

Article

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

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ABSTRACT

Recommendations by the Emergency Committee operating under the International Health Regulations (2005) (IHR) that the Director-General of the World Health Organization should not declare the Ebola outbreak in the Democratic Republic of the Congo a public health emergency of international concern sparked a sustained controversy in global health. The controversy exposed disagreements about the meaning and effectiveness of IHR provisions, the scope of the Emergency Committee's authority, and utility of the Director-General's power to declare a public health emergency of international concern. This article analyzes this controversy from its beginnings in October 2018 through the Director-General's declaration in July 2019 that the Ebola outbreak in the Democratic Republic of the Congo constituted a

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public health emergency of international concern. The article argues that the controversy inflicted serious damage on the IHR because the Emergency Committee abused its authority under the IHR and acted outside the authority the IHR prescribes for this committee. The damage done, and the manner in which it happened, raises bigger questions about the IHR's meaning, influence, and future in global health governance.

KEYWORDS: *Democratic Republic of the Congo, Director-General, Ebola, Emergency Committee, global health governance, International Health Regulations, public health emergency of international concern, Temporary Recommendations, trade and travel measures, World Health Organization*

I. INTRODUCTION

On July 17, 2019, the Director-General of the World Health Organization (hereinafter “WHO”) declared the Ebola outbreak in the Democratic Republic of the Congo constituted a public health emergency of international concern under the International Health Regulations (2005) (hereinafter “IHR”).¹ This declaration began a new phase in the response to this serious disease event. It also ended a controversy about the propriety of declaring a public health emergency of international concern (hereinafter “PHEIC”) for the Ebola outbreak in the Democratic Republic of the Congo.

Arguments for and against a PHEIC declaration during infectious disease incidents have appeared before, as happened, for example, during the outbreak of Middle East Respiratory Syndrome.² However, the controversy over declaring a PHEIC for the Ebola crisis in the Democratic Republic of the Congo was more serious, sustained, heated, and consequential than past debates about whether the Director-General should declare a PHEIC. Indeed, the arguments back and forth about a PHEIC declaration damaged the IHR. The controversy cast doubt on the meaning and effectiveness of key provisions in the IHR and undermined confidence in the process established by the regulations for determining whether the Director-General should declare a PHEIC. The eventual PHEIC declaration by the Director-General did not mitigate the damage done by the controversy. Indeed, the manner in which the Emergency Committee eventually recommended a declaration made the damage more severe. In the aftermath of this polarizing controversy, the meaning, influence, and purpose of the IHR in global health governance are more uncertain than they have ever been since the creation, nearly fifteen years ago, of this radical, innovative regime.

¹ *Ebola Outbreak in the Democratic Republic of the Congo Declared a Public Health Emergency of International Concern*, WORLD HEALTH ORG. [WHO] (July 17, 2019), <https://www.who.int/news-room/detail/17-07-2019-ebola-outbreak-in-the-democratic-republic-of-the-congo-declared-a-public-health-emergency-of-international-concern>.

² Kai Kupferschmidt, *MERS Situation More Serious but Not an Emergency Yet, WHO Panel Says*, SCIENCE (May 14, 2014, 1:45 PM), <https://www.sciencemag.org/news/2014/05/mers-situation-more-serious-not-emergency-yet-who-panel-says>.

II. THE INTERNATIONAL HEALTH REGULATIONS AND THE AUTHORITY TO DECLARE A PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN

A. Declaring a Public Health Emergency of International Concern: A Radical Authority

At the center of the controversy are the provisions in the IHR that grant the WHO Director-General the authority to declare a public health emergency of international concern.³ The quarrel that emerged from successive decisions by the Director-General not to declare a PHEIC in connection with the worsening Ebola situation in the Democratic Republic of the Congo (hereinafter “DRC”) involved, however, parts of the IHR beyond the declaration authority, especially provisions regulating trade and travel measures.⁴ Further, arguments against and for declaring a PHEIC for the Ebola crisis in the DRC connected the IHR-based authority to declare such an emergency with matters beyond the IHR’s scope and substance, such as financing outbreak response efforts. The range of matters within and outside the IHR implicated by this Ebola event demonstrates the importance of the PHEIC authority to the functioning of the IHR and the dynamics of other governance mechanisms. The significance of the PHEIC authority in global health governance meant that the controversy over whether the Director-General should declare a PHEIC for the Ebola outbreak in the DRC involved more than a few articles in the text of the IHR.

With WHO’s adoption of the IHR nearing its fifteenth anniversary in 2020, it bears remembering just how radical the authority granted to the Director-General to declare a PHEIC was in 2005 and remains today. Nothing like this authority had ever been part of any policy strategy or legal regime designed to address international health problems. Prior to being revised in 2005, the IHR and its precursors in international law—WHO’s International Sanitary Regulations and the pre-WHO international sanitary conventions—gave international health organizations limited powers. For example, under the old IHR, the WHO Director-General did not have the authority to receive and act upon information from non-governmental sources about outbreaks of diseases subject to the regulations. By contrast, not only did the revised IHR authorize WHO to receive and act upon information provided by non-state actors, but the new regulations also empowered the Director-General to use such information in deciding

³ WHO, INTERNATIONAL HEALTH REGULATIONS (2d ed. 2008), art. 12 [hereinafter IHR].

⁴ *Id.* arts. 2, 43.

whether to declare a serious disease event to be a PHEIC, even over the objections of states directly affected by such event.⁵

The authority to declare a PHEIC granted power to the Director-General and WHO—the ability to generate and guide political, economic, diplomatic, and public health responses to extraordinary events that threaten states through the international spread of disease and that require a coordinated international response. The willingness of states to give such power to international organizations is rare across all issue areas, not just health. Yet, member states of WHO accorded the Director-General this extraordinary authority. As discussed below, the controversy sparked by the Director-General’s decisions not to declare a PHEIC for the Ebola outbreak in the DRC revolved around disagreements about what the exercise of the PHEIC power could and would produce politically, economically, and epidemiologically for global efforts to respond to this serious disease event.

The power that comes with the authority to declare a PHEIC should be understood in the context of the time period in which WHO adopted the revised IHR and the radical blueprint for global health security that the new IHR contained. WHO officials and other global health experts recognized the need to revise the IHR well before 2005. The revision process at WHO officially began in 1995,⁶ but progress was slow until the world experienced the pandemic of Severe Acute Respiratory Syndrome (hereinafter “SARS”) in 2003. The SARS pandemic exposed the failure of the thinking and approaches reflected in the old IHR not only within public health circles but also at the highest levels of political leadership in countries. SARS blew away the neglect and complacency so long associated with the IHR and prepared the political ground for entirely new strategies to protect populations from dangerous disease events.

To its credit, WHO was ready for this moment with an approach that was astonishing in its ambitions. WHO officials proposed, and—with the SARS scare still vivid—member states accepted the significant expansion in the scope of the IHR’s application, the obligations undertaken by states parties, and the authority exercised by WHO and its Director-General. Other works describe and analyze all the changes made to produce this transformed legal regime,⁷ but, for my purposes, the root-and-branch reforms constituted a carefully crafted governance web of concepts, rules, and processes supported across almost every strand by the authority granted the Director-General to declare PHEICs.

Indeed, the primary function of a PHEIC declaration is to reinforce the IHR in the context of dangerous disease events. A PHEIC declaration is

⁵ *Id.* art. 9.

⁶ *Revision Process of the International Health Regulations*, WHO, <https://www.who.int/ihr/revision/process/revision/en/> (last visited Sept. 10, 2019).

⁷ *See, e.g.*, LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 177-204 (2014).

designed to heighten public health and political awareness of the need to double-down on core components of the IHR—conducting surveillance, notifying cases of serious disease events, sharing information on outbreaks and response strategies, cooperating with WHO and other countries, strengthening public health capacities, and implementing trade and travel measures that help rather than hinder response activities.

The reinforcement effect created by a PHEIC declaration works in subtle and blunt ways. Much of the transformation undertaken in the revised IHR creates incentives for governments to cooperate early and extensively with WHO and other countries when disease outbreaks occur. Generating such cooperation helps coordinate the political, economic, and public health components of public and private-sector responses to such incidents. Achieving effective cooperation increases the prospects that the outbreak will not worsen and force the Director-General to determine whether it constitutes a PHEIC. Failure to cooperate effectively, including attempts to hide outbreaks in order to avoid adverse political and economic consequences, increases the likelihood that WHO will exercise its IHR authorities, including the PHEIC power, in an effort to mitigate the damage that poor cooperation on dangerous disease events can wreak within and among nations.

Should it be necessary for the Director-General to exercise the PHEIC authority, this power—and the processes (e.g., the Emergency Committee) that guide its exercise—draws strength, credibility, and legitimacy from the manner in which the IHR aligns scientific evidence, public health principles, and the political interests of countries. Put differently, the PHEIC authority is not, and was not intended to be, merely an epidemiological exercise.⁸ It demands political leadership from the Director-General at moments in which certain disease outbreaks threaten to damage public health, economic well-being, political stability, and diplomatic engagement within and across borders. The PHEIC authority is discretionary in nature; nothing in the IHR mandates that the Director-General declare a PHEIC if certain criteria are met. This discretion reinforces the political leadership that the PHEIC power requires from the Director-General and the importance of the process, including the Emergency Committee, that informs the Director-General's exercise of the authority.

The PHEIC authority also has a reinforcing effect with respect to aspects of the revised IHR that member states did not transform. From the international sanitary conventions of the latter half of the nineteenth century through the 2005 revision of the IHR, states have included rules to regulate

⁸ Mara Pillinger, *WHO Declared a Public Health Emergency about Zika's Effects; Here Are Three Takeaways*, WASH. POST (Feb. 2, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/02/who-declared-a-public-health-emergency-about-zikas-effects-here-are-three-takeaway/> (noting that “[d]eclaring a PHEIC is as much a political move as a scientific one”).

trade and travel measures that governments adopt in response to disease events unfolding in other countries. These rules consistently reflected the same approach—states have a right to impose trade and travel measures as long as they base such measures on public health principles and scientific evidence relevant to the particular health risk in question. Failure by countries to comply with the rules on trade and travel measures constituted one of the biggest problems with the treaties designed to address international spread of infectious diseases. WHO officials recognized in the mid-1990s that the revision of the IHR would have to address this problem.

Unlike the radical changes made to the IHR in other areas, the revised IHR replicated the approach to regulating trade and travel measures during disease events that states have used since the mid-nineteenth century. The new regulations recognize the right of states parties to implement health measures affecting international trade and travel as long as those measures are based on public health principles and scientific evidence and are not more restrictive of trade and travel than other measures that would achieve the same level of health protection.⁹ However, the revised IHR contained additional rules and processes designed to increase compliance with this familiar legal approach to trade and travel measures imposed during outbreaks.

First, the regulations require states parties to share with WHO the public health rationale and scientific information supporting health measures that significantly interfere with international trade and travel.¹⁰ WHO can share that information with other states parties and “shall share information regarding the health measures implemented.”¹¹ Based on its assessment of the information provided, “WHO may request that the State Party concerned reconsider the application of the measures.”¹² These procedural provisions use information transparency and diplomatic dialogue to increase state party compliance with the substantive rules that regulate the implementation of trade and travel measures.

Second, the PHEIC authority provides a basis for the Director-General to inform and influence how states parties use trade and travel measures in responding to disease events. When the Director-General declares a PHEIC, he or she must issue Temporary Recommendations to guide responses to the emergency.¹³ These recommendations can include measures designed to ensure that state-party responses to the PHEIC “avoid unnecessary interference with international traffic.”¹⁴ Temporary Recommendations are

⁹ IHR, *supra* note 3, arts. 2, 43.

¹⁰ *Id.* art. 43(3).

¹¹ *Id.*

¹² *Id.* art. 43(4).

¹³ *Id.* art. 15(1).

¹⁴ *Id.* art. 15(2).

not legally binding, so they do not, as a matter of international law, affect the right of states parties to impose trade and travel measures in responding to serious disease events. However, the power to issue Temporary Recommendations gives the Director-General normative authority to shape the political context in which states parties consider and implement trade and travel measures in response to specific outbreaks. Similarly, WHO can issue guidance on trade and travel measures even when the Director-General does not declare that a disease event constitutes a PHEIC.¹⁵ Thus, the PHEIC authority reinforces the IHR's rules on trade and travel measures and calls for leadership from the Director-General to use this authority in ways that guide and support compliance with such rules.

B. Past Outbreaks and Controversies about the Authority to Declare a Public Health Emergency of International Concern

The radical nature of the PHEIC power—and the public health, political, and economic implications of its exercise—has made this authority prominent and controversial in global health governance. Prior to the Ebola outbreak in the DRC, the WHO Director-General had declared a PHEIC on four occasions: in 2009 during the H1N1 influenza pandemic,¹⁶ in 2014 concerning the re-emergence of polio in certain countries,¹⁷ in 2014 in response to the Ebola outbreak in West Africa,¹⁸ and in 2016 to address aspects of the Zika virus outbreak.¹⁹ Each of these disease episodes had its own dynamics, which makes generalizing across the outbreaks in terms of the PHEIC authority difficult.

¹⁵ As discussed in Part III below, the Director-General accepted and disseminated advice on trade and travel measures formulated by the Emergency Committee at the three meetings in which the committee did not recommend the declaration of a PHEIC.

¹⁶ *Statement by WHO Director-General, Dr. Margaret Chan on Swine Influenza*, WHO (Apr. 25, 2009), https://www.who.int/mediacentre/news/statements/2009/h1n1_20090425/en/.

¹⁷ *WHO Statement on the Meeting of the International Health Regulations Emergency Committee concerning the International Spread of Wild Poliovirus*, WHO (May 5, 2014), <https://www.who.int/mediacentre/news/statements/2014/polio-20140505/en/>.

¹⁸ *Statement on the 1st Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa*, WHO (Aug. 8, 2014), <https://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>.

¹⁹ *WHO Statement on the First Meeting of the International Health Regulations (2005) (IHR 2005) Emergency Committee on Zika Virus and Observed Increase in Neurological Disorders and Neonatal Malformations*, WHO (Feb. 1, 2016), [https://www.who.int/news-room/detail/01-02-2016-who-statement-on-the-first-meeting-of-the-international-health-regulations-\(2005\)-\(ihr-2005\)-emergency-committee-on-zika-virus-and-observed-increase-in-neurological-disorders-and-neonatal-malformations](https://www.who.int/news-room/detail/01-02-2016-who-statement-on-the-first-meeting-of-the-international-health-regulations-(2005)-(ihr-2005)-emergency-committee-on-zika-virus-and-observed-increase-in-neurological-disorders-and-neonatal-malformations).

The most intense controversies that emerged during the H1N1 pandemic, such as access to influenza vaccines,²⁰ fell outside the scope of the PHEIC authority and the IHR. The declaration of a PHEIC in connection with the re-emergence of polio raised questions about whether this disease event warranted the exercise of the PHEIC authority.²¹ In the West African Ebola outbreak, the WHO Director-General came under criticism for failing to use the PHEIC authority until the outbreak had become a raging crisis—a failure that contributed to the debacle that this outbreak became for WHO, the IHR, and global health governance.²² Perhaps influenced by the late resort to the PHEIC authority in the West Africa Ebola episode, the PHEIC declaration for the Zika virus reflected an abundance of caution about whether the virus was a potential cause for neurological disorders, such as microcephaly. The Director-General terminated the declaration 10 months later after research clarified links between the virus and microcephaly, which established the basis for managing the Zika virus without the need for continuing the emergency declaration.²³

The track record concerning the exercise of the PHEIC authority in these four cases is mixed, but, overall, what happened underscored the utility of the authority within the IHR and in global health governance. The emergence of problems not regulated by the IHR during the H1N1 pandemic did not undermine the appropriateness of the PHEIC declaration for that outbreak. Although questionable trade and travel measures emerged during the pandemic, the PHEIC declaration and the Temporary Recommendations helped increase global scrutiny of such measures and served to reinforce the IHR's rules in this area.²⁴ The declaration for polio does not appear to have done any harm to global efforts to address the polio threat within and beyond the IHR. The failure of the Director-General to exercise the PHEIC authority, including convening the Emergency Committee, earlier in the West African Ebola outbreak highlighted the value that many global health experts placed on the authority and the processes through which the

²⁰ *Supply and Safety Issues Surrounding an H1N1 Vaccine*, THE LANCET (Aug. 1, 2009), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(09\)61395-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(09)61395-7/fulltext).

²¹ Fergus Walsh, *Why is Polio a Public Health Emergency?*, BBC NEWS (May 6, 2014), <https://www.bbc.com/news/health-27295888>.

²² WHO, *Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, ¶¶ 99-103, WHA Doc. A69/21 (May 13, 2016) (discussing the delay in declaring the Ebola outbreak in West Africa constituted a PHEIC).

²³ *Fifth Meeting of the Emergency Committee under the International Health Regulations (2005) regarding Microcephaly, Other Neurological Disorders, and Zika Virus*, WHO (Nov. 18, 2016), [https://www.who.int/news-room/detail/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-\(2005\)-regarding-microcephaly-other-neurological-disorders-and-zika-virus](https://www.who.int/news-room/detail/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-(2005)-regarding-microcephaly-other-neurological-disorders-and-zika-virus) [hereinafter *Fifth Meeting of the Emergency Committee*].

²⁴ WHO, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, at 60, 79-81, WHA Doc. A64/10 (May 5, 2011).

Director-General exercised it. The PHEIC declaration for the Zika virus was limited in scope and duration, and the exercise of the PHEIC authority in this case has not been the apparent source of problems that damaged the perceived utility and importance of that power.²⁵

In addition, disease events that did not result in a PHEIC declaration reinforced the importance of the provisions in the IHR that establish and guide the PHEIC authority. The best example is how WHO used the PHEIC authority in addressing the outbreak of Middle East Respiratory Syndrome (hereinafter “MERS”). The Director-General has not, to date, declared MERS a PHEIC. However, the Director-General took the question repeatedly to the Emergency Committee and has, thus, used the process and mechanism established in the IHR for determining whether a PHEIC should be declared.²⁶

In this period, the PHEIC authority came under the most intense and sustained scrutiny in the wake of the West African Ebola crisis. The failure of the Director-General to convene the Emergency Committee and declare a PHEIC in a timely manner prompted many of the post-Ebola reviews to critique the PHEIC provisions in the IHR and propose changes.²⁷ For example, the Harvard Global Health Institute-London School of Hygiene and Tropical Medicine Independent Panel on the Global Response to Ebola proposed (1) shifting the power to declare a PHEIC from the Director-General to an independent, standing emergency committee; and (2) permitting this standing committee to operate a “graded system of warnings” rather than just being responsible for a binary PHEIC/no PHEIC decision.²⁸ These proposals, and others like them, recognized the need to use the IHR to empower a WHO-based process to evaluate disease events, determine their severity, declare emergencies, and guide responses to them. None of the post-Ebola reviews claimed the PHEIC authority in the IHR had lost its utility, become harmful when exercised, or was unimportant in global health governance.

²⁵ *Fifth Meeting of the Emergency Committee*, *supra* note 23 (in ending the PHEIC for the Zika virus, WHO stated that the declaration of a PHEIC “[h]as led the world to an urgent and coordinated response, providing the understanding that Zika virus infection and associated consequences represent a highly significant long-term problem that must be managed by WHO, States Parties and other partners in a way that other infectious disease threats are managed”).

²⁶ *WHO Statement on the Tenth Meeting of the IHR Emergency Committee regarding MERS*, WHO (Sept. 3, 2015), <https://www.who.int/mediacentre/news/statements/2015/ihr-emergency-committee-mers/en/>.

²⁷ *See Extended List of Ebola Reviews*, WHO (May 2016), <https://www.who.int/about/evaluation/extended-list-of-ebola-reviews-may2016.pdf?ua=1> (listing more than 40 reviews of the Ebola outbreak).

²⁸ Suerie Moon et al., *Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic—The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 THE LANCET 2204, 2212 (2015).

Reviews of the West African Ebola disaster highlighted other problems with the IHR. Responses to the outbreak involved violations of the IHR's rules on unnecessary trade and travel measures.²⁹ The outbreak also highlighted that many states parties did not comply with the IHR's obligations on building core public health surveillance and response capacities.³⁰ These problems raised questions about the strength of the PHEIC authority's reinforcement effect across the web of rules in the IHR. However, in the West African Ebola outbreak, WHO's credibility and legitimacy were damaged by the time it declared a PHEIC. In that context, governments and private-sector enterprises were less willing to heed WHO's guidance concerning an outbreak the response to which the organization had badly bungled.

Much more serious was the evidence that many states parties had not complied, and were often not even close to complying, with their IHR obligations on developing and maintaining surveillance and response capacities. Clearly, the PHEIC authority lacked any reinforcement effect for these critical obligations in the revised IHR. However, this grim situation at country-level increased the need at the international level for WHO leadership in monitoring outbreaks, identifying serious disease events, alerting the international community to emergency situations, and providing guidance for responses to such incidents. This observation connects to proposals made in the post-Ebola reviews to improve how the PHEIC authority functioned.

III. THE EBOLA OUTBREAK IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE CONTROVERSY OVER DECLARING A PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN

In October 2018, April 2019, and June 2019, the Director-General decided, in keeping with advice from the Emergency Committee, not to declare the Ebola outbreak in the DRC a public health emergency of international concern. Although the October 2018 meeting prompted questions about the Emergency Committee's reasoning, the April and June decisions really sparked and then deepened a controversy. Many global health experts believed that the outbreak met all the IHR's criteria for being a PHEIC before April 2019 and that a PHEIC declaration could be useful for response efforts. As noted above, disagreements appeared in earlier years about whether certain outbreaks qualified as a PHEIC, so the second-guessing of the Emergency Committee's recommendations and Director-General's decisions over Ebola in the DRC was not new in kind. However,

²⁹ *Id.* at 2209-10.

³⁰ WHO, *supra* note 22, ¶¶ 19-25.

this controversy had aspects that intensified the acrimony over the exercise of the PHEIC authority.

Briefly, the explanations offered by the Emergency Committee and accepted by the Director-General concerning the April and June decisions concluded that (1) the Ebola outbreak did not satisfy all the criteria in the IHR's definition of a PHEIC; (2) declaring a PHEIC would bring no additional benefits to the outbreak response; and (3) a PHEIC declaration would harm efforts to manage the outbreak by triggering unnecessary trade and travel measures. The handling of the PHEIC criteria in the IHR and the pessimistic perspectives on a PHEIC declaration's impact on response efforts surprised people in global health. Certainly, in earlier outbreaks, the Emergency Committee and Director-General had never openly claimed that a PHEIC declaration would be both useless and harmful. Such thorough skepticism about the exercise of the PHEIC authority found no grounding in the reports that examined what went wrong in the global response to the West African Ebola crisis. Further, as discussed below, the explanations provided by the committee and accepted by the Director-General also amounted to a vote of no confidence concerning aspects of the IHR beyond the PHEIC authority.

Critics attacked the April and June decisions not to declare a PHEIC and the reasons given for these decisions. Much of the criticism focused on the committee's troubling application of the IHR's provisions on the PHEIC authority and its dismissal of other parts of the IHR as ineffective and potentially harmful. The critiques painted a harsh picture of what the Emergency Committee and the Director-General did with the PHEIC authority and the IHR. The criticism left the impression that the PHEIC authority—a centerpiece of the IHR and global health governance—had become dysfunctional in the hands of the Emergency Committee and Director-General. In short, the controversy over declaring a PHEIC for the Ebola outbreak in the DRC left the IHR battered and bruised, with both sides of the debate inflicting damage.

A. The October 2018 Meeting of the Emergency Committee

The Director-General first convened the Emergency Committee in October 2018 to offer its advice on whether he should declare the Ebola outbreak in the DRC a PHEIC. When the committee met, the DRC had reported 216 Ebola cases and 139 Ebola-related deaths in two provinces, North Kivu and Ituri, of which 181 cases and 104 deaths had been

confirmed.³¹ The committee's statement from the October meeting catalogued the challenges the outbreak posed, including that it was occurring in an active conflict zone, and noted encouraging features of the outbreak response to date.³² Although the committee did not recommend a PHEIC declaration, it offered advice on the response efforts, including that no international trade or travel restrictions should be implemented.³³

The Emergency Committee's advice and the Director-General's decision in October did not generate much controversy, most likely because the outbreak was only a few months old, had not spread to another country, and had already stimulated promising response activities.³⁴ The epidemiological, geographical, and political features of the outbreak were still developing, and, generally, the committee's statement suggests that it could not conclude on the information before it that, at this stage, the outbreak constituted a PHEIC. The statement contains no detailed reasoning explaining why the committee advised the Director-General not to declare a PHEIC. The committee's statement did not discuss the outbreak in connection with the criteria in the IHR's definition of a PHEIC, and the committee did not, as Emergency Committees for other disease events have, expressly conclude that the "conditions for a PHEIC have not been met."³⁵ Nor did the committee make any claims about the potential benefits or harms of declaring a PHEIC. Although press reports mentioned speculation that the Emergency Committee was concerned about possible political blowback from a PHEIC declaration,³⁶ the committee's statement made no mention of this issue.

Further, the Director-General's convening of the Emergency Committee at this early point in the outbreak indicated that WHO had learned lessons from the West African Ebola crisis in 2014. The meeting of the committee raised the prominence of the outbreak in global health and signaled that the Director-General was willing to use the PHEIC authority early as part of

³¹ *Statement on the October 2018 Meeting of the IHR Emergency Committee on the Ebola Virus Disease Outbreak in the Democratic Republic of the Congo*, WHO (Oct. 17, 2018), <https://www.who.int/news-room/detail/17-10-2018-statement-on-the-meeting-of-the-ih-er-emergency-committee-on-the-ebola-outbreak-in-drc> [hereinafter *Emergency Committee Statement (October 2018)*].

³² *Id.*

³³ *Id.*

³⁴ Some experts believed that the criteria in the IHR's definition of a PHEIC were satisfied in October 2018. See, e.g., Lawrence O. Gostin et al., *Ebola in the Democratic Republic of the Congo: Time to Sound a Global Alert?*, 393 THE LANCET 617, 618 (2019); Mark Eccleston-Turner & Adam Kamradt-Scott, *Transparency in IHR Emergency Committee Decision Making: The Case for Reform*, 4(2) BRITISH MED. J. GLOBAL HEALTH (2019).

³⁵ Gostin et al., *supra* note 34; Eccleston-Turner & Kamradt-Scott, *supra* note 34.

³⁶ Susan Scutti, *Congo Ebola Outbreak Not a Public Health Emergency of International Concern*, WHO Says, CNN (Apr. 12, 2019), <https://www.cnn.com/2019/04/12/health/ebola-public-health-emergency-congo-africa-bn-intl/index.html>.

global response to the outbreak. In addition, compared to the inadequate responses from WHO and national governments to Ebola's emergence in West Africa, the DRC's and WHO's efforts as the Ebola outbreak emerged were more robust and transparent. The Emergency Committee's statement listed a number of "positive developments," including that investigational vaccines and therapeutics were being used at scale for the first time.³⁷ After the October meeting, the chair of the committee expressed the hope that the outbreak might be managed without resorting to a PHEIC declaration,³⁸ an outcome no one in global health would have lamented.

B. The April 2019 Meeting of the Emergency Committee

The Ebola outbreak in the DRC did not stabilize and recede after October 2018. It grew in worrying ways that indicated the response efforts were not containing the epidemic within the DRC, reducing the risk of cross-border spread of the virus, or decreasing the need for a coordinated international response. This trajectory prompted calls for the Director-General to reconvene the Emergency Committee to reconsider whether the Director-General should declare the outbreak a PHEIC. Arguments in favor of this approach claimed that the outbreak had developed such that it satisfied all the criteria in the IHR's definition of a PHEIC and that a PHEIC declaration would help the response efforts.³⁹ The Director-General reconvened the Emergency Committee in April 2019. The committee again advised against a declaration, and the Director-General accepted this recommendation.⁴⁰ This advice and decision are what ignited the controversy over the use of the PHEIC authority in connection with the DRC's Ebola crisis.

1. The IHR's Definition of a Public Health Emergency of International Concern — Despite the outbreak's expansion and intensification, the Emergency Committee's statement describing its April deliberations was opaque on the specific reasons why the committee advised against a PHEIC declaration. Press reports indicated that the advice not to declare a PHEIC "was based on the fact that, so far, the disease has not spread across the

³⁷ *Emergency Committee Statement (October 2018)*, *supra* note 31.

³⁸ Quoted in Scutti, *supra* note 36.

³⁹ Gostin et al., *supra* note 34.

⁴⁰ *Statement on the Meeting of the International Health Regulations (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo on 12th April 2019*, WHO (Apr. 12, 2019), [https://www.who.int/news-room/detail/12-04-2019-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-for-ebola-virus-disease-in-the-democratic-republic-of-the-congo-on-12th-april-2019](https://www.who.int/news-room/detail/12-04-2019-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-for-ebola-virus-disease-in-the-democratic-republic-of-the-congo-on-12th-april-2019) [hereinafter *Emergency Committee Statement (April 2019)*].

Congo's borders to start transmission in neighboring countries."⁴¹ The chair of the Emergency Committee stated that, if a disease event "stays within a country, it is, by definition, not an issue of international concern."⁴² This reasoning focused attention on the IHR's definition of a PHEIC, which includes as a criterion that an extraordinary event "constitute a public health risk to other States through the international spread of disease."⁴³ In this case, the Emergency Committee read this criterion narrowly as a requirement for an extraordinary disease event to have spread across borders and triggered transmission in other countries before the Director-General should declare a PHEIC.

Proponents of a PHEIC declaration challenged the Emergency Committee's conclusion that the definition of a PHEIC requires actual cross-border spread and transmission within another country. Critics argued that the committee's conclusion conflicted with the commonly held interpretation that the criterion for international spread included the potential for a disease to spread internationally.⁴⁴ The Emergency Committee had in October 2018 and April 2019 acknowledged that the Ebola outbreak in the DRC posed serious risks of cross-border spread.⁴⁵ The committee's statement from its April meeting noted, for example, the "very high risk of regional spread," the need for neighboring countries to "accelerate current preparedness and surveillance efforts," and the importance of strengthening "cross-border collaboration."⁴⁶

This tussle about interpreting a criterion in the PHEIC definition raised important issues about the PHEIC authority in the IHR. The claim that the Ebola outbreak satisfied the "legal criteria" for a PHEIC suggested that the Director-General might have a legal obligation to declare the outbreak a PHEIC. The IHR contains no such obligation. The PHEIC authority is a discretionary power, not a box-checking exercise. As a matter of international law, the Director-General can declare a PHEIC even if the Emergency Committee does not recommend it. Likewise, the Director-General can decide not to declare a PHEIC even if the committee concludes that a disease event satisfies each element of the IHR's definition of a PHEIC.

The criteria in the PHEIC definition guide how the Director-General exercises the discretionary authority the PHEIC authority grants, as advised

⁴¹ Helen Branswell, *Could an Emergency Declaration over Ebola Make a Bad Situation Worse?*, STATNEWS (May 14, 2019), <https://www.statnews.com/2019/05/14/could-an-emergency-declaration-over-ebola-make-a-bad-situation-worse/>.

⁴² Scutti, *supra* note 36.

⁴³ IHR, *supra* note 3, art. 1(1).

⁴⁴ Gostin et al., *supra* note 34.

⁴⁵ *Emergency Committee Statement (October 2018)*, *supra* note 31; *Emergency Committee Statement (April 2019)*, *supra* note 40.

⁴⁶ *Emergency Committee Statement (April 2019)*, *supra* note 40.

by the Emergency Committee. Under the IHR, what is an “extraordinary event,” that poses a “public health risk to other States through international spread of disease,” and “potentially requires a coordinated international response” is, and can only be, determined on a case-by-case basis because diseases are different, geographies are diverse, and capacities to handle public health risks vary. The case-by-case nature of the exercise creates the possibility that the Emergency Committee and the Director-General might apply each criterion differently across outbreaks for reasons that have little to do with international law. Thus, the Director-General’s acceptance of the Emergency Committee’s interpretation of the “international spread” criterion was not illegal under the IHR.

Nevertheless, the gap between the Emergency Committee’s awareness of the serious risk of cross-border spread and its narrow application of the “international spread” criterion raised questions about the committee’s deliberations. The statement by the chair of the committee that a disease event is not, by definition, of international concern if it stays in one country was bizarre, particularly from a public health perspective. It was especially so in a context in which WHO and other international bodies were warning about the risk of cross-border spread, mounting multifaceted efforts to address the regional threats the outbreak created, and calling for more international engagement. The committee appeared to have engaged in a box-checking exercise in which it read one of the boxes in a hairsplitting fashion at odds with the IHR’s text, the generally accepted interpretation of that criterion, and the threats the outbreak posed.

2. *The Emergency Committee’s Claim that Declaring a Public Health Emergency of International Concern Would Produce No Added Benefits for the Outbreak Response* — The Emergency Committee’s handling of the PHEIC definition might best be explained as reflecting the committee’s belief that it needed legal cover for the more substantive reasons why it advised against a PHEIC declaration. At its April meeting, the committee concluded that “there is no added benefit to declaring a PHEIC at this stage[.]”⁴⁷ In briefing the press after the meeting, the chair of the committee elaborated by claiming that “declaring an emergency would provide no added benefit given that the WHO was already receiving significant support for the effort to control the outbreak.”⁴⁸ In essence, the committee decided that, even if the Ebola outbreak satisfied all the criteria of the PHEIC definition, a PHEIC declaration would have no utility for the international response to the outbreak for the foreseeable future.

⁴⁷ *Id.*

⁴⁸ Helen Branswell, *WHO Stops Short of Declaring Ebola Crisis a Global Health Emergency*, STATNEWS (Apr. 12, 2019), <https://www.statnews.com/2019/04/12/who-stops-short-of-declaring-ebola-crisis-a-global-health-emergency/>.

This conclusion was particularly striking given the advice that the Emergency Committee formulated during the April meeting that stressed the need to sustain, scale up, accelerate, and strengthen key aspects of the outbreak response.⁴⁹ The committee also underscored that the outbreak response effort needed “substantial, immediate and sustained additional financial support.”⁵⁰ These statements echoed WHO’s desire for more engagement from government, intergovernmental, and private-sector actors in the response to the outbreak. Despite all the need for more international involvement and action, the Emergency Committee concluded that a PHEIC declaration would produce “no added benefit” for the international response.

This conclusion meant the Emergency Committee, and the Director-General in accepting the committee’s advice, did not believe a PHEIC declaration could support or enhance any aspect of the response that connected with the IHR, including surveillance, notification of cases, strengthening public health capacities, and improving international cooperation. In other words, a PHEIC declaration could not reinforce any of the core components of the IHR in any way. This sweeping claim, and the pessimism about the PHEIC authority it contained, was breathtaking and bewildering.

This comprehensive dismissal of any utility in a PHEIC declaration also rejected what proponents had been asserting for months about the benefits a declaration could produce. A comment in the *Lancet* in February 2019 exemplified this position: “A PHEIC is a clarion call to galvanise high-level political, financial, and technical support. A PHEIC would provide a clear signal from the world’s global health body that UN leadership is urgent. A PHEIC also empowers the WHO Director-General to make temporary, non-binding recommendations that have normative force.”⁵¹

The gap between the Emergency Committee’s position of “no added benefit” and the PHEIC proponents’ claim of many benefits sparked debate about the utility of the PHEIC authority. The debate revealed that the members of the Emergency Committee were not alone in believing that a PHEIC declaration would produce few, if any, benefits for the outbreak response.⁵² Such skepticism pointed to different factors about this outbreak that reduced the potential impact of a declaration, such as the existing level of international cooperation and the problems that armed conflict and distrust of the government in the DRC created for the response.

For critics of the Emergency Committee’s reasoning, these and other factors specific to the Ebola outbreak in the DRC meant that this outbreak was precisely the kind of situation in which a PHEIC declaration could

⁴⁹ *Emergency Committee Statement (April 2019)*, *supra* note 40.

⁵⁰ *Id.*

⁵¹ Gostin et al., *supra* note 34, at 618.

⁵² Branswell, *supra* note 41.

deliver benefits. The epicenter of this outbreak is a low-income country suffering from weak health capabilities, distrust of the government, and armed conflict. The outbreak threatened neighboring countries that have limited surveillance and response capacities. Although significant, international assistance for addressing the outbreak remained inadequate, as the Emergency Committee acknowledged. In this environment, the committee's conclusion that a PHEIC declaration would serve no constructive purpose seemed extreme, implausible, and unjustified.

In comments to the press, the chair of the Emergency Committee at the April meeting also raised eyebrows by stating that “[i]t would not be appropriate to declare a PHEIC just to generate funds.”⁵³ This statement appeared to recognize that a PHEIC declaration could create added benefits by generating funds for response efforts, which contradicted the committee's conclusion that a declaration would not create additional benefits. The statement implied that the committee believed that the Director-General was only justified in declaring a PHEIC for reasons not involving the raising of funds, a position not supported by anything in the text of the IHR. This implication was also odd because the committee itself underscored the need for “substantial, immediate and sustained additional financial support” for the outbreak response.⁵⁴ The committee acknowledged that achieving the many objectives contained in its own advice to WHO and countries required resources. Put another way, generating benefits for the outbreak response by implementing appropriate public health measures requires money. If a PHEIC declaration could help generate additional financial support for implementing such measures, then would not such a declaration create added benefits for the response effort?

3. Trade and Travel Measures and a Declaration of a Public Health Emergency of International Concern — Another member of the Emergency Committee mentioned a different potential explanation for the committee's recommendation in April by commenting in the press that “[w]e know all too well the probable side effects of a PHEIC declaration: unfounded travel and trade restrictions” that can “hamper the response work and severely affect the local economy, thus increasing community resistance.”⁵⁵ Although this member stressed that he spoke only for himself, suspicions grew that this reasoning about trade and travel measures played a role in the committee's deliberations and advice to the Director-General. This perspective blames the exercise of the PHEIC authority for unnecessary trade and travel restrictions that appear during outbreaks. Put differently, a PHEIC declaration not only would produce no added benefits but also would

⁵³ *Id.*

⁵⁴ *Emergency Committee Statement (April 2019)*, *supra* note 40.

⁵⁵ Branswell, *supra* note 41.

harm outbreak response activities. This reasoning also communicates a lack of confidence in the IHR's rules on trade and travel measures.

This link between a PHEIC declaration and unwarranted trade and travel measures implemented during outbreaks became part of the controversy in the wake of the April meeting. Proponents of a PHEIC declaration acknowledged that unnecessary trade and travel measures are a feature of outbreak politics, but they argued that the PHEIC authority gives the Director-General the normative means (Temporary Recommendations) to address this problem and shape how countries respond to outbreaks through trade and travel measures.⁵⁶ Under this perspective, neither the Emergency Committee nor the Director-General should reject the declaration of PHEIC because countries might subsequently impose unnecessary trade and travel restrictions. Rather, the Emergency Committee should help the Director-General use the PHEIC authority to address forthrightly the problem of unwarranted trade and travel restrictions and reinforce the IHR's rules on trade and travel measures.

This aspect of the controversy focused attention on the relationship between PHEIC declarations and trade and travel measures. The history of the IHR before 2005 and the PHEIC declarations issued under the revised IHR make drawing a direct, causal line between such declarations and unwarranted trade and travel restrictions questionable. Countries applied such restrictions under the international sanitary conventions and the old IHR, well before WHO member states granted the Director-General the power to declare PHEICs. The problem of trade and travel measures is not, thus, confined to outbreaks that the Director-General declares a PHEIC. The IHR's rules on trade and travel measures apply in all situations, not just when the Director-General declares a PHEIC.

The Emergency Committee was aware of the potential for unnecessary trade and travel restrictions to appear without a PHEIC declaration. In advising against a PHEIC declaration at its April meeting, the committee repeated "its previous advice that it is particularly important that no international travel or trade restrictions should be applied."⁵⁷ This advice only makes sense if the committee believed such restrictions might appear in a context where the Director-General had not declared a PHEIC. Thus, unwarranted trade and travel measures arise from causes other than a PHEIC declaration, and this possibility does not disappear because the Director-General declares a PHEIC.

Looking at contexts involving PHEIC declarations, the declarations for polio and Zika do not appear to have caused a rash of irrational trade and

⁵⁶ Gostin et al., *supra* note 34, at 618-19.

⁵⁷ *Emergency Committee Statement (April 2019)*, *supra* note 40.

travel restrictions.⁵⁸ Questionable trade and travel restrictions that appeared during the H1N1 pandemic had more to do with long-stoked fears about the harrowing political, economic, and societal dangers potentially posed by a novel, pandemic strain of human influenza than with the Director-General's PHEIC declaration.⁵⁹ The trade and travel restrictions that emerged during the West African Ebola outbreak did not arise simply because the Director-General declared a PHEIC. That story also involves the lack of confidence in WHO's actions and advice brought about by the Director-General's and the organization's mistakes and failures in responding to that outbreak in a timely and effective manner.

More broadly, the view that the Director-General should not declare a PHEIC because of the post-declaration appearance of unnecessary trade and travel measures demonstrates little, if any, confidence in the IHR's handling of such measures. As noted above, the PHEIC authority is designed to reinforce the IHR's rules on trade and travel measures. In determining whether to declare a PHEIC, the Director-General must assess the disease event's risk of generating "interference with international traffic."⁶⁰ In issuing Temporary Recommendations after a PHEIC declaration, the Director-General can include measures that help states parties "avoid unnecessary interference with international traffic."⁶¹ These aspects of the PHEIC authority empower the Director-General to guide states parties towards effective responses that comply with the IHR's rules on trade and travel measures. Further, Temporary Recommendations on trade and travel measures can slot into the process that the IHR establishes for addressing implementation of questionable restrictions on international traffic.⁶² Believing that the Director-General should avoid declaring a PHEIC because unnecessary trade and travel measures will follow clearly holds that the IHR's rules on trade and travel measures, even as reinforced by the PHEIC authority, are ineffective.

⁵⁸ WHO and other public officials did not consider encouraging pregnant women to avoid travel to areas experiencing local Zika transmission as an unnecessary trade and travel restriction. Lisa Schnirring, *WHO Stiffens Zika Travel Advice for Women, Aids Countermeasure Efforts*, CTR. FOR INFECTIOUS DISEASE RES. AND POL. (Feb. 12, 2016), <http://www.cidrap.umn.edu/news-perspective/2016/02/who-stiffens-zika-travel-advice-women-airs-countermeasure-efforts>.

⁵⁹ As one expert captured these fears, "Scientists have long forecast the appearance of an influenza virus capable of infecting 40 percent of the world's human population and killing unimaginable numbers." Laurie Garrett, *The Next Pandemic?*, FOREIGN AFF. (July/Aug. 2005), <https://www.foreignaffairs.com/articles/2005-07-01/next-pandemic>.

⁶⁰ IHR, *supra* note 3, art. 12(4).

⁶¹ *Id.* art. 15(2).

⁶² *Id.* art. 43.

C. The June 2019 Meeting of the Emergency Committee

The Director-General convened the Emergency Committee for a third time in June 2019. Despite further expansion of the Ebola outbreak in the DRC and the international spread of the virus to Uganda, the committee advised the Director-General not to declare a PHEIC.⁶³ This recommendation, and the Director-General's acceptance of it, intensified the controversy over the exercise of the PHEIC authority in relation to the DRC's Ebola outbreak.

1. The IHR's Definition of a Public Health Emergency of International Concern — In its statement from the June meeting, the Emergency Committee asserted that “the outbreak is a health emergency in the DRC and the region” but it “does not meet all three criteria for a PHEIC under the IHR. While the outbreak is an extraordinary event, with risk of international spread, the ongoing response would not be enhanced by formal Temporary Recommendations under the IHR (2005).”⁶⁴

Here, the committee concluded that two of the three criteria in the PHEIC definition were met. However, on the last criterion, its statement contained two astonishing features that demonstrated the committee had descended into definitional farce.

First, the committee ignored the third criterion in the IHR's definition of a PHEIC: the extraordinary event that constitutes a public health risk through international spread must also “potentially require a coordinated international response.”⁶⁵ Nowhere does the definition include a criterion that “the ongoing response would be enhanced by Temporary Recommendations.” In April, the Emergency Committee interpreted the “international spread” criterion in the definition narrowly in advising against a PHEIC declaration. Although this interpretation created controversy, the PHEIC authority requires the Emergency Committee and Director-General to interpret the criteria in the definition in the context of a specific disease event. In June, the committee effectively deleted the third criterion in the definition and inserted a new one that it made up, something neither the committee nor the Director-General has any right, discretion, or power to do under the IHR.

Second, the Emergency Committee's handling of the third criterion of the PHEIC definition produced a manifestly absurd result, with which the

⁶³ *Statement on the Meeting of the International Health Regulations (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo*, WHO (June 14, 2019), [https://www.who.int/news-room/detail/14-06-2019-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-for-ebola-virus-disease-in-the-democratic-republic-of-the-congo](https://www.who.int/news-room/detail/14-06-2019-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-for-ebola-virus-disease-in-the-democratic-republic-of-the-congo) [hereinafter *Emergency Committee Statement (June 2019)*].

⁶⁴ *Id.*

⁶⁵ IHR, *supra* note 3, art. 1(1).

Director-General agreed. The purpose of the definition is to guide the Director-General and the committee in determining whether a serious disease outbreak constitutes a PHEIC. Temporary Recommendations come *after* the Director-General declares a PHEIC under the definition's criteria. Thus, it makes no sense to include, as a criterion in the definition, an evaluation of the impact of recommendations that only appear after the Director-General declares a PHEIC according to the criteria in that definition. More importantly, the committee knew that a coordinated international response to the Ebola outbreak in the DRC was in progress and would continue. Its statement explicitly noted the "ongoing response."⁶⁶ The third criterion in the definition—the potential need for a coordinated international response—was unquestionably met. Instead, the committee decided that the outbreak did not "potentially require a coordinated international response" because it thought Temporary Recommendations would not enhance the coordinated international response already underway.

The Emergency Committee's handling of the PHEIC definition was so at odds with the text of the definition and the facts on the ground concerning the international response that it constituted an abuse of the authority the IHR creates for the committee. The Director-General's acceptance of the committee's actions compounded the abuse because, in so accepting, the Director-General based his decision not to declare a PHEIC on the unjustified and manifestly absurd conclusions of the committee.

The Emergency Committee's statement from the June meeting produced heightened consternation among global health experts and demands for a better explanation of the committee's advice and the Director-General's acceptance of it. In a *Lancet* editorial, members of the WHO Strategic and Technical Advisory Group for Infectious Hazards (hereinafter "STAG-IH") defended the committee.⁶⁷ The STAG-IH members attempted to explain how the PHEIC authority in the IHR works and why the committee advised against a declaration. This editorial did nothing to quell the controversy.

In terms of the PHEIC authority, the STAG-IH editorial stated that, "[b]y declaring a PHEIC, the Director-General requires states parties to share critical information for risk assessment, adjust response plans if deemed necessary, and implement temporary recommendations formulated by the emergency committee."⁶⁸ Unfortunately, nothing in this statement about the consequences of a PHEIC declaration is true. The IHR contains no provisions that require states parties to share information or adjust response plans because the Director-General has declared a PHEIC. Indeed, the IHR contains no provisions that require states to do anything because the

⁶⁶ *Emergency Committee Statement (June 2019)*, *supra* note 63.

⁶⁷ Johan Giesecke, *The Truth about PHEICs*, *THE LANCET* (July 5, 2019), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)31566-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)31566-1/fulltext).

⁶⁸ *Id.*

Director-General declares a PHEIC. Under the IHR, Temporary Recommendations are not legally binding, so a PHEIC declaration does not, and cannot, require states parties to implement them. Far from justifying anything that the committee did, this aspect of the STAG-IH's editorial suggested that yet another WHO-based body apparently does not understand what the text of the IHR contains and means.

2. *The Claims that Declaring a Public Health Emergency of International Concern Would Produce No Benefits but Would Cause Economic Harm for the Outbreak Response* — The Emergency Committee's handling of the PHEIC definition at the June meeting was so bad that it cannot explain its decision not to recommend a PHEIC declaration. The committee's more serious reason for its recommendation can be found in its analysis of the benefits and costs of declaring a PHEIC. The committee's conclusion that "the ongoing response would not be enhanced by formal Temporary Recommendations under the IHR (2005)" represented a determination that a PHEIC declaration would not produce benefits for response efforts.⁶⁹ This conclusion echoes the committee's determination in April that a declaration would produce "no added benefit" for the Ebola response.⁷⁰ The STAG-IH also pointed to a statement in the press in which the acting chair of the committee at the June meeting argued that a declaration "would add no clear benefit" in information sharing for risk assessment, the adjustment of response plans as necessary, and implementation of Temporary Recommendations.⁷¹ In terms of costs, the STAG-IH editorial highlighted that "[m]embers of the emergency committee cited potential disadvantages of a PHEIC declaration (effects on travel and trade that could impede support to affected regions and hinder outbreak control)[.]"⁷² Here again is the view that PHEIC declarations cause unwarranted trade and travel measures and that the IHR's other provisions on trade and travel are not effective in preventing or mitigating them.

Criticism of the Emergency Committee after the June meeting focused much of its energy on what benefits and harms a PHEIC declaration would generate. A *Lancet* editorial zeroed in on the committee's decision that "economic harms associated with a PHEIC declaration would outweigh the benefits."⁷³ The editorial chastised the committee for playing politics by "favour[ing] local protectiveness over global galvanising."⁷⁴ It concluded in a manner that presented the potential consequences of a declaration in different terms:

⁶⁹ *Emergency Committee Statement (June 2019)*, *supra* note 63.

⁷⁰ *Emergency Committee Statement (April 2019)*, *supra* note 41.

⁷¹ Giesecke, *supra* note 67.

⁷² *Id.*

⁷³ *The Politics of PHEIC*, 393 *THE LANCET* 2470, 2470 (2019).

⁷⁴ *Id.*

[A] PHEIC [declaration] could be a force for good, mobilising global resources and communities to build solidarity, preparedness, trust, and resolution of conflict. The concerns about trade and tourism restrictions with PHEIC are valid but not inevitable. Global financial and political support is badly needed, and a PHEIC declaration would have produced that.⁷⁵

Similarly, an editorial in the *Washington Post* argued that a PHEIC declaration could produce a multitude of benefits for the outbreak response and ward off potential adverse effects from unwarranted trade and travel measures. The editorial claimed that a declaration could make a difference to the response effort by:

- Improving security for health workers in the region;
- Stepping-up community engagement in outbreak-affected areas;
- Extending health care for populations beyond Ebola vaccines and treatment;
- Strengthening Ebola preparedness measures in countries bordering the DRC;
- Reducing the risk that countries would implement unnecessary trade and travel measures in response to the outbreak; and
- Encouraging the U.S. to scale up its involvement and contributions to the outbreak response by releasing more aid, allowing U.S. government personnel to work in and near outbreak zones in the DRC, and doing more to make Ebola countermeasures more widely available.⁷⁶

After the June meeting, the handling of the benefits and costs of a declaration by the Emergency Committee and its critics produced a tale of two PHEICs—it would be the best of declarations, it would be the worst of declarations, it would be an act of wisdom, it would be an act of foolishness, it would be a source of hope, it would be the cause of despair. The gap between the pessimism of the committee and its supporters and the optimism of the critics is so significant that scrutiny of both sides of the cost-benefit debate is in order.

⁷⁵ *Id.*

⁷⁶ Ronald A. Klain & Daniel Lucey, *It's Time to Declare a Public Health Emergency on Ebola*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/opinions/its-time-to-declare-a-public-health-emergency-on-ebola/2019/07/10/c77641fc-a327-11e9-b732-41a79c2551bf_story.html.

The Emergency Committee's cost-benefit analysis of a PHEIC declaration at its June meeting—and the Director-General's acceptance of it—leaves much to be desired. To begin, under the IHR, the Emergency Committee's task is to provide its views on “whether an event constitutes a public health emergency of international concern”⁷⁷ guided by the PHEIC definition. The IHR does not grant the committee the authority to speculate about whether a PHEIC will produce benefits or harms.

Leaving aside the text of the IHR, the proposition that a declaration, with its Temporary Recommendations, would produce no added benefits for information sharing, response plan adjustments, implementation of public health advice, enhanced international cooperation, or any other activity underway in the sizable, coordinated, and multifaceted international response is hard to believe. The context of the Ebola outbreak in June underscores this skepticism: No benefits from a PHEIC declaration—one of the most important actions a WHO Director-General can take—during an outbreak that was growing bigger and more dangerous and for which the international response was proving increasingly inadequate?

The Emergency Committee clearly believed that formulating public health advice would add value to outbreak response activities because it promulgated such advice at its October, April, and June meetings. The Director-General accepted this advice and the need to disseminate it. Members of STAG-IH also agreed with the advice and the importance of issuing it. Why, then, the committee, the Director-General, and the STAG-IH thought that developing and providing exactly the same kind of public health advice as Temporary Recommendations under a PHEIC declaration would produce no added benefits for response efforts is not clear.

The lack of clarity leaves the impression that the Emergency Committee, the Director-General, and the STAG-IH believed that the mere act of declaring a PHEIC somehow transforms beneficial guidance into empty rhetoric. This impression suggests that core bodies and personnel at WHO did not perceive that a declaration would have any utility. What had been considered a centerpiece of the IHR's strategy to strengthen global health security appears to have become something without value and to be avoided in the context of an outbreak that met all the criteria for a PHEIC under the IHR. Here, key people and mechanisms at the heart of global health governance delivered a resounding vote of no confidence in the PHEIC authority in the IHR.

For their part, proponents of a PHEIC declaration claimed that a declaration would catalyze many benefits from the local to the global level. The sheer scope of these claims invites skepticism, as does the substance of certain purported benefits of a declaration. Recall that a declaration does not

⁷⁷ IHR, *supra* note 3, art. 48(1).

trigger any legal requirements for IHR states parties to do anything. Within the IHR's blueprint, a declaration should reinforce—in connection with a specific disease event—obligations that states parties already have under the regulations, such as conducting surveillance, notifying cases to WHO, cooperating with WHO and other countries, strengthening surveillance and response capacities, and refraining from implementing unnecessary trade and travel restrictions. Thus, expecting a declaration to produce these benefits in the response to the outbreak in the DRC is reasonable.

However, some claims about purported benefits of a PHEIC declaration made after the Emergency Committee's June meeting stretched credulity. How exactly a declaration would improve security for health workers amidst the DRC's armed conflict is not clear. The dynamics of the armed conflict have nothing to do with Ebola or public health. Why the armed factions that attacked Ebola treatment centers would change their behavior because the Director-General declared a PHEIC is not explained. Similarly, how a declaration would cause the DRC government and the international community to expand health care for people beyond Ebola treatment and vaccines is not explained. Even with a declaration, outbreak responders would still have their hands full addressing the threat of Ebola.

The claims about security for health workers and the expansion of health services beyond Ebola attempt to connect a PHEIC declaration with problems that inhibited the Ebola response. Violence against health personnel and facilities and resentment about the international community's lack of interest in other health problems in the DRC are obstacles to an effective outbreak response.⁷⁸ However, the IHR, including the PHEIC authority, was not crafted to address armed conflict or remedy long-standing global neglect of the many health care and health system needs of populations in low-income countries. As reviews of the IHR after the West African Ebola outbreak demonstrate, compliance around the world with key obligations of the IHR, such as building core surveillance and response capabilities, was poor.⁷⁹ This unfortunate fact supports being cautious about claiming what the IHR, through the PHEIC authority, can achieve beyond what the regulations are designed to accomplish.

Turning from benefits to harms, the Emergency Committee re-emphasized at its June meeting the advice it gave in October 2018 and April 2019 “against the application of any international trade or travel restrictions.”⁸⁰ The committee formulated this guidance three times in

⁷⁸ Helen Branswell, “*On a Knife Edge*”: *Ebola Outbreak Threatens to Escalate as Violence Rises*, STATNEWS (May 7, 2019), <https://www.statnews.com/2019/05/07/ebola-outbreak-escalate-violence/>; Olivia Acland, *Hunger, Measles, Cholera, and Conflict: Ebola Not the Only Killer Ravaging Congo*, THE NEW HUMANITARIAN (July 3, 2019), <https://www.thenewhumanitarian.org/news/2019/07/03/hunger-measles-cholera-and-conflict-ebola-not-only-killer-ravaging-congo>.

⁷⁹ See, e.g., WHO, *supra* note 22, ¶¶ 19-25.

⁸⁰ *Emergency Committee Statement (June 2019)*, *supra* note 63.

accordance with the IHR's rules on trade and travel and expressed no concern at any meeting that its advice would trigger unwarranted trade and travel measures. However, the committee, Director-General, and STAG-IH seem to have believed that issuing exactly the same guidance under a PHEIC declaration would make states parties more likely to ignore the advice and, in the process, violate the IHR's provisions on trade and travel measures. The act of declaring a PHEIC apparently transformed beneficial, rule-based guidance into an incentive to implement illegal measures that would harm outbreak response efforts.

This grim perspective appears in another argument the members of the STAG-IH made. Their editorial suggested that, even if a PHEIC declaration produced benefits, the threat of post-declaration trade and travel restrictions might counsel against declaring a PHEIC:

The public health community must recognize the close link between disease and trade inherent in [the] IHR (2005) and the risks and benefits of using this strong instrument of international law to raise awareness and resources—a policy that could jeopardize the future effectiveness of the regulations in sectors of society other than health.⁸¹

Put differently, the STAG-IH asserted that using the PHEIC authority to generate public health benefits might jeopardize the IHR's effectiveness in sectors of society that deal with international economic matters.

However, recognizing the close link between trade and disease in the IHR requires a proper understanding of how the IHR manages this link through its rules on trade and travel measures, how the PHEIC authority reinforces these rules, and how international trade law supports the provisions in the IHR on the trade-disease link. The IHR rules are very similar to rules in international trade law, including agreements within the World Trade Organization (hereinafter "WTO").⁸² The rules in the IHR and international trade agreements apply whether or not the Director-General declares a PHEIC. A declaration provides no justification under the IHR or international trade law for violating rules on trade-health issues. Temporary Recommendations issued after a declaration do not counsel behavior that is illegal under the IHR or international trade law. Thus, how a PHEIC declaration made to produce public health benefits, including the avoidance of unnecessary trade and travel restrictions, could "jeopardize the future

⁸¹ Giesecke, *supra* note 67.

⁸² See, e.g., David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT'L L. 325, 382 (2005) (noting that the "approach in the new IHR resembles the structure and dynamics of obligations contained in the WTO's SPS Agreement").

effectiveness” of the IHR in non-health sectors of society concerned about international economic relations is not clear. Those sectors use the same rules and accept the same policy rationales that support the avoidance of economic measures that have no basis in science, contradict public health principles, and impose more restrictions on economic activity than are necessary to achieve a health objective.

The concern about a PHEIC declaration triggering unnecessary trade and travel measures connects, of course, with the long history of countries imposing irrational and harmful restrictions on international traffic in response to actual and perceived disease threats. The problem is real, and governments and international organizations have struggled to mitigate it in health and trade governance regimes. The problem is acute with respect to extraordinary disease events that emerge rapidly and have the potential to spread internationally. Trade agreements and institutions, such as those within the WTO, are not constructed to deal with fast-moving disease events in how they regulate the trade-health relationship. Although powerful, the WTO dispute settlement mechanism works too slowly to help countries struggling with an outbreak to fend off unwarranted trade measures imposed by other nations. The provisions on trade and travel in the IHR have not escaped criticism either. Reviews conducted after different outbreaks have scrutinized these provisions, identified problems, and made recommendations for better mitigation of unnecessary trade and travel restrictions.⁸³

These critiques should, however, be kept in perspective. As noted above, the historical record does not establish that PHEIC declarations cause the implementation of unnecessary trade and travel measures. Other factors play important roles in determining whether states implement such measures. The rules in the IHR, like those in the WTO, cannot banish irrational behavior by states during serious disease events. The strategy is to prevent, limit, and roll back such behavior so that it does not materially harm efforts to control an epidemic. The IHR uses the approaches found in international trade law—base measures on science and public health principles and use institutional processes to address problems through dialogue and the exchange of information. The IHR does not have a compulsory dispute mechanism with enforcement power, as does the WTO.⁸⁴ However, virtually no other international legal regime has a dispute settlement process like the WTO, so in this regard, the IHR is not an aberration.

Instead, WHO member states designed the PHEIC authority to empower the Director-General and the Emergency Committee to consider the trade and travel implications of serious disease events and issue guidance that

⁸³ See, e.g., WHO, *supra* note 22, at 65-67.

⁸⁴ IHR, *supra* note 3, art. 56 (Settlement of Disputes).

provides a roadmap for compliance with the IHR and international trade law. As happened at its first three meetings, the committee can formulate advice on trade and travel measures even when it does not recommend that the Director-General declare a PHEIC. The PHEIC authority allows the Director-General to issue Temporary Recommendations after declaring a PHEIC in order to address, among other things, trade and travel measures. Under the IHR, WHO can then use the Emergency Committee's advice and Temporary Recommendations to identify potential unnecessary measures and seek information and dialogue with the states parties concerned in an effort to have such measures removed.

To be sure, these provisions and this process cannot guarantee that states parties will never implement unnecessary trade and travel measures in violation of their IHR obligations. The objective is not, and never has been, 100% compliance. The strategy entails using the PHEIC authority to guide states parties towards implementation of trade and travel measures that are effective vis-à-vis the specific disease threat and that do not interfere with public health response activities. The PHEIC authority empowers the Director-General and the Emergency Committee to help states parties implement their IHR obligations on trade and travel in the difficult circumstances created by serious disease events. Deciding not to declare a PHEIC because countries might implement unwarranted trade and travel measures takes away the normative leadership that the IHR grants to the Director-General on this issue. In their arguments, proponents of a declaration pointed to the need for this very leadership and for the Director-General to embrace it.

D. The July 2019 Meeting of the Emergency Committee

The final stage of the controversy came when the Director-General accepted the advice of the Emergency Committee by declaring the Ebola outbreak in the DRC constituted a PHEIC on July 17, 2019.⁸⁵ In one sense, this decision ended the controversy because it put arguments for and against a declaration in the rearview mirror. However, the declaration also forced a reckoning with the previous advice of the committee and decisions of the Director-General. This reckoning leaves what the committee and the Director-General did in April and June in tatters and bolsters the arguments that proponents of a declaration had been making. Although the declaration allowed the global health community to move on, it did not undo the damage the controversy inflicted on the IHR.

⁸⁵ *Statement on the Meeting of the International Health Regulations (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo on 17 July 2019*, WHO (July 17, 2019), at 6, <https://www.who.int/ihr/procedures/statement-emergency-committee-ebola-drc-july-2019.pdf> [hereinafter *Emergency Committee Statement (July 2019)*].

The major development in the outbreak that led the Director-General to convene the Emergency Committee again, just over a month after the June meeting, was the identification of a case of Ebola in Goma involving a man who traveled to that city from Beni province, the epicenter of the outbreak in the DRC.⁸⁶ When discussed by the committee, this case did not feature Ebola transmission within Goma or cross-border spread. However, the Goma case heightened long-standing worries about the outbreak spreading internationally because Goma has approximately two million residents, has an airport that handles international flights, and is a hub of economic activities between the DRC and Rwanda. The Emergency Committee noted that, “[d]espite significant improvement in many places, there is concern about the potential spread from Goma, even though there have been no new cases in that city.”⁸⁷ The committee concluded that “a coordinated international response under the International Health Regulations (2005) is required” and that “the conditions for a Public Health Emergency of International Concern (PHEIC) under the IHR (2005) have been met.”⁸⁸ The Director-General accepted the committee’s recommendation, declared a PHEIC, and issued Temporary Recommendations based on the committee’s advice.

The Emergency Committee’s explanation of its decision to advise a PHEIC declaration raised new questions about the committee’s prior unwillingness to recommend one. The committee had been well aware of Ebola’s disturbing spread within the DRC, the potential for the virus to appear in Goma, and the serious risk of cross-border movement. It recognized these long-standing realities again at its July meeting, observing that “[t]here is continued seeding to new or previously cleared areas” and “the risk remains high for bordering countries.”⁸⁹ The case in Goma involved domestic movement of the virus and highlighted cross-border risks, features already long associated with the outbreak. As a WHO official said at the press briefing following the Emergency Committee’s meeting, “We’ve been preparing in Goma . . . for well over six months.”⁹⁰ In the words of the acting chair of the committee after its April 2019 meeting, the outbreak was a “severe emergency” that might “affect neighboring countries.”⁹¹ Encouraged and helped by WHO, the DRC’s neighbors, including Rwanda,

⁸⁶ *Emergency Committee on Ebola in the Democratic Republic of the Congo Press Conference (Transcript)*, WHO (July 17, 2019), <https://www.who.int/news-room/detail/17-07-2019-emergency-committee-on-ebola-in-the-dr-of-congo> [hereinafter *Emergency Committee on Ebola in Congo*].

⁸⁷ *Emergency Committee Statement (July 2019)*, *supra* note 85, at 3.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 3.

⁹⁰ *Emergency Committee on Ebola in Congo*, *supra* note 86.

⁹¹ Ineke Mules, *Ebola Outbreak Puts DR Congo’s Neighbors on High Alert*, DW.COM (June 15, 2019), <https://www.dw.com/en/ebola-outbreak-puts-dr-congos-neighbors-on-high-alert/a-49219737>.

had already started preparing for the cross-border spread of the virus. Thus, the Goma case did not transform the epidemiological features of the outbreak and the international risks it posed.

However, the Emergency Committee previously concluded, twice, that the increasing domestic spread of Ebola and the growing risks of cross-border spread—including an Ebola case in Uganda—did not mean the outbreak met all the criteria in the IHR’s definition of a PHEIC. After the Goma case, the committee concluded that the outbreak met all the criteria because, now, “a coordinated international response under the International Health Regulations (2005) is required.” This change in direction involved the committee mishandling, again, the IHR’s definition of a PHEIC.

One more time, under the IHR, a PHEIC is an “extraordinary event” that “constitute[s] a public health risk to other States through the international spread of disease” and that “potentially require[s] a coordinated international response.”⁹² No meeting of the Emergency Committee raised concerns that the Ebola outbreak in the DRC did not qualify as an “extraordinary event.” The committee claimed at its April meeting that the outbreak did not satisfy the “international spread” criterion. After the Ebola case in Uganda, the committee acknowledged in June that the outbreak posed a risk of international spread. The committee’s statements after the April and June meetings did not explicitly address the “coordinated international response” criterion. The ongoing, WHO-led, and coordinated international response that began in 2018—and that involved cooperation under various IHR provisions—suggested that this criterion had long been met. Indeed, the committee’s statements from its October 2018, April 2019, and June 2019 meetings describe components of a coordinated and expanding international response to the outbreak.⁹³

Thus, the committee’s statement in July that the outbreak finally satisfied all the criteria in the PHEIC definition because, now, the outbreak required a “coordinated international response under the International Health Regulations (2005)” was very strange. Understanding what the committee did requires seeing that, for the second time, it read into the PHEIC definition something that the IHR does not contain. Recall the committee’s conclusion in June that the outbreak did not satisfy all the criteria in the PHEIC definition because “the ongoing response would not be enhanced by formal Temporary Recommendations under the IHR (2005).”⁹⁴ As noted above, the IHR’s definition of a PHEIC includes no such criterion. Turning to the

⁹² IHR, *supra* note 3, art. 1(1).

⁹³ See generally, *Emergency Committee Statement (October 2018)*, *supra* note 31; *Emergency Committee Statement (April 2019)*, *supra* note 40; *Emergency Committee Statement (June 2019)*, *supra* note 63.

⁹⁴ *Emergency Committee Statement (June 2019)*, *supra* note 63.

committee's July statement, the IHR also does not require "a coordinated international response *under the International Health Regulations (2005)*."⁹⁵

The IHR's criterion is different—the extraordinary event that poses a public health risk to other states through international spread of disease has to "potentially require a coordinated international response."⁹⁶ WHO member states did not restrict the "coordinated international response" criterion only to responses under the IHR. Coordinated international responses to extraordinary disease events that pose risks of international spread might require cooperation on matters that the IHR does not address, such as obtaining funds from international financial institutions or working with pharmaceutical companies on vaccine availability and distribution.

The Emergency Committee's reasoning is more perplexing because, even under its formulation of the "coordinated international response" criterion, the response to the Ebola outbreak in the DRC involved international coordination under the IHR well before the Goma case. The process of convening the committee to provide advice to the Director-General on whether to declare a PHEIC happens under the IHR. Even though the Director-General had not declared a PHEIC before the July meeting, the analysis and advice formulated by the committee and accepted by the Director-General constituted important and prominent aspects of the evolving international response to the outbreak that happened under the IHR. A decision not to declare a PHEIC does not mean the IHR is irrelevant to coordinated, international responses to serious disease events. In the Ebola outbreak, the IHR supported other aspects of the coordinated international response, including surveillance, notification of cases, information sharing, cooperation with other intergovernmental organizations, and strengthening public health response capacities. The committee's advice on trade and travel measures, rendered at each of its meetings on Ebola in the DRC, was based on the IHR's rules on such measures.

The Emergency Committee's reasoning at its July meeting has other problems. The committee was clear, at both its April and June meetings, that it believed a PHEIC declaration—and the Temporary Recommendations that would follow—would produce no added benefits but would cause harm for response efforts.⁹⁷ How one case of Ebola in Goma transformed the committee's cost-benefit analysis of a declaration is not clear.

For the committee's recommendation of a PHEIC declaration to make sense, the Goma case—or something else that happened between the June and July meetings—must have changed dramatically its cost-benefit calculations. Otherwise, the committee would have been advising the

⁹⁵ *Emergency Committee Statement (July 2019)*, *supra* note 85 (emphasis added).

⁹⁶ IHR, *supra* note 3, art. 1(1).

⁹⁷ *Emergency Committee Statement (April 2019)*, *supra* note 40; *Emergency Committee Statement (June 2019)*, *supra* note 63.

Director-General to take actions that it still thought would cause more harm than good. The committee's statement from its July meeting contains nothing to illuminate why it concluded that a declaration and Temporary Recommendations would now generate more benefits than harms for outbreak response efforts. This silence is particularly deafening given the committee's conclusion in June that a declaration and Temporary Recommendations would not enhance response activities for an outbreak that was growing worse domestically, had crossed the border into a neighboring country, and required more international cooperation.⁹⁸

Similarly, in April and June, the committee clearly believed that a declaration would trigger harmful trade and travel measures.⁹⁹ This belief communicated that the committee had no confidence in either Temporary Recommendations on such measures or the IHR's general rules on trade and travel. In June, the committee doubled-down on its trade-and-travel pessimism despite the backlash the April meeting sparked and the criticism this stance would undoubtedly provoke again in the wake of the June meeting.

However, the Emergency Committee's determined pessimism about a PHEIC declaration's impact on trade and travel appears to have vanished at the July meeting. The committee does not explain why the Goma case, or anything else that happened in the DRC or neighboring countries over the course of one month, would make harmful trade and travel measures less likely or damaging after the Director-General declared a PHEIC. The committee does not explain how developments between the June and July meetings suddenly gave it confidence in the IHR's general rules on trade and travel measures.

All the committee's statement from the July meeting contains is the following paragraph: "The Committee discussed the impact of a PHEIC declaration on the response, possible unintended consequences, and how these might be managed. The global community should anticipate possible negative consequences and proactively prevent them from occurring, taking into account experience with Ebola in West Africa in 2014."¹⁰⁰

These statements are indistinguishable from arguments made against the committee's April and June decisions, namely that response efforts after a declaration should anticipate problematic trade and travel measures and use Temporary Recommendations, the IHR's rules on trade and travel measures, and other strategies to prevent such measures and address them if they appear.

⁹⁸ *Emergency Committee Statement (June 2019)*, *supra* note 63.

⁹⁹ *Emergency Committee Statement (April 2019)*, *supra* note 40; *Emergency Committee Statement (June 2019)*, *supra* note 63.

¹⁰⁰ *Emergency Committee Statement (July 2019)*, *supra* note 85, at 4.

IV. THE CONTROVERSY AND THE DAMAGE DONE TO THE INTERNATIONAL HEALTH REGULATIONS

The controversy over declaring a PHEIC for the Ebola outbreak in the DRC inflicted damage on the IHR. The decision to declare a PHEIC in July exacerbated rather than mitigated the damage done earlier. The Emergency Committee's recommendations at its April, June, and July meetings, and the Director-General's acceptance of the committee's advice, gave the IHR two black eyes. First, the committee's handling of the PHEIC definition at the April, June, and July meetings demonstrated an astonishing lack of fidelity to the text of the IHR. At and across these meetings, the committee rejected widely held interpretations of the definition, ignored the actual text, and inserted language that the IHR does not contain. The criticism that the committee received after its interpretation of the "international spread" criterion at the April meeting did not deter it from even more egregious definitional contortions in June and July.

The Emergency Committee is not a legal body, so expecting it to apply the international legal rules on treaty interpretation with lawyerly rigor and zeal is not warranted. However, the committee so deviated from the text and understood interpretations of the text that its treatment of the PHEIC definition constituted an abuse of its role under the IHR. The committee only has legitimacy under the IHR, and the committee damages that legitimacy when it repeatedly disregards the plain language of the IHR and authoritative interpretations of that language. Likewise, when the committee engages in such behavior, the IHR's legitimacy suffers because the IHR does not appear to constrain the advisory entity and process that the regulations created.

The observations raise questions about what happened within the Emergency Committee on the PHEIC definition to produce such bad outcomes under, and for, the IHR. Unfortunately, post-meeting statements and press briefings failed to provide sufficient transparency about how the committee reached decisions on the PHEIC definition so at odds with the IHR's text and accepted interpretations of the text. The statements indicate that WHO legal counsel briefed the committee on its role and the PHEIC definition in the IHR.¹⁰¹ However, publicly available information provides no insight on whether committee members and WHO legal counsel discussed, or argued about, the committee's handling of the definition or its component criteria. The IHR provides no assistance because it contains little about the Emergency Committee and how it is to function.¹⁰² In the context of the DRC's Ebola crisis, the process through which the committee rendered

¹⁰¹ See, e.g., *Emergency Committee Statement (June 2019)*, *supra* note 63 (noting that "[r]epresentatives of WHO's legal department . . . briefed the Committee members on their roles and responsibilities, as well as the requirements of the IHR and the criteria that define a PHEIC").

¹⁰² IHR, *supra* note 3, arts. 48-49.

its advice to the Director-General under the IHR appears nontransparent, arbitrary, and capricious.

The IHR received its second black eye from the comprehensive pessimism the Emergency Committee exhibited at its April and June meetings about the PHEIC authority and other provisions of the regulations. At these meetings, the committee concluded that a PHEIC declaration had no utility for international efforts to respond to the DRC's Ebola outbreak. This conclusion was extreme, especially in light of the outbreak's disturbing trajectory within the DRC, cross-border spread into Uganda, and the widespread belief—shared by the committee—that international cooperation on the outbreak had to be strengthened urgently. This bleak perspective on the IHR's utility even rejected benefits that a declaration might create by reinforcing parts of the IHR relevant to the Ebola outbreak response, including provisions on surveillance, notification, information sharing, and international cooperation.

The Emergency Committee was also pessimistic about the PHEIC authority and rules in the IHR in its April and June determinations that a PHEIC declaration would harm outbreak response efforts by triggering unnecessary trade and travel restrictions. The committee clearly had no faith in IHR's rules on trade and travel measures because they concluded that unwarranted measures would follow a declaration. The committee also had no faith in how the IHR designed the PHEIC authority to reinforce the IHR's trade and travel rules through Temporary Recommendations issued after a declaration. Put more bluntly, the committee believed that the IHR's rules on trade and travel measures were useless and that issuing Temporary Recommendations to reinforce those rules was pointless. What was once considered a groundbreaking, cross-cutting, and critical authority in the revised IHR had become, in the eyes of the Emergency Committee, impotent in producing benefits and malign in generating harms to outbreak response efforts that the IHR could not prevent or control.

This aspect of the committee's activities also battered and bruised the IHR in a different way. The committee's recommendation in July that the Director-General should declare a PHEIC intensified scrutiny of the committee's prior unrelenting pessimism about the benefits and harms of a declaration. This scrutiny raised questions about how the committee reached its conclusions in April, June, and July about benefits and harms of a declaration. First, the IHR do not authorize the Emergency Committee to provide its views on what might or might not happen after the Director-General declares a PHEIC. Basing advice entirely on such speculations constituted an action outside the authority the committee has under the IHR. Second, although the committee and its critics were speculating about what might happen after a declaration, the committee, as a body rendering advice to the Director-General and the global health community, had heightened

responsibility to explain its reasoning and identify the evidence informing its decisions, especially when those decisions clash with the scope of the committee's authority.

The committee failed in fulfilling this responsibility. The statements and press briefings after meetings lacked transparency, making it difficult, if not impossible, to understand how the committee constructed its cost-benefit analyses at each meeting. At the press briefing after the June meeting, the acting chair of the Emergency Committee observed that the committee had "extensively debated the impact of a declaration," but the acting chair provided no insight as to how such an extensive debate could result in the conclusion that a PHEIC declaration would produce no benefits, none, for a faltering Ebola response.¹⁰³ Thus, as with the definitional controversies, criticism of the committee's assessment of the benefits and harms of a PHEIC declaration exposed a process in the IHR that appeared deeply dysfunctional.

In sum, the damage inflicted to the IHR during controversy over declaring a PHEIC for the Ebola outbreak in the DRC was comprehensive. At its April, June, and July meetings, the Emergency Committee proved incapable or unwilling to apply the plain text of the PHEIC definition or follow accepted interpretations of the definition's criteria. The Director-General accepted this abuse of the committee's authority and discretion in agreeing to implement the committee's advice. At its April and June meetings, the committee went beyond the authority it has under the IHR and concluded that a PHEIC declaration would (1) have no utility for efforts to respond to an Ebola outbreak that was growing more dangerous in the DRC and to neighboring countries; and (2) unleash unnecessary trade and travel measures that would harm outbreak response efforts. By accepting the committee's recommendation after the April and June meetings, the Director-General agreed that declaring a PHEIC would serve no purpose and that the IHR was entirely ineffective in its regulation of unwarranted trade and travel restrictions.

In international affairs, states, rather than international organizations, typically manipulate legal texts, deny the usefulness of treaties, and highlight the ineffectiveness of rules of international law. Remarkably, in the controversy over a PHEIC declaration for the DRC's Ebola outbreak, a treaty-based process operating under WHO supervision for the purpose of providing advice to the Director-General exhibited this behavior. This reality reflected a stunning turnabout for the IHR. The IHR adopted in 2005 emerged through determined and innovative leadership within WHO. The revised regulations, especially the PHEIC authority, became a critical regime

¹⁰³ *Emergency Committee Press Conference - 14 June 2019 (Transcript)*, WHO (June 13, 2019), <http://www.who.int/news-room/detail/13-06-2019-emergency-committee-press-conference---14-june-2019>.

for global health security in a new era of global health governance. The April, June, and July meetings of the committee sent entirely different messages about the PHEIC authority and the IHR from people and processes at the epicenter of global health governance.

The decision at the July meeting to declare a PHEIC did not undo the damage done at the previous meetings and redeem the IHR. The evaporation of the Emergency Committee's prior, thoroughgoing, and extensively debated pessimism about the benefits and harms of a PHEIC declaration was inexplicable in the circumstances. The committee's continued manipulation of the PHEIC definition at the July meeting provided no legal cover for its drastic shift. The impression left is that events on the ground in the DRC—events WHO had long anticipated—forced the committee to reverse course in a manner that underscored the criticism heaped on its previous advice and the Director-General's acceptance of it.

V. CONCLUSION

The damage inflicted on the IHR by the controversy over whether to declare a PHEIC for the Ebola outbreak in the DRC creates the need to consider what went so terribly wrong. The West African Ebola crisis also left the IHR black and blue in many ways, and efforts to address problems have been mounted, including work on improving state party compliance with the IHR's obligations on core surveillance and response capacities.¹⁰⁴ Formal reviews of the IHR's performance during the H1N1 pandemic and the West African Ebola epidemic likewise identified what went wrong in order to develop solutions. WHO might conduct such an analysis of the IHR in the aftermath of the Ebola outbreak in the DRC, but, with that outbreak still raging, a formal IHR review will not happen soon.

One approach would be to acknowledge the damage done to the IHR by the controversy but interpret what happened as a *sui generis* event rather than as an incident exposing strategic and systemic flaws with the IHR, the PHEIC authority, and the Emergency Committee. This perspective cautions against extrapolating too much from how this specific Emergency Committee functioned in connection with an Ebola outbreak that exhibits its own particular features in a country experiencing a multitude of interconnected woes. However, the scope, substance, and intensity of the controversy suggest that what happened exposed problems that WHO and IHR states parties need to understand and address.

¹⁰⁴ See, e.g., the Joint External Evaluation strategy, a “voluntary, collaborative, multisectoral process to assess country capacity to prevent, detect and rapidly respond to public health risks . . . [and] to assess country-specific status, progress in achieving the targets under Annex 1 of the IHR, and recommend priority actions to be taken[.]” JOINT EXTERNAL EVALUATION (JEE) MISSION REPORTS, WHO, <https://www.who.int/ihr/procedures/mission-reports/en/> (last visited Sept. 5, 2019).

As noted repeatedly above, analyzing the committee's decisions is frustrating because outside experts cannot understand, from the limited information provided, how the committee decided to apply the PHEIC definition as it did and how the committee concluded that a PHEIC declaration would produce much harm but no benefits for outbreak response efforts. Not surprisingly, the controversy produced calls for better transparency in the Emergency Committee. After the April meeting of the committee, an editorial in *BMJ Global Health* argued that transparency concerns with the committee's deliberations "undermine[] the decisions reached, the legitimacy of those decisions and their processes and, by association, the IHR 2005 and the treaty's custodian, the WHO."¹⁰⁵ The editorial called for greater transparency through livestreaming committee deliberations and providing verbatim records of committee proceedings, with mechanisms for protecting sensitive information about, for example, security matters. The editorial claimed that heightened transparency of the Emergency Committee's work could "provide the entire international community with critical insights into how a public health crisis is unfolding and what the WHO is doing to contain it."¹⁰⁶

WHO has acted in the past to improve transparency for the Emergency Committee. In response to criticism about potential conflicts of interest among the members of the Emergency Committee during the H1N1 pandemic, WHO agreed to publish the names of the members in order to increase the transparency of the committee's membership.¹⁰⁷ With a mandate across the organization to reduce conflicts of interest, and the perception of conflicts, WHO implemented this change without creating controversies under the IHR's provisions for the Emergency Committee.

However, more substantive transparency measures, such as livestreaming committee deliberations and producing verbatim transcripts of meetings, might create problems under the IHR. The regulations only require that the Emergency Committee prepare a "brief summary report of its proceedings and deliberations, including any advice on recommendations."¹⁰⁸ This provision stands in the way of the Director-General creating more expansive and intrusive transparency requirements for the Emergency Committee because the IHR does not mandate that the Emergency Committee be maximally transparent about its deliberations and decisions. Making the Emergency Committee's substantive deliberations and decisions more transparent is a choice that IHR states parties must make.

¹⁰⁵ Eccleston-Turner & Kamradt-Scott, *supra* note 34, at 2. See also Moon et al., *supra* note 28, at 2212 (review of the Ebola outbreak in West Africa proposing transparency measures in its recommendations on improving the declaration of PHEICs).

¹⁰⁶ Eccleston-Turner & Kamradt-Scott, *supra* note 34, at 3.

¹⁰⁷ WHO, *supra* note 24, ¶ 282.

¹⁰⁸ IHR, *supra* note 3, art. 49(3).

In addition, greater transparency does not address the most serious problems associated with the Emergency Committee's performance in the DRC's Ebola crisis. Debate about how the PHEIC definition applied to the Ebola outbreak in the DRC began in connection with the October 2018 meeting of the committee and continued through its July meeting. This debate was in the open, and the committee produced enough information for critics to challenge repeatedly its handling of the PHEIC definition. Further, the committee was undoubtedly aware of the criticism of its handling of the definition. The committee's application of the definition during its April and June meetings rejected outright the argument frequently made after the October 2018 meeting that the Ebola outbreak satisfied all the criteria in the definition.

Similarly, the committee's categorical pessimism about the PHEIC authority and the IHR's rules on trade and travel measures came through loud and clear. The potential costs and benefits of a declaration were discussed and debated publicly after the committee's October 2018 meeting, and especially after its April 2019 and June 2019 meetings. The committee's conclusion in April and June that a PHEIC declaration would provide no added benefits for the outbreak response rejected, in no uncertain terms, what proponents of a declaration were arguing. The committee's finding in April and June that a declaration would trigger harmful trade and travel restrictions dismissed claims that the exercise of the PHEIC authority put WHO in a stronger position to address unnecessary trade and travel measures. Here again, transparency does not seem the core problem.

Put differently, it was clear what the committee was doing, even if outsiders wanted more information and explanation than the IHR required the committee to provide. The question becomes whether the committee acted within, and according to, the authority it had under the IHR. Again, the IHR instructs the Emergency Committee to provide its views on "whether an event constitutes a public health emergency of international concern."¹⁰⁹ The committee exercises this authority guided by the IHR's definition of that concept and the epidemiological evidence the Director-General, WHO, and states participating in committee meetings make available to it. The discretion the committee has to interpret the public health information in light of the PHEIC definition is limited, and much more so than the Director-General's discretion under the PHEIC authority.

In the context of the Ebola outbreak in the DRC, the committee abused its authority by ignoring the text of the IHR, rejecting authoritative interpretations of the PHEIC definition, and inventing criteria that suited the outcome it apparently wanted. The committee acted outside its authority by basing its decisions (and its manipulation of the PHEIC definition) on its

¹⁰⁹ IHR, *supra* note 3, art. 48(1).

pessimistic predictions about the costs and benefits of a PHEIC declaration. The IHR does not instruct the Emergency Committee to speculate on “whether a PHEIC declaration might constitute a good or a bad thing.” The committee’s abuse of its authority and its *ultra vires* actions are the foundational source of the extensive damage the IHR suffered during this episode.

Previous outbreaks unfolded in ways that damaged that IHR, but, in the past, blame has been laid at the feet of states parties (e.g., non-compliance with IHR rules) or the Director-General (e.g., failure to use the PHEIC authority in a timely manner). The Ebola outbreak in the DRC constitutes the first time that the Emergency Committee became the epicenter of a controversy that battered, bruised, and weakened the IHR. The controversy should not be dismissed as a *sui generis* event that has nothing to teach us about the role of the IHR in global health governance. To the contrary, this episode became a polarizing referendum within the global health community on critical aspects of the IHR, including its definition of a PHEIC, the PHEIC provisions, its rules on trade and travel measures, and the authority and discretion of the Emergency Committee. This controversy calls for probing more broadly and deeply whether once-heralded aspects of the IHR have lost their intended meaning, their influence in global health governance, and the confidence of national and global health leaders and practitioners.

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