

PANDEMIC: BUILDING A LEGAL CONCEPT FOR THE FUTURE

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I. INTRODUCTION

At a press conference on February 26, 2020, the World Health Organization (WHO)'s Director-General, Tedros Adhanom Ghebreyesus, warned that the word "pandemic" was ill-suited to describe the ongoing spread of COVID-19.¹ He expressed concerns about the fear-mongering effects of using the term. Instead, he urged all countries to "prepare for a potential pandemic." At that moment in time, the disease was already present in all the continents of the world except Antarctica.² According to the organization's reports of that day, there were 81,109 confirmed infections and 2,762 confirmed deaths worldwide, with the virus confirmed in 37 countries outside of China. But, technically, according to the WHO, the world was not yet facing a pandemic. Moreover, two days before the WHO Director-General's statement, officials from the same organization had declared the category of a pandemic was no longer being employed as a matter of institutional policy.³

Later, at another press conference on March 11, 2020,⁴ the WHO Director-General declared that the conditions had been met to deem COVID-19 to be a pandemic. By then, there were 118,319 confirmed

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1 Tedros Adhanom Ghebreyesus, World Health Org. Director-General, Opening Remarks at the Mission Briefing on COVID-19 (Feb. 25, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19--26-february-2020>.

2 Joshua Berlinger, *Coronavirus Has Now Spread to Every Continent Except Antarctica*, CNN (Feb. 26, 2020, 5:12 PM), <https://edition.cnn.com/2020/02/25/asia/novel-coronavirus-covid-update-us-soldier-intl-hnk/index.html>.

3 Stephanie Nebehay, *WHO Says It No Longer Uses 'Pandemic' Category, But Virus Still Emergency*, REUTERS (Feb. 24, 2020, 9:26 AM), <https://www.reuters.com/article/uk-china-health-who-idUKKCN20I0PD>.

4 See Tedros Adhanom Ghebreyesus, World Health Org. Director-General, Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

infections and 4,292 confirmed deaths globally. While the number of affected countries had dramatically risen from 38 to 114, the virus' presence in different continents had actually experienced no variation—Antarctica remained free of contagion. It is unclear what exactly triggered the change of status between February 26 and March 11 of 2020 (see Table 1).

Global status of COVID-19	Pandemic not declared (26 February 2020)	Pandemic declared (11 March 2020)
Confirmed infections	81,109	118,319
Deaths	2,762	4,292
Affected countries	38	114
Affected continents (out of 7)	6	6

Table 1. Comparison of global status of COVID-19 before and after WHO's pandemic declaration

By the second date, the global nature of the disease was undeniable. For all practical purposes, the world was now facing the COVID-19 pandemic. But the WHO Director-General's statement deeming the spread of the disease to be a pandemic brought no discernible legal consequences for the international community of states. It is unclear to what extent it marked a watershed in the chronology of the disease. In fact, the statements described above had been issued more than one month after an initial declaration on January 30, 2020, deeming the spread of the disease then-known as nCoV-2019 as a public health emergency of international concern (PHEIC).⁵ As opposed to the term 'pandemic,' a PHEIC is defined in the International Health Regulations (IHR 2005), the main legally binding instrument to "prevent, protect against, control and provide a public health response to the international spread of disease," as stated in its Article 2.⁶

⁵ *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), <https://bit.ly/2WCrm4a>.

⁶ International Health Regulations art. 2, May 23, 2005, 2509 U.N.T.S. 79 [hereinafter IHR].

Despite the pandemic declarations' lack of legal pedigree, multiple national governments later cited it their own national emergency declarations.⁷ It thus becomes all the more striking that there is no definition of a pandemic enshrined in any legally binding instrument.⁸ A recent report by a WHO Review Committee with the mandate to assess the implementation of the IHR in the pandemic highlighted confusion amongst Member States on the difference between a PHEIC and a pandemic as a salient problem.⁹

Against such a backdrop of terminological confusion, this essay provides an initial basis for future discussions by individuating the basic elements of the definition of a pandemic for the purposes of international law. Two goals are at stake: the need for providing certainty, on one hand; and a sufficient flexibility for grasping future events the dimensions of which are currently unforeseeable, on the other hand. A legal definition of a pandemic could fulfill both a descriptive role by providing a tool for framing events such as the global spread of a disease, as well as a normative one by triggering specific acts by the international community of states expressed in legal obligations.

II. PANDEMICS AND PHEICs: THE SPECIFIC VS. THE GENERAL

The current contribution makes a distinction between the general use of the term “pandemic” and its institutional usage by the WHO. The focus is on the latter, in order to underscore how its use by a qualified actor with a specific authority for doing so, *i.e.* the WHO Director-General, can lead to a set of legally relevant consequences.

The terminological challenges related to formulating a definition of pandemic are well-known in debates within legal theory. As posited by H.L.A. Hart when discussing “borderline cases,” there are facts that may fall within a penumbra regarding the application of general rules to specific

⁷ For a comparative overview of how the WHO's pandemic declaration was cited by authorities of dozens of countries, see THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octávio Ferraz eds., 2021).

⁸ Armin von Bogdandy & Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis* 12 (Max Planck Inst. for Compar. Pub. L. & Int'l L., Research Paper No. 2020-07, March 26, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650.

⁹ World Health Org., *WHO's Work in Health Emergencies. Strengthening Preparedness for Health Emergencies: Implementation of the International Health Regulations (2005)*, Doc. A74/9 Add.1, ¶ 106 (2021) [hereinafter WHO, 2021 Report of the Review Committee].

cases.¹⁰ Making a definition more concrete for the sake of clarity may come at the expense of leaving events which do not follow pre-established patterns beyond its reach and scope.

Even though it is vague, ‘pandemic’ is not an essentially contested concept.¹¹ There are generally no opposing camps with alternative definitions, but rather there is a relative agreement on what types of events would qualify as such. One common denominator is that the term is meant to convey, under all circumstances, the global geographical spread of a disease.¹² The difficulties lie in ascertaining from which point onwards transmission is considered to be ‘global.’ Resorting to specific numerical values might be ill-suited. As seen below, past attempts at creating pandemic phases showed considerable limitations.

Aside from the geographical dimension, scientific consensus amongst the medical and public health communities on the necessary elements of a ‘pandemic’ is conspicuously incomplete.¹³ Existing usages are not based on quantitative thresholds, but rather to qualitative components like ‘sustained transmission,’ open to interpretations of when it occurs.¹⁴ This partly explains why the challenge of formulating a clear-cut definition begins in the fields of medicine and public health. Any future legal definition of a pandemic must have a solid epistemic basis stemming therefrom.

In light of the above, the main difficulty lies in framing an operational definition of ‘pandemic’, i.e. one having performative effects when it is uttered. The WHO currently includes an institutional definition within its non-binding influenza guidelines, where a pandemic is considered to be present when “an influenza A virus to which most humans have little or no existing immunity acquires the ability to cause sustained human-to-human transmission leading to community-wide outbreaks. Such a virus has the potential to spread rapidly worldwide, causing a pandemic.”¹⁵ The

10 H.L.A. HART, *THE CONCEPT OF LAW* 121–44 (1961); see also Brian Bix, *H.L.A. Hart and the ‘Open Texture’ of Language*, 10 L. & PHIL. 51, 52 (1991).

11 W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 171–72 (1956).

12 Chloe Sellwood, *Brief History and Epidemiological Features of Pandemic Influenza*, in *INTRODUCTION TO PANDEMIC INFLUENZA* 41 (Jonathan Van-Tam & Chloe Sellwood eds., 2011).

13 As espoused in David Morens, Gregory Folkers & Anthony Fauci, *What Is a Pandemic?*, 200 J. INFECTIOUS DISEASES 1018, 1019–20 (2009); Peter Doshi, *The Elusive Definition of a Pandemic*, 89 BULLETIN OF THE WORLD HEALTH ORGANIZATION [WHO] 532 (2011), <https://www.who.int/bulletin/volumes/89/7/11-086173/en/>.

14 Benjamin Singer, Robin Thompson & Michael Bonsall, *The Effect of the Definition of ‘Pandemic’ on Quantitative Assessments of Infectious Disease Outbreak Risk*, 11 NATURE – SCI. REPS. 2547 (2021).

15 World Health Org., *Pandemic Influenza Risk Management*, at 26 (2017).

definition is based on experiences from the past, leading to an estimation that the influenza virus was considered to be, as recently as in 2019, the likeliest source of a pandemic event.¹⁶

By contrast, PHEICs are defined in Article 1 of the IHR as “an extraordinary event which is determined... (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.”

While not all PHEICs are pandemics, all pandemics would be PHEICs. The relationship shows how the two definitions fulfill overlapping, yet distinct goals. Declaring a PHEIC is aimed at conveying a message to the international community, namely that a disease-related event occurring in the territory of one State may pose a risk to other states. Therefore, a disease outbreak may constitute a PHEIC even though, at a given moment, there is no active cross-border spread. This is enshrined in the definition under Article 1 of the IHR 2005 and has been a criterion used to denote previous emergencies.¹⁷ Consequently, these declarations have an *ex ante* orientation, namely to tackle outbreaks before they acquire an international dimension or the extent of their consequences is fully known.¹⁸

Conversely, the WHO’s existing definition of a pandemic fulfills a descriptive purpose, as it communicates the active presence of a communicable disease in multiple regions of the world. It is an assessment of ongoing facts, rather than a risk-based analysis. Therefore, the definitions of a PHEIC and a pandemic operate at different conceptual levels. Despite their not leading to a change in the legal status of its addressees, both of these declarations currently have performative effects, albeit unclear ones. They hold sway over national authorities, in so far as they become aware of the existence of a threat not constrained to a specific region of the world. On this point, the literature on global governance shows how the effects of

16 In 2019, the WHO listed a potential influenza pandemic as one of the top ten global threats. *Ten Threats to Global Health in 2019*, WORLD HEALTH ORG. (2019), <https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019>. For past projections of the features of then-potential pandemic influenza viruses, see Jonathan Nguyen-Van-Tam & Alan Hampson, *The Epidemiology and Clinical Impact of Pandemic Influenza*, 21 VACCINE 1762–68, 1766 (2003), on the influenza virus’s potential to cause pandemics, Velislava Petrova & Colin Russell, *The Evolution of Seasonal Influenza Viruses*, 16 NATURE REV.S MICROBIOLOGY 47, Box 1 (2018).

17 Particularly, in the recent Ebola crisis in the Democratic Republic of the Congo. Bogdandy & Villarreal, *supra* note 8, at 12.

18 David L. Heymann, Abraham Hodgson, Amadou Alpha Sall, David O. Freedman, J. Erin Staples, Fernando Althabe, Kaplana Baruah, Ghazala Mahmud, Nyoman Kandun, Pedro F.C. Vasconcelos, Silvia Bino & K.U. Menon, *Zika Virus and Microcephaly: Why Is This Situation a PHEIC?*, 387 LANCET 719, 720 (2016).

legally non-binding acts can, at times, lead to more tangible consequences than those of binding ones.¹⁹

In light of the above, both PHEICs and pandemics are plagued with conceptual vagueness, directly affecting their application to particular cases.²⁰ Another consequence is the conferral of a higher degree of discretion upon the one person with the authority to declare them: the WHO Director-General. In the case of PHEIC declarations, an Emergency Committee, an ad hoc body in the WHO, must be summoned before emitting them. Committees advise the WHO Director-General in deciding, inter alia, whether the elements of a PHEIC have been fulfilled.²¹ Even if an Emergency Committee is summoned, it does not necessarily lead to a PHEIC declaration.²² This is also a consequence of conceptual vagueness.

Moreover, in order for an IHR Emergency Committee to be summoned, there must be at least a prima facie presumption that events reported to the WHO might constitute a PHEIC.²³ If the WHO Director-General does not wish to summon the Committee, no further action is taken. The West-African Ebola crisis of 2014 is a case in point, given how disagreements on the actual nature of events in Guinea, Liberia and Sierra Leone led to a delayed response.²⁴ This does not mean other bodies play no role in the process to declare a PHEIC. The WHO's other principal organs, the World Health Assembly and the Executive Board, may exert pressure to use

19 Armin von Bogdandy, Philip Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* 3, 11 (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010).

20 On the consequences of vagueness for the application of legal rules and definitions, see TIMOTHY ENDICOTT, *VAGUENESS IN THE LAW* 57–75 (2000).

21 See IHR, *supra* note 6, art. 48.

22 Lucia Mullen, Christina Potter, Lawrence O. Gostin, Anita Cicero & Jennifer B. Nuzzo, *An Analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations*, 5 *BMJ GLOB. HEALTH* e002502 (2020); David P. Fidler, *To Declare or Not to Declare: The Controversy over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo*, 14 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 287, 296 (2019).

23 Pedro Villarreal, *The World Health Organization's Governance Framework in Disease Outbreaks: A Legal Perspective*, in *THE GOVERNANCE OF DISEASE OUTBREAKS. INTERNATIONAL HEALTH LAW: LESSONS FROM THE EBOLA CRISIS AND BEYOND* 264 (Leonie Vierck, Pedro A. Villarreal & Katarina Weilert eds., 2017).

24 Adam Kamradt-Scott, *WHO's to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa*, 37 *THIRD WORLD Q.* 401, 401–18 (2016); Mateja Steinbrück Platise, *Hands Tied? The Law Governing the World Health Organization* 19 (Max Planck Inst. for Comp. Pub. L. & Int'l L., Research Paper No. 2021-01, Jan. 11, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764086.

powers in a certain manner. This occurred in previous PHEICs, where both organs requested the Director-General to summon IHR Review Committees,²⁵ even though the latter is an exclusive competence of the Director-General.²⁶ A similar process could be undertaken for Emergency Committees. The WHO's Executive Board would be in a better position to do so, as its members have the power to hold extraordinary meetings.²⁷

Despite the fact that they lead to no new legal obligations by themselves, delays in previous PHEIC declarations have been criticized due to a perceived misinterpretation of the terms.²⁸ A reluctance by the Emergency Committee to declare a PHEIC during the Ebola outbreak of 2018–2020 in the Democratic Republic of the Congo (DRC) was the focus of notable scrutiny. The reasoning provided by the members of the Emergency Committee for this decision was contradictory. Despite having a “high risk of regional spread,” the spread of Ebola in the DRC was initially not considered to be a PHEIC because it would bring “no added benefit.”²⁹ Instead, the Committee deemed the criteria was met only after the virus was identified in the city of Goma, a major trade and transport hub.³⁰ As pointed out by other legal scholars,³¹ such an interpretation of the PHEIC definition provided in Article 1 of the IHR 2005 is questionable.

Elsewhere, the binary nature of PHEICs has been considered to be problematic.³² Disease outbreaks at the international level may currently be divided into emergencies or non-emergencies. A direct consequence is that events as diverse in nature as H1N1 influenza, the spread of Zika in the Americas—with comparatively low death rates but posing other types of health hazards, namely microcephaly in newborns—Ebola in West Africa

25 In the case of Ebola, see World Health Org., *Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, ¶ 3, WHO Doc. A69/21 (May 13, 2016) [hereinafter WHO, 2016 Report of the Review Committee]. In the case of COVID-19, see World Health Assembly Res. 73.1, ¶ 9, COVID-19 Response (May 19, 2020).

26 IHR, *supra* note 6, art. 50.

27 Constitution of the World Health Organization art. 28(i), July 22, 1946, 14 U.N.T.S. 185.

28 Lawrence Gostin, Alexandra Phelan, Alex Godwin Coutinho, Mark Eccleston-Turner, Ngozi Erondu, Oyebanji Filani, Tom Inglesby, Rebecca Katz, Allan Maleche, Jennifer B. Nuzzo, Oyewale Tomori & Matthew Kavanagh, *Ebola in the Democratic Republic of the Congo: Time to Sound a Global Alert?*, 393 LANCET 617, 618 (2019).

29 *Statement on the Meeting of the International Health Regulations (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo*, WORLD HEALTH ORG. (Apr. 12, 2019), <https://bit.ly/3omKgYL>.

30 *Statement on the meeting of the International Health Regulations (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo*, WORLD HEALTH ORG. (July 17, 2019), <https://bit.ly/3bxkWKt>.

31 See Fidler, *supra* note 22, 302–04.

32 See Gian Luca Burci, *The Legal Response to Pandemics. The Strengths and Weaknesses of the International Health Regulations*, 11 J. INT'L HUMANITARIAN LEGAL STUD. 204, 212–13 (2020).

and in the DRC, or even COVID-19—the latter being the most devastating global health crisis in a century—are conflated. Even though they fall within the same legal category, each of them requires different types of responses. Article 17 of the IHR does provide an open framework for the WHO, and particularly its Emergency Committee, to decide on a case-by-case basis which health measures may be recommended for the emergency at hand. The tenets of global administrative law are a useful theoretical framing, as they show how international institutions play an active role in specifying the range and scope of application of general norms to specific situations.³³ Nevertheless, others have considered the multi-tiered approach towards emergency declarations to be problematic.³⁴ Moreover, the recent IHR Review Committee Report recommended against creating multilayered emergency declarations.³⁵

Vagueness in the definition of a PHEIC spills over to discussions over the term pandemic. As witnessed during the H1N1 pandemic of 2009-2010, arguably the first such event of the Twenty-First Century,³⁶ the PHEIC declaration was not the focus of concern. Rather, it was the declaration of the maximum-level of a pandemic per se that led to intense scrutiny. It led to thorough reports by an IHR Review Committee³⁷ as well as by regional organizations including the Council of Europe.³⁸ The reason is that, even though the definition so far lacks a formally binding legal source, its usage carried major consequences.³⁹

33 Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005); PEDRO A. VILLARREAL, PANDEMIAS Y DERECHO: UNA PERSPECTIVA DE GOBERNANZA GLOBAL 83 (2019).

34 Clare Wenham, Matthew Kavanagh, Alexandra Phelan, Simon Rushton, Maike Voss, Sam Halabi, Mark Eccleston-Turner & Mara Pillinger, *Problems with Traffic Light Approaches to Public Health Emergencies of International Concern*, 397 LANCET 1856, 1857–58 (2021).

35 WHO, 2021 Report of the Review Committee, *supra* note 9.

36 The Severe Acute Respiratory Syndrome (SARS) crisis of 2002–2003 can be considered a “borderline case.”

37 World Health Org., *Strengthening Response to Pandemics and other Public-Health Emergencies. Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza (H1N1) 2009* (2011), https://apps.who.int/iris/bitstream/handle/10665/75235/9789241564335_eng.pdf?sequence=1 [hereinafter WHO, 2011 Report of the Review Committee].

38 Deborah Cohen & Philip Carter, *WHO and the Pandemic Flu “Conspiracies”*, 340 BMJ 1274 (2010).

39 Pedro A. Villarreal, *Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions between Legitimacies*, 7 GOETTINGEN J. INT’L L. 95 (2016).

III. REVISITING PAST DEFINITIONS OF ‘PANDEMIC’

In the past two decades, the WHO has revised the institutional definitions of a pandemic in multiple occasions, most of them focusing upon the influenza virus. In the first document on this subject published in 1999, a pandemic was deemed to be present whenever a new subtype of the influenza virus “has been shown to cause several outbreaks in at least one country, and to have spread to other countries, with . . . serious morbidity and mortality . . . in at least one segment of the population.”⁴⁰ It was divided into phases, where each would be attached to a series of indicators. These elements of the definition of a pandemic were restated in the following guidelines of 2005, by referring to the geographical spread of a new subtype of influenza that could lead to “high numbers of cases and deaths.”⁴¹ These criteria, though alluding to the incidence of influenza, were still qualitative in nature as none provided clear indication of what “high” incidence or death rate would be.

Another set of pandemic guidelines was published in 2009 as the result of several meetings between 2007 and 2008. These guidelines found that a pandemic occurred when a strain of the influenza virus previously not present in humans acquired “a potential to spread worldwide.”⁴² The shift emphasizing the geographical spread of a disease, whilst removing considerations of severity, raised eyebrows partly due to its poor timing, *i.e.*, just as H1N1 pandemic influenza was spreading.⁴³

Conversely, establishing a precise threshold of severity carried its own risks.⁴⁴ There was a concern, in some estimations, that different waves could have varying degrees of morbidity and mortality, much like the H1N1 influenza pandemic of 1918.⁴⁵ If pandemic declarations and their operational consequences are postponed because the first waves are mild, it might convey a false sense of security and result in unpreparedness for ulterior, more severe waves. Similarly, using numerical values to scale

40 World Health Org., *Influenza Pandemic Plan. The Role of WHO and Guidelines for National and Regional Planning*, at 14 (Apr. 1999).

41 World Health Org., *WHO Checklist for Influenza Pandemic Preparedness Planning*, at vi (2005).

42 World Health Org., *Pandemic Influenza Preparedness and Response*, at 14 (2009).

43 LAWRENCE GOSTIN, *GLOBAL HEALTH LAW* 202–03 (2014); *c.f.* SUDEYPA ABEYSINGHE, *PANDEMICS, SCIENCE AND POLICY: H1N1 AND THE WORLD HEALTH ORGANIZATION* 64 (2015).

44 Villarreal, *supra* note 39.

45 David Morens & Jeffery Taubenberger, *Understanding Influenza Backward*, 302 *JAMA* 679 (2009).

severity was seen by some public health experts as overambitious, since it might be asking for too much precision amidst uncertainty.⁴⁶

While these considerations help explain the changes to the definition, the fact that the 2009 H1N1 influenza pandemic was comparatively mild led to accusations of declaring the alert too soon.⁴⁷ New guidelines to address these concerns were issued in 2013,⁴⁸ and their subsequent version of 2017, which enshrine the institutional definition of a pandemic in place as of today.

The lack of a clear-cut definition of ‘pandemic’ currently leads to confusion. It does not allow for an accurate portrayal of the nature of globe-spanning events such as COVID-19. The international community of states would be highly benefitted from a common framing allowing them to respond adequately. While the use of the term ‘pandemic’ to denote the spread of COVID-19 was hesitant at first, the message to Member States came across loud and clear. To date, numerous national governments have quoted the WHO’s pandemic declaration in their own legal acts as a global turning point.⁴⁹ They seem to subscribe the idea that such a declaration, despite its lack of concrete legal effects, marked a before-and-after in terms of their actions.

As for procedural elements, unlike a PHEIC, declaring a pandemic is not preceded by any institutional step. In 2009, in the case of H1N1 influenza, the WHO Director-General declared a pandemic after asking for the advice of the Emergency Committee. But it was pointed out that, legally, the WHO Director-General is not required to consult the Committee, nor any other consultative body, before declaring a pandemic.⁵⁰ Instead, the utterance of the term ‘pandemic’ in a press conference sufficed for officially labeling COVID-19 as such.⁵¹ As posited below in section 4, additional procedural elements could increase the certainty that such a consequential decision is adopted only after consulting diverse stakeholders.

46 WHO, 2011 Report of the Review Committee, *supra* note 37, at 80.

47 ABEYSINGHE, *supra* note 43, at 35.

48 World Health Org., *Interim Guidance, Pandemic Influenza Risk Management* (2013), https://www.who.int/influenza/preparedness/pandemic/GIP_PandemicInfluenzaRiskManagementInterimGuidance_Jun2013.pdf.

49 For a sample, see THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19, *supra* note 7.

50 Kumanan Wilson, John S. Brownstein & David Fidler, *Strengthening the International Health Regulations: Lessons from the H1N1 pandemic*, 25 HEALTH POL’Y & PLANNING 507 (2010).

51 Ghebreyesus, *supra* note 4.

IV. LEGALLY FRAMING PANDEMICS BEYOND H1N1 AND COVID-19

Despite the existence of borderline cases, COVID-19 undoubtedly fits any and all understandings of a pandemic.⁵² Yet any durable legal definition would need to take into account not only past and present, but also future events. Therein lie both the main operational benefits as well as the core challenges. Due to the global nature of pandemics, a legal definition would only be effective if it is developed at the international level.

A legal definition of pandemic could have not only descriptive, but also normative implications for when it is declared. Descriptively, declaring a pandemic would portray the actual global dimension of a health threat, giving states proper warning of its consequences even if a particular country or region is not heavily affected at a particular time. National-level responses triggered by a pandemic declaration could still be differentiated, taking into account diverging states of affairs as well as health system capacities. But even then, it could be an initial yardstick for assessing whether measures, particularly those restricting human rights, have a *prima facie* justification due to a global problem. Therefore, the descriptive dimension of a legal definition of a pandemic could be a first basis for the assessment by international and regional human rights bodies of states' responses, particularly if the latter notify the suspension or derogation of specific rights.⁵³ While the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights refer only to the IHR, it is in a non-exhaustive manner.⁵⁴ The IHR does not provide the only potential grounds for limiting, suspending⁵⁵ or derogating human rights on grounds of public health.

Conversely, whether the definition of a pandemic should also be normative-performative and carry its own set of legal consequences is an

⁵² A component of borderline cases described in ENDICOTT, *supra* note 20, at 29.

⁵³ During the COVID-19 pandemic, human rights suspensions and derogations have been invoked throughout the world. Lawrence Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 AM. J. INT'L L. 20, 20–23 (2021).

⁵⁴ The interpretative principle iv on 'public health' affirms: "[d]ue regard shall be had to the international health regulations." Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, annex (1985), <https://bit.ly/2WE4v8u>.

⁵⁵ The American Convention on Human Rights uses the term 'suspension' instead of 'derogation.' American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123. In their use throughout the Latin American region, suspensions are functional equivalents. Pedro A. Villarreal, *Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International*, in CONSTITUTIONALISM UNDER EXTREME CONDITIONS 217, 223 (Richard Albert & Yaniv Roznai eds., 2020).

open question. In the case of a PHEIC declaration, the phrase “requiring a coordinated international response,” it has an inherent normative component, albeit a soft one. Elsewhere, it has been referred to as a clarion call capable of mustering international cooperation.⁵⁶ Yet the exact consequences of PHEIC declarations are, from a legal point of view, unclear.⁵⁷

Although PHEIC declarations do not create new legal obligations, states have embedded stakes in them. Some authors have even argued that a delayed declaration of an emergency should lead to the international responsibility of the WHO.⁵⁸ There is no full agreement on the matter, as others have criticized the understanding that declaring a PHEIC amounts to “box-checking,” where its elements may be unequivocally ascertainable by any external observer.⁵⁹ Beyond the question of which of these two views is adopted, the discussions show a concurrence on the major importance of declarations per se.

As for their potential consequences, national pandemic preparedness plans may be linked to the declaration of a pandemic by the international authority empowered to do so, *i.e.*, the WHO Director-General. Comparative legal analyses have shown how national authorities reacted more often to pandemic declarations rather than PHEICs.⁶⁰ But, depending on the effects, pandemic declarations may lead to distorting incentives. The triggering of “dormant contracts” with pharmaceutical companies in 2009 was considered by critics to be a potential influencing factor for declaring a pandemic.⁶¹ Because these contracts directly led to major profits, it raised suspicions of conflicts of interest in the WHO’s internal decision-making.⁶² Although subsequent investigations did not find evidence of any meddling by private interests in the decision to declare the maximum pandemic phase,

⁵⁶ Gostin et al., *supra* note 28, at 618.

⁵⁷ Pedro A. Villarreal, *Public International Law and the 2018–2019 Ebola Outbreak in the Democratic Republic of Congo*, EJIL: TALK! (Aug. 1, 2019), <https://www.ejiltalk.org/public-international-law-and-the-2018-2019-ebola-outbreak-in-the-democratic-republic-of-congo/>.

⁵⁸ Mark Eccleston-Turner & Scarlett McArdle, *The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak*, in *INFECTIOUS DISEASES IN THE NEW MILLENNIUM: LEGAL AND ETHICAL CHALLENGES* 89, 89–109 (Mark Eccleston-Turner & Iain Brassington eds., 2020)

⁵⁹ Fidler, *supra* note 22, at 301.

⁶⁰ THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19, *supra* note 7.

⁶¹ Cohen & Carter, *supra* note 38.

⁶² Particular criticism was raised at the fact that the names of the Emergency Committee were initially not divulged. Council of Eur. Res. 1749, *The Handling of the H1N1 Pandemic: More Transparency Needed* (June 24, 2010), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17889&lang=en>.

a lack of transparency, including in the use of the term “pandemic,” was underscored as a major shortcoming.⁶³

The linkage between the WHO Director-General’s pandemic declaration and the fulfillment of contractual undertakings is, once again, present during the COVID-19 crisis. For instance, the publicly available advance purchase agreement—*i.e.*, a legal contract⁶⁴—between the European Commission and pharmaceutical company CureVac inserted a clause making the fulfillment of certain undertakings dependent on the WHO’s declaration of a pandemic, specifically of its end.⁶⁵ The linkage is certainly not self-evident, but is rather contingent upon contracting parties’ decision to defer to the WHO’s declaration. It is certainly not a uniform practice, as similar contracts, such as the one between the European Commission and AstraZeneca, do not incorporate the reference.⁶⁶

Any future attempt at formulating an operative definition of a pandemic should take into account the potential for creating incentives that may distort institutional decision-making. Additionally, the pandemic declared in 2009 was due to the new strain of an already-known disease, influenza. Plans were formulated beforehand, and the available pharmaceutical resources for a well-known pathogen were scoped. Yet any effective definition must be capable of taking into account future events caused by a so-called “disease X,” *i.e.*, one caused by a pathogen currently not detected amongst humans, which before December 2019 was actually the case of the SARS-CoV-2 virus.⁶⁷ Since the full range of consequences cannot be foreseen, a description with sufficient flexibility is needed.

Determining *ex ante* all types of public health measures triggered by a pandemic declaration may not be feasible. Doing so directly depends on the

63 WHO, 2011 Report of the Review Committee, *supra* note 37.

64 Alexandra Phelan, Mark Eccleston-Turner, Michelle Rourke, Allan Maleche & Chenguang Wang, *Legal Agreements: Barriers and Enablers to Global Equitable COVID-19 Vaccine Access*, 396 LANCET 800 (2020).

65 See Eur. Comm’n, Directorate-Gen. for Health & Food Safety, *Advance Purchase Agreement (“APA”) for the Development, Production, Advance Purchase and Supply of a COVID-19 Vaccine for EU Member States*, Doc. No. SANTE/2020/C3/049, cl. 1.7.4.

66 Conversely, other publicly available contracts make no reference to the WHO’s pandemic declaration whatsoever. See European Commission Press Release IP/21/302, *Vaccines: Contract Between European Commission and AstraZeneca Now Published* (Jan. 29, 2021), <https://bit.ly/2Qspvyo>.

67 *Prioritizing Diseases for Research and Development in Emergency Contexts*, WORLD HEALTH ORG., <https://www.who.int/activities/prioritizing-diseases-for-research-and-development-in-emergency-contexts> (last visited June 22, 2021); see also Sam Kiley, Ingrid Formanek & Ivana Kottasová, *Hunting for ‘Disease X’*, CNN (Jan. 5, 2021, 7:24 AM), <https://edition.cnn.com/2020/12/22/africa/drc-forest-new-virus-intl/index.html>.

epidemiological features of a new disease, which is not always foreseeable. Nevertheless, certain mechanisms can be devised for mitigating a pandemic's economic impact. For instance, in past public health emergencies such as Ebola, the need for a scheme guaranteeing constant financing for pandemic response was underscored in several official reports both within and beyond the WHO.⁶⁸ Fundraising in the middle of a devastating global event carrying major economic burdens for all countries is not an efficient way to enhance responses. Instead, creating a standing resource pool would allow for enhanced preparedness. This reasoning underpins the WHO's Contingency Fund for Emergencies,⁶⁹ and the World Bank's Pandemic Emergency Financing Facility.⁷⁰ More recently, the Independent Panel for Pandemic Preparedness and Response proposed to deploy the International Monetary Fund's consultations under Article IV of its Articles of Agreement to assess national-level capacities through five-yearly Pandemic Preparedness Assessment Programs.⁷¹

However, both of these existing financing models currently fall short during catastrophic pandemics such as COVID-19. The WHO's Contingency Fund for Emergencies operates under traditional, country-focused humanitarian allocation. It is not geared towards global threats that potentially affect all countries simultaneously. By contrast, while the Pandemic Emergency Financing Facility is disease-focused, meaning all countries could potentially have access to funds once certain requirements are met, its insurance-based design has been the subject of criticism. For instance, its thresholds regarding death tolls are formalistic and do not allow for exercising discretion.⁷² While both funds are aimed at response and not preparedness, delays in their release due to technical issues are counterproductive. The Pandemic Emergency Financing Facility's so-far untapped potential for providing a dynamic pool of funding should be reexamined.⁷³

68 World Health Org., *Report of the Ebola Interim Assessment Panel* (2015), <https://www.who.int/csr/resources/publications/ebola/ebola-panel-report/en/>.

69 *Contingency Fund for Emergencies*, WORLD HEALTH ORG., <https://www.who.int/emergencies/funding/contingency-fund-for-emergencies> (last visited June 22, 2021).

70 World Bank, Pandemic Emergency Fin. Facility, *Pandemic Emergency Financing Facility. Operational Brief for Eligible Countries* (Feb. 2019), <http://pubdocs.worldbank.org/en/478271550071105640/PEF-Operational-Brief-Feb-2019.pdf>.

71 Indep. Panel Pandemic Preparedness & Response, *COVID-19: Make it the Last Pandemic*, at 51 (2021), <https://theindependentpanel.org/mainreport/>.

72 Bogdandy & Villarreal, *supra* note 8, at 24–25.

73 Int'l L. Ass'n Res. 2/2020, ¶ 13, *Global Health Law* [hereinafter ILA Resolution].

Linking finances to future pandemic declarations should be accompanied by a clear awareness of the consequences. Vesting an international official with such power, specifically the WHO Director-General, entails granting a high degree of authority to one single person. Therefore, there should be clear procedural steps to ensure, at least to a minimum degree of certainty, that the decision to issue a declaration is justified. Involving more stakeholders would help. Besides scientific input by way of an advisory body similar to the Emergency Committee, the WHO's Executive Board, composed of a group of thirty-four persons chosen by Member States at the World Health Assembly every three years.⁷⁴ The Board's functions include to "take emergency measures... to deal with events requiring immediate action . . . [and to] authorize the Director-General to take the necessary steps to combat epidemics."⁷⁵ Actions by the Board would provide enhanced representativeness of Member States. Input from representatives of other international institutions collaborating in different types of economic support would be directly relevant, such as the World Bank, the International Monetary Fund and the United Nations' Interagency Standing Committee.⁷⁶ And non-State donors should be consulted, to verify whether they are able and willing to rapidly disburse funds. Including such a wide and diverse set of actors in decision-making related to pandemic declarations would be based on the "whole-of-world" approach towards COVID-19 proposed elsewhere.⁷⁷

Lastly, in terms of national pandemic preparedness plans, enhancing the operational dimension of a future legal definition of "pandemic" should be joined by analyses of national-comparative law.⁷⁸ This would provide a clear indication of which authorities have legal competence in specific spheres, avoiding future legal disputes related to the distribution of powers. National pandemic preparedness plans could explicitly incorporate criteria on the steps to be taken by specific authorities in case a pandemic is declared. In the aegis of COVID-19, the WHO has emphasized that decisions on which public health measures to adopt should be taken at the

⁷⁴ Constitution of the World Health Organization, *supra* note 27, art. 24.

⁷⁵ *Id.* art. 25.

⁷⁶ ILA Resolution, *supra* note 73, ¶¶ 8, 13.

⁷⁷ Shahul Ebrahim, Jiatong Zhuo, Ernesto Gozzer, Qanta A. Ahmed, Rubina Imtiaz, Yusuf Ahmed, Seydou Doumbia, Mujeeb Rahman, Habida Elachola, A. Wilder-Smith, Ziad A. Memish, All Hands on Deck: *A Synchronized Whole-of-World Approach for COVID-19 Mitigation*, 98 INT'L J. INFECTIOUS DISEASES 208, 211–12 (2020).

⁷⁸ See generally World Health Org., *Comparative Analysis of National Pandemic Influenza Preparedness Plans* (Jan. 2011), https://www.who.int/influenza/resources/documents/comparative_analysis_php_2011_en/en/.

“most local administrative level possible”.⁷⁹ Community-wide measures for mitigating a pandemic should be implemented by taking into account a series of situational elements determining their effectiveness, *i.e.*, population size, public spaces and, notably, existing health system capacities.⁸⁰ A global mapping of these national public health capacities throughout different levels of government, while a daunting task, would provide a key overview of the status quo regarding pandemic preparedness and response.

V. CONCLUSION

The preceding analysis provided an overview of some of the conceptual challenges inherent in developing a legal definition of a pandemic. Creating an operational definition thereof capable of capturing ongoing events such as COVID-19, as well as future diseases the consequences of which cannot be foreseen now, would yield major dividends for the international community of states. The recent call for a new treaty on pandemic preparedness and response might provide a fertile background for distinguishing a ‘pandemic’ from a PHEIC.⁸¹ For the time being, considering the persistent lack of consensus in medicine and public health, an ultimate definition seems to be a tall order.

An overview of underlying conceptual challenges in legal theory debates can contribute to taking some initial steps. A deeper retrospective analysis of previous institutional iterations of the term “pandemic” will prove useful for potential international lawmaking endeavors in the area. In its descriptive dimension, it would provide states with increased clarity on the type of available resources for facing the problem. More ambitiously, framing the potential legal consequences attached to declaring a pandemic can pave the way for a more elaborate mechanism guaranteeing a diligent global response. It is unclear how these terminological discussions will progress in the near future. So far, the least sustainable approach has been to wait until acute health threats, such as COVID-19, are already ravaging the world.

⁷⁹ World Health Org., *Interim Guidance, Considerations for Implementing and Adjusting Public Health and Social Measures in the Context of COVID-19* (Nov. 4, 2020), <https://www.who.int/publications/i/item/considerations-in-adjusting-public-health-and-social-measures-in-the-context-of-covid-19-interim-guidance>.

⁸⁰ *Id.*

⁸¹ World Health Org., *Special Session of the World Health Assembly to Consider Developing a WHO Convention, Agreement or Other International Instrument on Pandemic Preparedness and Response*, Doc. A74/A/CON./7 (May 25, 2021).