10665/68936/A85729_eng.pdf?sequence=1&isAllowed=y; and David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT'L L. 325 (2005), which all survey the history of international law relating to infectious disease control as well as the substantive changes that the WHO's International Health Regulations (IHR) have had on international infectious disease law, creating a new regime for addressing public health issues.

⁵⁴ See David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 33 J. L., MED. & ETHICS 85, 93 (2006).

⁵⁵ See generally OBLJIOFOR AGINAM, GLOBAL HEALTH GOVERNANCE: INTERNATIONAL LAW AND PUBLIC HEALTH IN A DIVIDED WORLD 64–70 (2005). Scholars have recognized the emergent field of global health governance as indicative of this overarching need for health policies that go beyond nation states. See Lawrence O. Gostin & Allyn L. Taylor, *Global Health Law: A Definition and Grand Challenges*, 1 PUB. HEALTH ETHICS 53, 53 (2008).

WHO also aids many developing countries⁵⁶ to leverage expertise, aid, healthcare support, and other technical engagements essential to their well-being and flourishing.⁵⁷ Thus, the WHO's collaborative platform enhances the epidemic and pandemic response and management capacity of these states in ways that would have been impossible if they were to act alone. In the COVID-19 era, where many state economies were devastated, the value of this shared responsibility⁵⁸ against pandemics such as COVID-19 through the WHO is self-evident.⁵⁹

It is the Constitution of the WHO that governs the relationship between the organization and Member States.⁶⁰ It

⁵⁶ Highly indebted poor countries have the more difficult challenge of managing pandemics because of not only limited infrastructure but also the funding capacity to meet the demands of such sudden and sometimes fast spreading diseases. See Peter S. Goodman, *How the Wealthy World Has Failed Poor Countries During the Pandemic*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/01/business/coronavirus-imf-world-bank.html>. The WHO often provides the needed support for these countries in negotiating for aid and health care.

⁵⁷ WHO's work with countries, *What WHO does in countries*, WORLD HEALTH ORG., <https://www.who.int/country-cooperation/what-who-does/en/> (last visited Apr. 2, 2021).

⁵⁸ For an example on the implementation of shared responsibility, see Sirleaf, *supra* note 37, at 341.

⁵⁹ Article 79 of the WHO Constitution provides that "States may become parties to th[e] Constitution by: (i) signature without reservation as to approval; (ii) signature subject to approval followed by acceptance; or (iii) acceptance." WHO Const., *supra* note 1, art 79(a)(i)–(iii). Acceptance is accomplished by the formal deposit of an instrument with the Office of the Secretary-General of the United Nations. *Id.* art 79(b). Following this procedure, the WHO has today grown to include more than 190 Member States. World Health Organization [WHO], *WHO Presence in Countries, Territories and Areas*, ¶ 4, WHO Doc. EB144/INF./4 (Jan. 25, 2019), https://apps.who.int/gb/ebwha/pdf_files/EB144/B144_INF4-en.pdf. Beyond the full Member States, the WHO allows territories that are either non-self-governing or that do not control their own foreign policy to become associate members of the WHO. See *id.* Today, Puerto Rico and Tokelau—both non-self-governing territories of the United States and New Zealand—are the two associate members of the WHO. *Id.*

⁶⁰ See generally Sharp, *supra* note 49. The Constitution, which was adopted in June 1946, has undergone four amendments—resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23—which came into effect on February 3, 1977, January 20, 1984, July 11, 1994 and September 15, 2005

comprises 19 Chapters and 82 Articles encapsulating the vision and rules regulating the WHO's activities and operations and is the largest international health policy body on the planet.⁶¹ More importantly, the Constitution accords legal personality to the WHO. Together with the UN's other specialized agencies, the Constitution's legal character is guaranteed to enable it to fulfill the functions as specified or implied by their constitutive instruments.⁶² The ICJ has espoused the WHO's legal personality in the case of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.⁶³

respectively. WHO Const., *supra* note 1, at 1 n.1. Some of these revisions have been critiqued for further intruding into the traditional domain of state sovereign powers. See Eric Mack, *The World Health Organization's New International Health Regulations: Incursion on State Sovereignty and Ill-Fated Response to Global Health Issues*, 7 CHI. J. INT'L L. 365, 366 (2006); David P. Fidler, *Revision of the World Health Organization's International Health Regulations*, AM. SOC'Y INT'L L.: INSIGHTS (Apr. 16, 2004), <https://www.asil.org/insights/volume/8/issue/8/revision-world-health-organizations-international-health-regulations>.

⁶¹ See generally WHO Const., *supra* note 1.

⁶² Different schools of thought have arisen in consideration of this legal status of international organizations. James D. Fry, *Rights, Functions, and International Legal Personality of International Organizations*, 36 B.U. INT'L L. J. 221, 228 (2018). First is the objective personality school, which argues that once the international organization is created by states, there emerges an objective legal personality of the organization. *Id.* Thus created, the organization automatically acquires a legal personality capable of being so recognized not only by member states of the organization but also by the general public. *Id.* at 228–29. This enhances certainty and this personality is opposable to all states as an objective criterion. See *id.* Second, the subjective school of thought insists that the legal personality of an international organization must be found within the text of the treaty or constitutive instrument establishing the organization. *Id.* at 228. It is reluctant to accommodate implied or functionally driven powers. See *id.* This is often used to hedge against “mission creep” or incremental expansion of the powers of an international organization. See *id.* The moderate school conceives the legal personality of an international organization as either expressly provided or impliedly possessed. *Id.* at 229. It is also the case that legal personality is considered as a unit. See *id.* Thus, when an international organization binds itself to a treaty or any other form of agreement, it also binds all its organs and subsidiaries. See *id.* For a full analysis on legal personality in international law, see ROLAND PORTMAN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* (2010).

⁶³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 21 (July 8).

III. THE WORLD HEALTH ORGANIZATION AND PANDEMICS

In line with its mandate, the WHO is always at the frontline of the fight against all kinds of diseases, including pandemics⁶⁴ like COVID-19. Over the years, the organization has developed great human and institutional capacity to strategically deal with emerging diseases—while preparing for new threats from anywhere around the world. It has developed archives, research, guidelines,⁶⁵ management plans,⁶⁶ networks, and partnerships,⁶⁷ that can be revved up at short notices in order to fulfill its objective of *providing the highest attainable standard of health for all peoples*. In the face of the current struggle to contain and eliminate the ongoing deadly pandemic, the strategic position of the organization in global health policy has manifested once more.

The method the WHO used to address this and other pandemics is to produce *a strategic action plan*.⁶⁸ These plans

⁶⁴ See *Pandemic Influenza Risk Management: A WHO Guide to Inform & Harmonize National & International Pandemic Preparedness and Response*, WORLD HEALTH ORGANIZATION [WHO] (2017), https://www.who.int/influenza/preparedness/pandemic/PIRM_update_052017.pdf, which outlines national influenza preparedness and response plans for all countries.

⁶⁵ See, for example, WHO & PATIENT SAFETY, WHO GUIDELINES ON HAND HYGIENE IN HEALTH CARE (2009), which provides “hospital administrators and health authorities with . . . specific recommendations to improve and reduce transmission of pathogenic microorganisms to patients and [hospital care workers]”; and World Health Org. [WHO], Report by the Secretariat, *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, annex, ¶ 6, WHO Doc. EB126/4 (Dec. 10, 2009), which summarizes the finalization of guidelines for the development of a vaccine sharing network.

⁶⁶ See generally WORLD HEALTH ORG., WHO GUIDANCE FOR SURVEILLANCE DURING AN INFLUENZA PANDEMIC (2017) (providing Member States with significant guidance for managing an influenza outbreak).

⁶⁷ For example, the Asia Pacific Strategy for Emerging Diseases and Public Health Emergencies (APSED III) was formulated by the WHO in collaboration with Member States from the Asian region to enhance collaboration and strengthen preparedness and responses to outbreaks of public health emergencies. See WHO, ASIA PACIFIC STRATEGY FOR EMERGING DISEASES AND PUBLIC HEALTH EMERGENCIES (2017).

⁶⁸ See generally Benjamin Mason Meier et al., *Examining National Public Health Law to Realize the Global Health Security Agenda*, 25 MED. L.

are often aimed at reducing exposure to the disease, providing for and enhancing timely warning protocols, operationalizing containment strategies, providing for capacity building to cope with the pandemic, and coordinating global scientific research⁶⁹ and development.⁷⁰ Thus, upon the onset of the COVID-19 pandemic, the WHO produced and publicized a *Strategic Preparedness and Response Plan*.⁷¹ This plan was aimed at providing a holistic approach to managing the pandemic and all other matters related to it.⁷² It is also complemented by the *Global Humanitarian Response Plan*⁷³ that is meant to cater to situations of fragility—involving refugees and internally displaced persons around the world.⁷⁴ Central to the strategic plan was implementing the transmission of the pandemic by identifying, isolating, and optimizing care for those already infected.⁷⁵

REV. 240, 240–69 (2017) (discussing the background, development, and framework of the Global Health Security Agenda—an action plan developed by national governments and international organizations, including the WHO, to address infectious disease threats).

⁶⁹ See, for example, World Health Org. [WHO], Rep. of the Special Session of the Pandemic Influenza Preparedness Framework Advisory Grp., *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, WHO Doc. A69/22 Add.1 (Apr. 1, 2016), https://apps.who.int/iris/bitstream/handle/10665/252678/A69_22Add1-en.pdf?sequence=1&isAllowed=y, which addresses the Pandemic Influenza Preparedness (PIP) Framework—a mechanism developed by Member States and used to bring Member States, industry, other stakeholders, and WHO together to design a global preparedness and response plan for addressing the influenza pandemic.

⁷⁰ See generally World Health Org. [WHO], *WHO Strategic Action Plan for Pandemic Influenza*, WHO Doc. WHO/CDS/EPR/GIP/2006.2 (2007), https://www.who.int/csr/resources/publications/influenza/StregPlanEPR_GIP_2006_2.pdf?ua=1.

⁷¹ See generally 2019 Novel Coronavirus (2019-nCoV): *Strategic Preparedness and Response Plan*, WORLD HEALTH ORG. [WHO] (2020), <https://www.who.int/docs/default-source/coronaviruse/srp-04022020.pdf> [hereinafter WHO COVID-19 Response Plan].

⁷² See *id.* at 1.

⁷³ U.N. Off. for the Coordination of Humanitarian Affs., *Global Humanitarian Response Plan COVID-19*, at 5, 24–28 (Apr.–Dec. 2020), <https://www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf> [hereinafter OCHA COVID-19 Glob. Response Plan].

⁷⁴ *Id.* at 4–5.

⁷⁵ *Id.* at 12.

Early and consistent communication to the general public is deemed an essential pandemic preparedness and management technique.⁷⁶ This is intended to clearly communicate the critical risks, hence alleviating the socioeconomic impact of the disease. This multi-sectoral up-to-date strategic communication approach⁷⁷ has ensured that no gap is left in the effort to contain and eliminate the deadly pandemic. Indeed, the Director-General's consistent briefings and calls to action have been central to the efforts of states and regional organizations in responding to the disease.

Indeed, the WHO has also produced and continued to use a strategic communication guideline.⁷⁸ The guideline emphasizes assessment, coordination, transparency, listening during an outbreak, communication evaluation, and constructing an emergency communication plan.⁷⁹ This proved critical to the effective management of pandemics,⁸⁰ and the WHO guide provides a robust template for governments, regional organizations, and other collaborative agencies in the fight against epidemics and other forms of infectious diseases.⁸¹

⁷⁶ See Eric E. Johnson & Theodore C. Bailey, *Legal Lessons from a Very Fast Problem: COVID-19*, 73 STAN. L. REV. ONLINE 89, 90–96 (2020), who argue in favor of free flow of information as an important strategy for managing the outbreak of pandemics like COVID-19.

⁷⁷ WHO COVID-19 Response Plan, *supra* note 71, at 5. In a nutshell, the WHO, in response to the disease, established an international coordinating center to provide technical support and partnerships in support of countries. *Id.* at 5–6. It also accelerated and gave priority to research about the disease. *Id.* at 5, 17. This has been the preoccupation of the WHO since the onset of the disease. *Id.* at 1.

⁷⁸ See generally WHO, WORLD HEALTH ORGANIZATION OUTBREAK COMMUNICATION PLANNING GUIDE (2008) [hereinafter WHO OUTBREAK COMMUN. PLAN. GUIDE].

⁷⁹ *Id.* at 8–28.

⁸⁰ See generally WHO, COMMUNICATING RISK IN PUBLIC HEALTH EMERGENCIES: A WHO GUIDE FOR EMERGENCY RISK COMMUNICATION (ERC) POLICY AND PRACTICE 10–15 (2017).

⁸¹ Experts are in agreement that effective health communication is indispensable to the management of pandemics. See generally Abbigail J. Tumpey, David Daigle & Glen Nowak, *Communicating During an Outbreak or Public Health Investigation*, in CDC FIELD EPIDEMIOLOGY MANUAL 243 (Sonja A. Rasmussen & Richard A. Goodman eds., 2019); Barbara Reynolds & Sandra Crouse Quinn, Commentary, *Effective Communication During an Influenza*

More so, the WHO has remained on the frontlines in terms of the ongoing efforts aimed at producing vaccines for the disease, distributing them, and ensuring that they are properly administered.⁸² Because of the great capacities of the WHO, it not only has a team of researchers that work on vaccine development, standardization and regulation, it also advises drug regulatory authorities, health departments, and officials around the world on vaccines.⁸³ Without the WHO's effective involvement, many countries and populations around the world will face the risk of either lack of access or inappropriate use of drugs—especially vaccines.⁸⁴ In times of uncertainty and rapidly evolving pandemics, the WHO plays a critical role in keeping the general public informed about vaccine development, access,⁸⁵ and application. The vital aspects of the WHO's work—

Pandemic: The Value of Using a Crisis and Emergency Risk Communication Framework, 9 HEALTH PROMOTION PRAC. 13S (2008); BARBARA REYNOLDS & MATTHEW SEEGER, CRISIS AND EMERGENCY RISK COMMUNICATION (Ctr. for Disease Control & Prevention et al. eds., 2014). See also VINCENT T. COVELLO, RISK AND CRISIS COMMUNICATION: 77 QUESTIONS COMMONLY ASKED BY JOURNALISTS DURING A CRISIS (2002), <http://www.nwcphp.org/docs/pdf/journalist.pdf> (outlining specific questions for effective risk and crisis communication).

⁸² See, for example, Geoffrey Makenga et al., *Vaccine Production in Africa: A Feasible Business Model for Capacity Building and Sustainable New Vaccine Introduction*, FRONTIERS PUB. HEALTH, Mar. 2019, at 1, 3, which highlights the WHO's assessment of Africa's National Regulatory Authorities (NRAs) in 2010, which contributed to substantial vaccine development. For example, in collaboration of public and private organizations, such as UNICEF, GAVI, and the Pan-American Health Organization, the WHO has set up a COVAX facility with the aim of accelerating the development, manufacture and equitable distribution of vaccines to every country. The rationale is that unless every country has a fair access to the vaccine, no country will be immune to the consequences of the disease. For many small countries, this is very helpful because unlike the United States and other OECD countries, they have limited capacities for the development, manufacture, distribution and effective administration of the COVID-19 vaccines. See COVAX, *Working for global equitable access to COVID-19 vaccines*, WHO, <https://www.who.int/initiatives/act-accelerator/covax> (last visited May 17, 2021).

⁸³ Makenga, *supra* note 82, at 3.

⁸⁴ See *id.* at 3–4.

⁸⁵ Currently, there is a significant push for inclusive access to the COVID-19 vaccine and the WHO is a critical partner in this effort. See Ann Danaiya Usher, *COVID-19 Vaccines For All?*, 395 LANCET 1822, 1823 (2020). Without this effort to make the vaccine accessible to all countries—rich and

especially in advising states and partners—are registration of products, inspections and licensing of manufacturers, inspection and licensing of distributors, continued surveillance, and authorization of clinical trials.⁸⁶

Interestingly these efforts can also run into diplomatic tensions between Member States themselves, on the one hand, and between the WHO and Member States on the other hand.⁸⁷ The interests of sovereigns and the limits of modest international law has come to the fore once more.⁸⁸ One significant example is the China-US relationship within the WHO and the impact it may be having on the implementation of the strategic plan to stop the COVID-19 pandemic. At several points, the United States Government has accused China of not telling the whole truth about the pandemic's emergence and transmission.⁸⁹ Some policy commentators have also accused the WHO of whitewashing the China story.⁹⁰ Others have accused China of failing to uphold its responsibilities⁹¹ under the

poor—it will be difficult for many communities around the world to have access to this life saving drug. See Lawrence O. Gostin, Safura Abdool Karim & Benjamin Mason Meier, *Facilitating Access to a COVID-19 Vaccine through Global Health Law*, 48 J. L., MED. & ETHICS 622, 623 (2020).

⁸⁶ Dep't of Vaccines & Other Biologicals, World Health Org. [WHO], *Regulation of Vaccines: Building on Existing Drug Regulatory Authorities*, at 9, WHO Doc. WHO/V&B/99.10 (Aug. 1999), https://apps.who.int/iris/bitstream/handle/10665/65968/WHO_V-B_99.10_eng.pdf?sequence=1.

⁸⁷ See generally Quintana & Uriburu, *supra* note 3, who argue that the crisis and tension arising from the COVID-19 pandemic could be useful in helping develop norms of international law that will govern a post COVID-19 era of international law.

⁸⁸ See Ugo Pagallo, *Sovereigns, Viruses, and the Law: The Normative Challenges of Pandemic in Today's Information Societies*, 37 L. CONTEXT 11, 15–21 (2020).

⁸⁹ See Jeff Stein et al., *US officials crafting retaliatory actions against China over coronavirus as President Trump fumes*, WASH. POST (Apr. 30, 2020, 6:25 PM), <https://www.washingtonpost.com/business/2020/04/30/trump-china-coronavirus-retaliation/>; see also Sebastián Guidi & Nahuel Maisley, *A Trillion Dollar Question: Who Should Pay for COVID-19?*, 96 N.Y.U. L. REV. 3, 5, 32 (forthcoming 2021).

⁹⁰ Selam Gebrekidan et al., *In Hunt for Virus Source, W.H.O. Let China Take Charge*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2020/11/02/world/who-china-coronavirus.html>.

⁹¹ James Kraska, *China Is Legally Responsible for COVID-19 Damage*

International Health Regulations (IHR).⁹² The Chinese government has denied all of these allegations.⁹³ Instead, it continued to maintain that it followed the standard procedure for responding to global health challenges under the WHO's auspices.⁹⁴

The legal quandary that exists currently is the extent of the obligation of a state in international law following the outbreak of pandemics in its territory. More so, the rapid nature of the transmissions that often follow epidemics—especially in this age of people's fast global movement—is a prime obstacle to accountability. As we have seen, finding out the real moment of the outbreak is critical. That is why the WHO insists on transparency and early reporting of the outbreak of pandemics.⁹⁵ The Trump administration did not seem satisfied, and

and Claims Could Be In The Trillions, WAR ON THE ROCKS (Mar. 23, 2020), <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>.

⁹² See generally WHO, INTERNATIONAL HEALTH REGULATIONS (2005) 12 (2d ed. 2008) [hereinafter WHO INT'L HEALTH REGS.] ("Each State Party shall notify WHO, by the most efficient means of communication available . . . and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory . . .").

⁹³ See Damien Cave & Amy Qin, *China Mounts Aggressive Defense to Calls for Coronavirus Compensation*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/world/asia/coronavirus-china-compensation.html>.

⁹⁴ See *id.*; *Those who want China to pay virus compensation are daydreaming – diplomat*, REUTERS (May 24, 2020, 3:52 AM), <https://www.reuters.com/article/us-china-parliament-coronavirus-lawsuit/those-who-want-china-to-pay-virus-compensation-are-daydreaming-diplomat-idUSKBN23007O>. For a detailed timeline of events occurring between December 31, 2019, and July 10, 2020, concerning the WHO's response to the emerging virus in China, see Morgan Winsor, *Timeline: WHO's response to the coronavirus pandemic and the ensuing controversy*, ABC News (Aug. 15, 2020, 4:00 AM), <https://abcnews.go.com/Health/timeline-response-coronavirus-pandemic-ensuing-controversy/story?id=71690767>.

⁹⁵ WHO INT'L HEALTH REGS., *supra* note 92, at 12; see generally P. O'Malley, J. Rainford & A. Thompson, *Transparency During Public Health Emergencies: From Rhetoric to Reality*, 87 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 614 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2733257/pdf/08-056689.pdf> (explaining the WHO's rationale behind transparency).

threatened to withdraw from the WHO.⁹⁶ Equally, Washington continued to suggest that the name given⁹⁷ to the pandemic should have been something else suggesting the origins of the disease instead of COVID-19 as it is currently named.⁹⁸ The WHO insists that it has since abandoned the practice of naming diseases after the places where such diseases first occurred because of the potential unintended negative consequences⁹⁹ arising from this practice. The emergence of the Biden Administration seems to have reduced the tension despite the outstanding concerns about transparency and due compliance with WHO regulations by state parties.¹⁰⁰

Many have seen the contestation between China and the United States as an extension of their current global strategic rivalry and, as such, consider it unhelpful.¹⁰¹ The increasing significance of China as a force in global policymaking—in trade, finance, infrastructural development, supply chains, and military capacity—significantly influences how the rest of the world, especially the US and other Security Council members,

⁹⁶ All Things Considered, *President Trump Announces That U.S. Will Leave WHO*, NPR (May 29, 2020, 4:02 PM), <https://www.npr.org/2020/05/29/865685798/president-trump-announces-that-u-s-will-leave-who>.

⁹⁷ See Fernando Prieto-Ramos, Jiamin Pei & Le Cheng, *Institutional and News Media Denominations of COVID-19 and its Causative Virus: Between Naming Policies and Naming Politics*, 14 DISCOURSE & COMMUN 635, 636 (2020), for the rationale behind the naming of COVID-19.

⁹⁸ See Zaria Gorvett, *The tricky politics of naming the new coronavirus*, BBC FUTURE (Feb. 16, 2020), <https://www.bbc.com/future/article/20200214-coronavirus-swine-flu-and-sars-how-viruses-get-their-names>, which notes arising concerns surrounding the naming of virus species after places of origin.

⁹⁹ Yi-Zheng Lian, *Why Did the Coronavirus Outbreak Start in China?* N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/opinion/sunday/coronavirus-china-cause.html>; *WHO issues best practices for naming new human infectious diseases*, WORLD HEALTH ORG. (May 8, 2015), <https://www.who.int/news/item/08-05-2015-who-issues-best-practices-for-naming-new-human-infectious-diseases>.

¹⁰⁰ Christina Morales, *Biden restores ties with the World Health Organization that were cut by Trump*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/world/biden-restores-who-ties.html>.

¹⁰¹ Lord Jim O' Neill, *Blaming China Is a Dangerous Distraction*, CHATHAM HOUSE (Apr. 15, 2020), <https://www.chathamhouse.org/2020/04/blaming-china-dangerous-distraction>.

engages with China.¹⁰² The difficulty in this is the potential capacity of such strategic rivalries to reduce critical international organizations such as the WHO into platforms of contestation. States are reminded that whatever may be their grievances and strategic interests, transnational crises such as pandemics should be prioritized because of the apparent devastation it can have on the wellbeing of all societies if the responses are compromised.¹⁰³

The current contestation is threatening the WHO's financing,¹⁰⁴ which will negatively affect its mandate delivery capacity if left unchecked. To carry out its functions effectively, the WHO relies on the financial contributions of state parties. State parties are therefore obliged to fulfill their financial obligations as a way of not only upholding their membership, but also complying with their apportioned dues to the organization.¹⁰⁵

It is in line with this established legal foundation that the WHO can pursue its objectives by apportioning levies or dues on Member States through donations, gifts, and bequests from the general public. For example, the WHO's program budget for the 2020-2021 fiscal year was presented to the World Health Assembly (WHA) in May 2019, and was subsequently adopted in resolution WHA72.1.¹⁰⁶ In the proposed budget, the WHO captures its proposed programs for the period and focuses its aim at strengthening accountability.¹⁰⁷ It leverages its own vision of expanding global access to healthcare but also aims to integrate

¹⁰² See generally THOMAS LUM ET AL., CONG. RSCH. SERV., RL34620, COMPARING GLOBAL INFLUENCE: CHINA'S AND U.S. DIPLOMACY, FOREIGN AID, TRADE, AND INVESTMENT IN THE DEVELOPING WORLD (2008).

¹⁰³ See O' Neill, *supra* note 101.

¹⁰⁴ Jacobs, Shear & Wong, *supra* note 41.

¹⁰⁵ Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 164 (July 20).

¹⁰⁶ See World Health Org. [WHO], Assembly Res. 72.1 (2019), in Seventy-Second World Health Assembly: Resolutions and Decisions, at 3–5, WHO Doc. WHA72/2019/REC/1 (2019), for the resolution adopting the budget; and World Health Org. [WHO], *Programme Budget 2020–2021*, WHO Doc. WHO/PRP/19.1 (May 2019) [hereinafter WHO Budget 2020–21], for the final version of the budget.

¹⁰⁷ WHO Budget 2020–21, *supra* note 106, at 6–8, 13.

key aspects of the UN Sustainable Development Goals (SDGs) into the policy framework of the WHO.¹⁰⁸

When these finances are withheld or compromised because of diplomatic spats between states, it diminishes the capacity of the WHO to stop pandemics, such as COVID-19. It is crucial to remind states of the overarching obligation which they have towards these essential multilateral platforms. Hence, denial of funding is an extreme measure—especially when there are clear dispute settlement mechanisms within the international organization's constitutional framework.¹⁰⁹ Thus, any tensions arising from the due execution of the WHO's mandate are remediable through the several dispute settlement mechanisms recognized under the constitution and Chapter VI of the United Nations Charter.¹¹⁰

IV. DISPUTES SETTLEMENT

The arena of international law and policy is, in a sense, an arena of contestation between states.¹¹¹ The existence of international organizations mitigates these contestations by providing platforms upon which the interests of states and organizations can be harmonized and channeled towards human wellbeing, creating justification for multilateral frameworks like the WHO.¹¹² Because of the wide-ranging continued state interest, even after forming an international organization like the WHO, global affairs disputes continue to arise.¹¹³ However, there are international health regulations that govern responses

¹⁰⁸ *Id.* at 4.

¹⁰⁹ WHO Const., *supra* note 1, arts. 75–77.

¹¹⁰ *Id.*; U.N. Charter arts. 33–38.

¹¹¹ For a full examination into the politics of international law, see Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990) [hereinafter Koskenniemi 1]; and Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7 (2009).

¹¹² Jennifer Shkabatur, *A Global Panopticon - The Changing Role of International Organizations in the Information Age*, 33 MICH. J. INT'L L. 159, 165 (2011).

¹¹³ See, for example, Ching-Fu Lin, *COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?*, 13 CONTEMP. ASIA ARB. J. 269 (2020), who addresses the disputes arising from non-compliance with the WHO's International Health Regulations during the COVID-19 pandemic.

to pandemics and how disputes may be resolved. These regulations, prepared and accepted by WHO Member States, are important to resolving controversies that arise in the course of fighting pandemics. As has been revealed by the COVID-19 global pandemic, these disputes can be on even small subject matters such as distributing test kits and travel advisories by the WHO.¹¹⁴

Nothing is insignificant in the affairs of states. The coordination of the global health response to the pandemic has now clearly exhibited the diplomatic trappings of the work of the WHO. This assertion rests on two key grounds. First, the WHO has become a global platform for states to engage each other and deliberate on subject matters that are essential to human resilience around the world.¹¹⁵ The WHO's capacity to articulate programs and offer top notch advice on health issues further heightens its diplomatic importance for states that may wish to engage in proxy foreign policy wars through the WHO. Second, the WHO has become a major advocate for access to health care, nutrition, water, and sanitation around the world.¹¹⁶ The voice of the WHO gives life to these issues in ways that are remarkably beyond national and international civil society organizations' capacity. Thus, the WHO's policy voice may have political ramifications for states—especially in the COVID-19 influenced political economy. For instance, in the ongoing fight against COVID-19, the WHO's recommendation of wearing masks to prevent the spread of the disease has been significant in convincing otherwise skeptical states to adopt the directive.¹¹⁷ More so, the accessibility of vaccines to states—especially highly

¹¹⁴ See *id.* at 273–77.

¹¹⁵ See generally WHO REG'L OFF. EUR., BUILDING RESILIENCE: A KEY PILLAR OF HEALTH 2020 AND THE SUSTAINABLE DEVELOPMENT GOALS (2017).

¹¹⁶ *Water Sanitation and Health – WASH and waste in health care facilities*, WORLD HEALTH ORG., [https://www.who.int/teams/environment-climate-change-and-health/water-sanitation-and-health-\(wash\)/health-care-facilities](https://www.who.int/teams/environment-climate-change-and-health/water-sanitation-and-health-(wash)/health-care-facilities) (last visited Apr. 8, 2021).

¹¹⁷ See Joshua Cohen, *Despite Growing Evidence, Some Public Health Officials Still Downplay Mask Use Against Coronavirus Transmission [Update]*, FORBES (Oct. 4, 2020, 9:07 AM), <https://www.forbes.com/sites/joshuacohen/2020/10/04/some-public-health-officials-continue-to-question-effectiveness-of-masks-in-preventing-coronavirus-transmission/?sh=51be679b1f5e>.

indebted, emerging countries—will likely depend greatly on the WHO's diplomatic voice. These states will often turn to the WHO for health policy advice on vaccines—including acquisition, storage, and safe administration of the vaccine.¹¹⁸

Therefore, it is not difficult to see that the WHO's primary mandate may trigger anxious behavior from some frontline states. Undoubtedly, the politics of international law knows no boundaries.¹¹⁹ In other words, every opportunity for global engagement is a foreign policy opportunity.¹²⁰ At the minimum, such opportunities are principally soft power opportunities that cannot be taken lightly. While this is the legitimate right of states, it is important not to destroy the institutions in a zero-sum quest for national interests; hence the need to ensure global health policy does not suffer because of the failure of international cooperation.¹²¹

Owing to the increased capacities of international organizations like the WHO to influence global discourse and shape policies, many dispute settlement methods and

¹¹⁸ See, for example, G.A. Res. 74/274, ¶ 5 (Apr. 21, 2020), which requests the U.N. Secretary-General, in collaboration with the WHO, to “effectively coordinate and follow up on the efforts . . . to promote and ensure global access to . . . vaccines and medical equipment needed to face COVID-19”

¹¹⁹ See generally Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006) (covering 100 years of scholarly views on the intersection of international law and power); Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 3 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (focusing on conceptual and empirical concepts of international law); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1st ed. 1948) (detailing how political relations are created globally and how they interact when in force); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987) (analyzing sources, procedures, and the substance of international law).

¹²⁰ Koskeniemi 1, *supra* note 110, at 19–20.

¹²¹ Note that disputes arising from contractual obligations of international organizations do not often generate as much public interest as disputes involving the direct interests of state parties. See Anne-Marie Slaughter, *International Law and International Relations Theory: A Prospectus*, in IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 16, 31 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

approaches exist.¹²² These approaches include negotiation, mediation, inquiry, conciliation, arbitration, and litigation.¹²³ Within the WHO Constitution, the governing rules on dispute settlement can be found in Articles 75, 76, and 77.¹²⁴ In particular, Article 75 provides that: “[a]ny question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice . . . unless the parties concerned agree on another mode of settlement.”¹²⁵

Prima facie, Article 75 privileges negotiation as a primary means of dispute settlement. This provision is in line with Article 2(3) of the United Nations Charter, which underscores the peaceful settlement of disputes in a manner that does not compromise international peace and security.¹²⁶ This was reiterated by the United Nations General Assembly resolution on friendly relations.¹²⁷

¹²² Michael Wood, *The Settlement of International Disputes to Which International Organizations are Parties*, in Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, annex A, at 389–94 (2016).

¹²³ See J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 2 (6th ed. 2017) (quoting G.A. Res. 2626 (XXV), annex (Oct. 24, 1970)).

¹²⁴ WHO Const., *supra* note 1, arts. 75–77.

¹²⁵ *Id.* art 75.

¹²⁶ U.N. Charter art. 2(3).

¹²⁷ G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970). The UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, during a commemorative session to celebrate the twenty-fifth anniversary of the United Nations (U.N. Doc. A/PV.1883), emphasized the peaceful settlement of disputes. *Id.* Precisely, the Declaration states that “States shall . . . seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.” *Id.* This resolution was also remarkable in that it was adopted without a vote. *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations – Procedural History*, AUDIOVISUAL LIBR. OF INT'L L., <https://legal.un.org/avl/ha/dpilfrscun/dpilfrscun.html> (last visited Apr. 8, 2021).

On the other hand, referrals to the ICJ for advisory opinion¹²⁸ are usually dependent upon due authorization by the United Nations General Assembly.¹²⁹ This has been the case in disputes such as the relocation of the WHO's regional office from Alexandria, Egypt which was adjudicated before the ICJ.¹³⁰ It must be noted that the privilege of negotiation does not foreclose other methods of dispute settlement. Parties are left with an open choice to adopt other peaceful means of settling disputes.¹³¹ It also means that techniques such as mediation, inquiry, consultation, conciliation, arbitration, and litigation may be adopted to resolve these disputes.¹³²

Therefore, it is often unnecessary to engage in zero-sum strategic games when there are established pathways and mechanisms for dispute settlements in international organizations like the WHO. As such, it is argued that the United States and China should have avoided drawing the WHO into their strategic contentions, mostly over matters that are as serious as a global pandemic. State parties to the WHO should therefore refrain from using pandemics to further their zero-sum strategic games.¹³³ Pandemics do not recognize boundaries, nor do they know about sovereigns.

¹²⁸ See generally Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 EUR. J. INT'L L. 437, 439–40 (1998), who analyzes two ICJ opinions addressing the competence of international organizations and the extent of the ICJ's advisory jurisdiction.

¹²⁹ Anthony Aust, *Advisory Opinions*, 1 J. INT'L DISP. SETTLEMENT 123, 132 (2010).

¹³⁰ See generally Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20), for the full opinion.

¹³¹ MERRILLS, *supra* note 123, at 21.

¹³² U.N. Charter art. 33(1); see generally INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS (Laurence Boisson de Chazournes et al., eds., 2002) (providing a full analysis of international organizations and the international judicial process throughout the various international courts).

¹³³ See Tanja Aalberts & Thomas Gammeltoft-Hansen, *Sovereignty Games, International Law and Politics*, in CHANGING PRACTICES OF INTERNATIONAL LAW 26 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018), who discuss the mutual exclusivity of international law and politics and that international relations and international law are meant to be separate.

V. CONCLUSION

The COVID-19 pandemic has brought the world to a moment of reckoning. The reckoning has ranged from taking a fresh look at socioeconomic inequality to radical nationalism's failures. The pandemic has also unveiled many other lessons. One inescapable lesson from it is that the world has become very integrated, and many of the problems of the 21st century would demand deeper collaborations across state boundaries, identities, class, cultural, and ideological differences. This entails both a horizontal and vertical collaboration between states—big and small. No state can do it alone, and the sustainability of any collaborative effort is measurable by the strength of the weakest state.

More so, knowledge and real-time access to reliable information are central to sustainable development, health for all, and global peace. Those with the knowledge and means to act responsibly will be better positioned to tackle the menace of global pandemics. The WHO and other international organizations are critical to finding lasting and sustainable solutions to these problems. In that regard, they ought to be insulated from the political and global strategic games of Member States. Where conflicts emerge despite state parties' best efforts, it is vital to use the accepted means of dispute settlement to resolve all such contentions. In other words, whatever misgivings may arise in tackling joint problems like global pandemics, states must focus on using specific dispute resolution mechanisms to settle their disputes. The United Nations Charter, in its Chapter VI, emphasizes the peaceful settlement of disputes¹³⁴ and this should be borne in mind at all times in the international relations of states. It is imperative not to defeat the mandate of the WHO since the whole world—especially the underprivileged communities—will suffer the most devastating consequence of policy failures arising from these contestations. Even significantly prosperous economies like India and Brazil can suffer direly due to failures arising from inadequate policy interventions in health care due to strategic games or limited collaboration amongst states.

¹³⁴ U.N. Charter ch. VI.

The world is at a new threshold of international law and relations amongst states. This is a moment to recalibrate and reform,¹³⁵ rather than relegate multilateralism for inclusive development and shared prosperity. The pandemic's unmatched lesson is the fragility of all human societies and the need for cooperation amongst states.¹³⁶ One state alone cannot respond to grand global challenges—such as climate change and pandemics. Therefore, there is no gainsaying that humanity will pay a steep price whenever IOs such as WHO are turned into arenas of strategic zero-sum games.¹³⁷ International epidemics are global security issues¹³⁸ and should not be approached with a power game mentality, let alone a zero-sum game approach. Rather, these organizations are spaces for seeking enduring collective answers to common problems like pandemics.¹³⁹ Thus, it is in the enlightened self-interest of all states to abide by settled norms, rather than to engage in the festival of corpses in the name of strategic contestations during pandemics. This will defeat the WHO's human rights¹⁴⁰ essence—to ensure the highest attainable standard of health for all peoples.

¹³⁵ There is room for improvement, especially in enhancing early warning systems and responses to outbreak of pandemics. See David Cameron, *We need a new international body to sound the alarm earlier*, TIMES (June 24, 2020), <https://www.thetimes.co.uk/article/david-cameron-we-need-a-new-international-body-to-sound-the-alarm-earlier-2wwxkc3ml>.

¹³⁶ Sara E. Davies & Clare Wenham, *Why the COVID-19 Response Needs International Relations*, 96 INT'L AFFS. 1227, 1228 (2020).

¹³⁷ See generally Adam R. Tanielian, *The International Legal (Dis)order: Deleterious Effects of "Us and Them" Politics, Zero-Sum Games, and Flagrancy of Power at Global Scale* (July 13, 2020) (unpublished manuscript) (on file with SSRN).

¹³⁸ Colin McInnes & Anne Roemer-Mahler, *From Security to Risk: Reframing Global Health Threats*, 93 INT'L AFFS. 1313, 1325 (2017).

¹³⁹ David P. Fidler, *The World Health Organization and Pandemic Politics*, THINK GLOB. HEALTH (Apr. 10, 2020), <https://www.thinkglobalhealth.org/article/world-health-organization-and-pandemic-politics>.

¹⁴⁰ See Benjamin Mason Meier, Dabney P. Evans & Alexandra Phelan, *Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease*, 82 INFECTIOUS DISEASES IN THE NEW MILLENNIUM 217, 224 (2020), which details the origins of the WHO's human rights-based framework.