

Global Emergency Power in the Age of Ebola

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The gradual transfer of emergency power to the international level, as seen in the control of infectious disease outbreaks, creates new challenges for the legitimacy of global institutions. In particular, this Article contends, the expert nature of international bureaucracies fits awkwardly with the political decision making required of crisis managers, often producing decisions that appear neither scientifically nor politically justifiable. Worse, the ordinary deliberative mechanisms for smoothing the interaction between expert knowledge and political decision often appear unavailable in the midst of a disaster.

The task for law and institutional design, then, is to develop tools for easing this interaction between expertise and decision making in ways that function even under the strain of crisis. This Article undertakes this challenge through an in-depth case study of the responses of the World Health Organization ("WHO") to Ebola and swine flu. After diagnosing the key problems facing the WHO and other global emergency governors, the Article elaborates three novel design principles for improving emergency decision making: managed decentralization, epistemic openness, and forced dissent. This inquiry constitutes an initial step in what must be an ongoing project to redesign the institutions of global governance to meet capably and legitimately the challenges of crisis management beyond the state.†

INTRODUCTION

The Ebola outbreak of 2014 heralds a new era of global emergency governance and a new challenge for international law.¹ Crisis management, in a traditional view, was primarily the province of national governments, with international law providing a reserve of principles to protect against the worst abuses by states.² In recent years, however, the transnational dimen-

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† This Article, which examines the emergency power of the WHO, was sent to press before the organization declared an international health emergency in connection with the Zika virus.

1. On the emergence of emergency powers in international institutions, see Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORGS. L. REV. 319, 334–38 (2009) (describing the growth and importance of emergency action by international organizations); Christian Kreuder-Sonnen & Bernhard Zangl, *Which Post-Westphalia?: International Organizations Between Constitutionalism and Authoritarianism*, 21 EUR. J. INT'L REL. 3 (2014).

2. A defining work from this perspective is OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

sions of emergency have begun to take precedence,³ and international institutions frequently find themselves on the front lines, cooperating and competing with national and subnational authorities in emergency response efforts.⁴ A field of global emergency governance has thus emerged, comprising the various public international organizations, transnational networks, nongovernmental organizations, and other nonstate actors that manage transnational emergencies through legally binding and nonbinding acts.⁵

International legal thought has largely failed to keep up with these developments. A public legal theory of global emergency governance should be capable of at least two things.⁶ First, public law should provide a well-theorized set of concepts and tools for establishing, justifying, and maintaining the authority of global emergency governors, in order to enable them to solve pressing collective problems. Second, the same set of tools should provide means for disciplining the exercise of emergency power, rendering it more responsive to disregarded interests.⁷ At present, international law falls short on both counts.⁸

This Article establishes a framework to guide and assess the ongoing transformation of global emergency governance. It observes that these

3. Arjen Boin, *The New World of Crisis and Crisis Management*, 26 REV. POL'Y RES. 367, 367–70 (2009); see also GOVERNING DISASTERS: THE CHALLENGES OF EMERGENCY RISK REGULATION xxviii–xxix (Alberto Alemanno ed., 2011).

4. See, e.g., Gabrielle Marceau, Editorial, *IGOs in Crisis? Or New Opportunities to Demonstrate Responsibility?*, 8 INT'L ORGS. L. REV. 1, 13 (2011) (arguing that “technical and political crises have allowed [international organizations] to develop more sophisticated normative capacities and responsibilities”). Other scholars have noted the institutionalization of emergency power and risk regulation, often in specific issue areas. See, e.g., JACQUELINE PEEL, SCIENCE AND RISK REGULATION IN INTERNATIONAL LAW 34–36 (James Crawford & John S. Bell eds., 2010) (tracing these developments in health and environmental risks); Karin Loevy, *The Legal Politics of Jurisdiction: Understanding ASEAN's Role in Myanmar's Disaster, Cyclone Nargis* (2008), 5 ASIAN J. INT'L L. 55 (2014) (addressing jurisdictional competition and cooperation in disaster response); Chris Ansell et al., *Managing Transboundary Crises: Identifying the Building Blocks of an Effective Response System*, 18 J. CONTINGENCIES & CRISIS MGMT. 195 (2010).

5. On the crystallization of this transnational regulatory activity into a “global administrative space,” see Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 25–27 (2005).

6. For perspectives on this point, see MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 163 (2003) (conceptualizing public law as a method of prudence); Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance*, 9 GER. L.J. 1375, 1380 (2008) (describing public law in terms of a constitutive and limiting function); Benedict Kingsbury, *International Law as Inter-public Law*, in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 167 (Henry S. Richardson & Melissa S. Williams eds., 2009) (describing public law as a means for managing deep disagreement, delivering services and ensuring welfare, and limiting the scope of power).

7. See, e.g., Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance*, 108 AM. J. INT'L L. 211, 220 (2014) (describing the “problem of disregard” as the fact that “[m]any global regulatory authorities have been justly criticized for giving inadequate regard to the interests and concerns of vulnerable and politically weak groups, diffuse and less well-organized and resourced societal interests, and vulnerable individuals, which has resulted in decision making that causes unjustified harm or disadvantage”); B.S. Chimini, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 14–15 (2004) (arguing that dense institutionalization at the global level promotes the interest of a transnational capitalist class and of the Western capitalist states).

8. Kingsbury & Casini, *supra* note 1, at 334–35 (noting that legal practice has yet to “establish [] an adequate legal and political order” for assessing the emergency powers of international organizations).

emerging institutions are largely international bureaucracies, professional networks, and other bodies that are, at least nominally, led by civil servants and experts. Such institutions, this Article contends, are hobbled by a fundamental tension between their expert and professional nature, on the one hand, and the political and legal demands of emergency decision making, on the other hand. Attempts by emergency governors to manage this tension are frequently pathological or even catastrophic, producing decisions that are neither scientifically nor politically justifiable. As shown below, the World Health Organization's responses to Ebola and swine flu demonstrated these failures dramatically. This challenge calls for a renewed commitment to identifying and implementing creative revisions to international decision-making processes and to building organizations that are at once more resilient and more responsive under the strain of catastrophe.

The experience of the World Health Organization ("WHO"), discussed in detail below, demonstrates the importance of developing new legal tools to meet the rise of global emergency governors. By way of introduction, in 2005, member states authorized the WHO Director-General to exercise broad new emergency powers in the fight against disease outbreaks.⁹ These powers were celebrated at the time, and they have been the envy of practitioners in other fields where international institutions lack analogous legal authority.¹⁰ But, in practice, the WHO's emergency powers have at times seemed to cause the organization nothing but trouble, inviting withering criticism, frustration, and soul searching.¹¹ Most recently, the Ebola crisis spurred competing calls to strengthen the WHO, to reform it, and to dismantle the organization altogether.¹²

9. See World Health Organization, *International Health Regulations* (2005) (with annexes), arts. 12–17, 48–49, May 23, 2005, 2509 U.N.T.S. 79 [hereinafter *International Health Regulations*]. For overviews of the 2005 *International Health Regulations* ("IHR"), see generally David P. Fidler, *Revision of the World Health Organization's International Health Regulations*, ASIL INSIGHTS (Apr. 16, 2004), <http://www.asil.org/insights/volume/8/issue/8/revision-world-health-organizations-international-health-regulations>; J. Benton Heath, *SARS, the 'Swine Flu' Crisis, and Emergency Procedures in the WHO*, in *GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES* 148 (Sabino Cassese et al. eds., 3d ed. 2012).

10. See, e.g., David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 34 J.L. MED. & ETHICS 85, 85–86 (2006) (discussing the transformative potential for the WHO's new powers, particularly in the field of health); Matthew Bunn & Olli Heinonen, *Preventing the Next Fukushima*, 333 SCI. 1580, 1581 (2011) (suggesting a similar approach for nuclear disasters).

11. Most recently, the organization's handling of Ebola met with widespread criticism. See, e.g., Laurie Garrett, *We Could Have Stopped This*, FOREIGN POL'Y (Sept. 6, 2014), <http://foreignpolicy.com/2014/09/06/we-could-have-stopped-this/>; Lawrence O. Gostin & Eric A. Friedman, Comment, *Ebola: A Crisis in Global Leadership*, 384 THE LANCET 1323 (2014); Oyewale Tomori, Editorial, *Ebola in an Unprepared Africa*, 349 BRIT. MED. J. 5597 (2014); Declan Butler, *Global Ebola Response Kicks into Gear at Last*, 513 NATURE 469 (2014).

12. See, e.g., Lawrence O. Gostin, *Reforming the WHO after Ebola*, JAMA FORUM (Feb. 25, 2015), <http://newsatjama.jama.com/2015/02/25/jama-forum-reforming-the-world-health-organization-after-ebola/> (proposing five governance reforms); Editorial, *The Ebola Twilight of Public Institutions*, WALL ST. J. (Oct. 16, 2014), <http://www.wsj.com/articles/the-ebola-twilight-of-public-institutions-1413415407> (arguing that the WHO be defunded in favor of "a more serious and capable institution").

This Article applies the conceptual framework introduced above and argues that the WHO's emergency powers are designed and implemented in a way that exacerbates the tension between expert knowledge and political decision. As it is currently structured, the organization lacks the institutional and normative resources to justify its determination of whether an emergency exists, the specific policies implemented during a health crisis, and the power that it grants to a relatively insulated group of expert advisers to formulate that policy. But analysis of the organization's own shortcomings begins to reveal design solutions that would mitigate these problems. These principles—managed decentralization, epistemic openness, and forced dissent—are developed and discussed in detail below.

The power of global emergency governors today is significant, but it should not be overstated. In the case of the WHO, severe deficiencies in funding and enforcement capacity render the organization far less powerful than many insiders and observers would wish.¹³ But we are still in the early stages of this phenomenon. For example, even as the Ebola crisis highlighted the WHO's shortcomings, it also spurred observers and member states to advocate for endowing the WHO with greater authority and resources.¹⁴ And even critics of the WHO do not question the need for the transnational governance of disease outbreaks; they only express a preference for other forms of global regulation, such as professional networks, public-private partnerships, or unilateral action by powerful states acting extraterritorially.¹⁵ The deepening of emergency power at the global level seems to be a given, whether it happens within the WHO or outside of it.

The discussion proceeds in five further parts. Part I advances the conceptual argument, locating the challenge for emergency governance in the marriage between expertise and political decision, and arguing that creative institutional design can alleviate this tension. Part II introduces the WHO's emergency powers, and Part III identifies the ways in which this tension manifests itself in the organization's response to disease outbreaks. On the basis of this diagnosis, Part IV sketches design principles to improve deci-

13. See, e.g., Kumanan Wilson et al., *Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic*, 25 HEALTH PLAN. & POL'Y 505 (2010) (noting weaknesses in surveillance, poor response capacities in some countries, and violations of the IHR by member states).

14. See, e.g., World Health Organization, Res. WHA68(10), WHO Doc. A68/DIV./3 (May 26, 2015) (adopting measures to strengthen the International Health Regulations, create a "contingency fund" for health emergencies, and establish a global health emergency workforce to "unite" the WHO response to emergencies); World Health Organization Exec. Board, Spec. Sess. on the Ebola emergency, WHO Doc. EBSS3.R1 (Jan. 25, 2015) (affirming the Director-General's authority in emergencies and committing to provide greater standing resources for emergency response); Angela Merkel, Ger. Fed. Chancellor, Statement at the 68th WHO World Health Assembly (May 18, 2015), <http://www.who.int/mediacentre/events/2015/wha68/merkel-speech-wha68.pdf> (stressing that "the WHO is the only international organisation that enjoys universal political legitimacy on global health matters").

15. See, e.g., Stewart M. Patrick & Daniel Chardell, *The Health of Nations: The WHO's Moment of Truth*, THE INTERNATIONALIST (May 21, 2015), <http://blogs.cfr.org/patrick/2015/05/21/the-health-of-nations-the-whos-moment-of-truth/> (noting the "host of competing international institutions" for the management of health crises).

sion making under the strain of emergency. Part V concludes by reflecting further on the role of law and legal analysis as it relates to global emergency power in the age of Ebola.

I. KNOWLEDGE AND DECISION

The challenge for legitimating global emergency governance lies in the tension between *knowing* and *doing*. Global emergency authority has developed largely within institutions whose chief claim to virtue lies in the development of specialized expert knowledge. This development gives rise to a seemingly unavoidable pathology: the decision-making processes necessary for crisis management are fundamentally unsuited to the activities of scientists and other experts. This tension emerges in several places in crisis management, and it threatens to produce decisions that appear both scientifically unsound and politically unsustainable. It is suggested that these dangers may be minimized, though not eliminated, through the development of innovative structural and procedural rules that govern the terms on which expert knowledge meets political decision.

First, a word should be said about the terms used and the approach taken here. This inquiry focuses on claims to authority. Global governors exercise *authority* when they display a capacity to induce deference in other actors.¹⁶ Authority is *claimed*, as I use that term here, when an institution seeks to establish, maintain, or deepen its capacity to induce deference.¹⁷ Such claims take the explicit or implicit form of a normative justification: “my decisions merit your deference because” they serve legitimate ends, they are premised on superior knowledge, they are arrived at by democratic procedure, etc.

A *claim to authority* makes reference to a complex set of justifications, including moral beliefs, rational decision-making processes, expertise, and legal delegation.¹⁸ Every institution claims authority by reference to a

16. MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD* 20 (2004). This definition, it may be noted, has two fundamental features. The first is that authority relationships induce deference, rather than coercing compliance or incentivizing behavior. See, e.g., Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 383–89 (1999) (distinguishing compliance and self-interest from the effects of legitimate authority). Second, authority, insofar as it is established normatively, is meant to be “content-independent”; the reason for deference exists independently of the content of the authoritative speaker’s statement. See, e.g., Allen Buchanan, *The Legitimacy of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 79, 83–84 n.8 (Samantha Besson & John Tasioulas eds., 2010) (assessing various possible implications of the content-independence of legitimate authority).

17. BARNETT & FINNEMORE, *supra* note 16. Finnemore and co-authors, upon whom I rely here, do not use the term *claim*, emphasizing instead “types” of authority in international institutions. The concept of claiming, I would suggest, contributes some clarity to their theory, and is preferable to other constructions, such as stating that institutions “derive” their authority from or “base” their authority on a particular source.

18. See *id.*, *supra* note 16, at 20–29 (elaborating four basic types of authority claims); WHO GOVERNS THE GLOBE? 1, 11–14 (Deborah D. Avant et al. eds., 2010) (repeating the typology and adding additional information).

unique assemblage of these values, and this mixture may shift over time.¹⁹ These claims, moreover, need not be announced in press releases or touted in reform proposals; they are implicit in the way that an institution organizes and channels its decision-making power.²⁰ The length of a notice-and-comment period, for example, or the procedures for choosing decision makers implies certain ideas about the nature of an institution's authority. The ability to recognize normative significance in the details of institutional processes and structures is therefore critical to uncovering the nuanced authority claims embedded in any given institution.

The structure of a given claim to authority is important because it contributes to the ability of an institution to withstand pressure. The elements of any claim to authority will exist in tension with one another and with the external world.²¹ These tensions create vulnerabilities, which may be exploited by critics, self-interested political actors, or other exogenous shocks. Although no claim to authority is without internal tension, some institutions are more resilient than others because their claims are well-accepted or because such claims are structured in a way that allows them to be nimble and responsive to changing circumstances.²² This section exposes the tension at the root of claims to authority made by global governors and explains the ways in which the pressures of emergency exploit this tension.

A. Expert Emergency Governance

Today's global emergency governance is emerging in parallel with the state-driven paradigm of global emergency power with which public lawyers are more familiar. This familiar form of emergency power is represented in international law by human rights and humanitarian law, which purport to

19. See BARNETT & FINNEMORE, *supra* note 16, at 25.

20. See DAVID BEETHAM, THE LEGITIMATION OF POWER 37 (2d ed. 2013) (1991); see also MAX WEBER, ECONOMY AND SOCIETY 213 (Guenther Roth & Claus Wittich eds., 1968) (1956) (“[A]ccording to the type of legitimacy which is claimed, the type of obedience, the kind of administrative staff developed to guarantee it, and the mode of exercising authority, will all differ fundamentally.”).

21. E.g., WHO GOVERNS THE GLOBE, *supra* note 18, at 18–20.

22. See, e.g., Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 585–86 (1995) (explaining that “skillful legitimacy management requires a diverse arsenal of techniques and a discriminating awareness of which situations merit which responses”). One commonplace example of an effort to increase flexibility, and thereby stabilize authority, is the practice of creating departments of social scientists, such as economists and econometric analysts, in private organizations. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 349–53 (1977). The failure of a business plan constitutes a threat to the legitimacy of a firm's management vis-à-vis shareholders or other important constituencies. By subjecting the proposed business plan to econometric analysis *ex ante*, firms may attempt to demonstrate to their shareholders, *ex post*, that the business plan, despite its ultimate failure, was nevertheless the rational outcome of the most sophisticated analytical tools available. *Id.* at 350. This renders the institution somewhat less vulnerable to the legitimization crisis that may emerge from economic failure. In the more abstract terms of this section, the introduction of *ex ante* econometric analysis creates a more sophisticated and adaptable claim to authority than one driven solely by management's claim to produce positive fiscal results.

limit what national governments can do in response to emergencies.²³ The U.N. Security Council famously extended the *problématique* of national emergency power to the international space by enabling a subset of member states to issue binding policies in response to threats to international peace and security.²⁴ Whereas the Security Council's activities are state-driven, the emerging forms of emergency governance take place through international bureaucracies, secretariats, and even more decentralized organizational forms involving nongovernmental organizations ("NGOs") and other nonstate actors.²⁵ In these new fora, moreover, the actors charged with managing emergencies are often experts, or political actors closely advised by experts.²⁶

The rise of expert emergency governance on the global stage echoes two more general trends in international institution building. First, in formal, treaty-based organizations, the second half of the twentieth century witnessed a "flight from the plenary," in which the representative organs of international organizations appeared blocked and ineffectual.²⁷ Second, alongside this shift away from the representative bodies and to the secretariat, a new crop of alternative organizational forms has emerged, which includes networks of professionals and regulators, NGOs, and other private bodies, some of which may adopt emergency functions.²⁸ Both the international bureaucracy and these new forms of organization prove attractive to those who seek a fast-acting response to global threats.²⁹

23. See, e.g., GROSS & NÍ AOLÁIN, *supra* note 2, at 247–364.

24. On the Security Council's powers, see the U.N. Charter arts. 24, 39–50. These activities have been the subject of substantial attention in the literature. See, e.g., José E. Alvarez, Editorial, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003); Gráinne de Búrca, *The EU, the European Court of Justice, and the International Legal Order after Kadi*, 51 HARV. INT'L L.J. 1 (2010). On their administrative dimensions, see René Uruña, *International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror*, 4 INT'L ORGS. L. REV. 321 (2007).

25. See *infra* text accompanying notes 30–45.

26. See generally Emanuel Adler & Steven Bernstein, *Knowledge in Power: The Epistemic Construction of Global Governance*, in POWER IN GLOBAL GOVERNANCE 294, 304 (Michael Barnett & Robert Duvall eds., 2007) ("International institutions commonly rely on expert authority in at least three settings. First, experts are called upon to make authoritative interpretations of rules. For example, dispute-resolution panels in trade agreements may rely on trade lawyers and economists rather than judges. Second, experts may develop standards in technical areas, which then may become authoritative either directly or indirectly through recognition of those standards by other institutions (e.g., the World Trade Organization . . . recognizing standards from the International Organization for Standardization). Third, experts may gain authority through specialized cause-effect knowledge where their prescriptions gain legitimacy as focal points for cooperation, or the bases of new rules. In all these cases, institutional power will be affected by the way in which experts enter into the construction of rules."). This trend may even transform the Security Council, whose increasingly active legislative activities in the areas of counterterrorism and arms control require the creation of administrative bodies at the global level. See, e.g., S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1540 (Apr. 28, 2004).

27. Jochen von Bernstorff, *Procedures of Decision-making and the Role of Law in International Organizations*, 9 GER. L.J. 1939, 1946–47 (2008).

28. For an overview of these forms, see generally Kingsbury et al., *supra* note 5, at 20–23.

29. See Kingsbury & Casini, *supra* note 1, at 336 ("The reality in many [international organizations ("IOs")] . . . is that plenary and even executive board inter-state institutions may be ineffective at managing emergency responses: considerable discretion and authority may have to devolve on the secretariat and professional leadership (acting with support from specific states, or in collaboration with other

These trends are evident in the humanitarian arena where countless international agencies and NGOs deliver disaster relief and coordinate reconstruction efforts after major catastrophes.³⁰ For the past decade, the United Nations has sought to orchestrate the activities of this multifarious group through the so-called “Cluster Approach,” which sets global and site-specific policy on humanitarian aid.³¹ The policies set through this network of agencies can extend far beyond what is ordinarily expected of international agencies and may reach the full battery of issues ordinarily tackled by municipal governments, such as infrastructure, governance, markets, and police.³² The importance of a coordination mechanism like the Cluster Approach is widely acknowledged, and U.N. officials are faulted if they fail to activate the system in major emergencies.³³ However, the presence and power of this mechanism often compounds the perception that emergency relief and reconstruction is being governed by international humanitarian “experts” according to a hypertechnical logic that remains inaccessible to the populations actually affected by the catastrophe.³⁴

International refugee law also creates a space in which international agencies exercise direct power over individuals.³⁵ Although the determination of an individual’s entitlement to the protections of refugee law is traditionally assumed to be the province of governments, the United Nations High Commissioner for Refugees (“UNHCR”) has undertaken this task directly, with

IOs or state agencies or private actors), raising problems of mandate, powers (vires), oversight, and legal accountability.”)

30. The number of NGOs responding to major disasters continues to increase. See, e.g., David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES 30 (2007), <http://www.ifrc.org/PageFiles/125639/113600-idrl-deskstudy-en.pdf> (noting that 100 NGOs responded to the 2001 Gujarat earthquake, and more than 200 arrived in Banda Aceh, Indonesia, following the Indian Ocean tsunami of 2004). In post-earthquake Haiti, one report stated that the number of active NGOs likely exceeded 560, and that “[t]he Haitian government doesn’t even know how many NGOs are operating within its borders. No one does.” Kathie Klarreich, *The NGO Republic of Haiti*, THE NATION (Oct. 31, 2012), <http://www.thenation.com/article/ngo-republic-haiti/>. These numbers in all likelihood do not include the various U.N. agencies, other international and regional treaty-based organizations, and international financial institutions involved in a major response.

31. See, e.g., Miriam Stumpfenhorst et al., *The UN OCHA Cluster Approach: Gaps Between Theory and Practice*, 19 J. PUB. HEALTH 587, 588 (2011).

32. See, e.g., Margaret L. Satterthwaite, *Indicators in Crisis: Rights-Based Humanitarian Indicators in Post-Earthquake Haiti*, 43 N.Y.U. J. INT’L L. & POL. 865, 874 (2011) (explaining that humanitarians “govern the putatively ungoverned”). This is particularly evident with respect to policy concerning the management of camps for refugees or displaced persons. See Ralph Wilde, Note, *Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of “Development” Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L.J. 107, 108 (1998); see also Mark Pallis, *The Operation of UNHCR’s Accountability Mechanisms*, 37 N.Y.U. J. INT’L L. & POL. 869, 877–82 (2005).

33. See, e.g., Jeffrey Gettleman, *As Ebola Rages, Poor Planning Thwarts Efforts*, N.Y. TIMES (Dec. 6, 2014), <http://www.nytimes.com/2014/12/07/world/africa/as-ebola-rages-in-sierra-leone-poor-planning-thwarts-efforts.html> (noting the failure to activate the cluster system in response to the Ebola crisis).

34. See, e.g., J. Benton Heath, *Managing the ‘Republic of NGOs’: Accountability and Legitimation Problems Facing the U.N. Cluster System*, 47 VAND. J. TRANSNAT’L L. 239, 289–93 (2014) (noting these problems).

35. See generally Wilde, *supra* note 32; Pallis, *supra* note 32; B. S. Chimni, *Co-Optation and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799, 819–26 (2005).

“little or no government involvement,” in a number of migration emergencies.³⁶ The power of the High Commissioner over status determination and over other decisions relevant to the fate of refugees has turned attention to the bureaucratic structures of the UNHCR, as well as to the discourse of expertise and professionalism the organization deploys to routinize and justify its decisions.³⁷

A similar pattern emerges in the management of global financial emergencies, as the Eurozone financial crisis demonstrates.³⁸ Kreuder-Sonnen and Zangl, in one of the handful of recent studies focusing on emergency power at the global level, highlight the European Council’s decision to establish “emergency credit facilities,” such as the European Financial Stabilization Mechanism, that have separate legal personality and that may absorb indirectly the debts of troubled economies.³⁹ Countries obtaining such relief, however, may be forced to accept harsh austerity conditions elaborated “by the so-called Troika comprised of the European Commission, the [European Central Bank] and the International Monetary Fund (IMF), which provides the expertise for these negotiations.”⁴⁰ The power to impose austerity measures effectively, though seen as a necessary emergency response by many, has been criticized as arbitrary and contrary to economic and social rights.⁴¹

The World Health Organization’s emergency powers framework provides just one more, particularly formalized, example. For years, the organization’s secretariat was largely hobbled in its efforts to coordinate international responses to disease outbreaks.⁴² In 2003, however, the organization’s secretariat took highly publicized steps to combat the spread of Severe Acute Respiratory Syndrome (“SARS”) by warning travelers to avoid certain destinations.⁴³ Although the organization’s warnings likely had serious economic and political consequences, its swift action was widely praised and eased the

36. Michael Kagan, *The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18 INT’L J. REFUGEE L. 1, 3–4 (2006).

37. See BARNETT & FINNEMORE, *supra* note 16, at 75 (describing the emergence of a “repatriation culture” at UNHCR in the 1980s); cf. Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33, 50 (2001) (noting aspects of UNHCR organizational culture that Loescher argues inhibit self-examination).

38. See generally Andrew Glencross, *Democratic Input Versus Output-Oriented Governance: The ECB’s Evolving Role and the New Architecture of Legitimacy in the EU*, 5 J. INT’L ORG. STUD. 23 (2015); Kreuder-Sonnen & Zangl, *supra* note 1.

39. Kreuder-Sonnen & Zangl, *supra* note 1, at 16–17.

40. *Id.* at 17.

41. See *id.* at 8–9; see also Andreas Fischer-Lescano, HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY V (Feb. 17, 2014), https://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf.

42. See, e.g., Katrina Tomasevski, *Health*, in 2 UNITED NATIONS LEGAL ORDER 859, 865 (Oscar Schachter & Christopher Joyner eds., 1995) (noting that the organization’s policies forced it to continually refrain from commenting on outbreaks that were already widely reported in the media); Adam Kamradt-Scott, *The WHO Secretariat, Norm Entrepreneurship, and Global Outbreak Control*, 1 J. INT’L ORG. STUD. 72, 77 (2010) (suggesting that the secretariat internalized these weaknesses and continued to be hobbled by them long after states stopped caring).

43. See generally DAVID P. FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE (2004); Andrew T. Price-Smith & Yanzhong Huang, *Epidemic of Fear: SARS and the Political Economy of*

way for a wholesale revision of the law governing the organization's response to diseases.⁴⁴ These new rules authorized the WHO Director-General to exercise emergency power with the advice of a committee of experts drawn largely from the broader epistemic community of public health and epidemiology professionals, with relatively limited involvement from the plenary or executive organs of the organization.⁴⁵

These developments, taking place across multiple sectors, suggest the emergence of a particular mode of crisis governance. Emergency power is no longer the sole province of states, or even of international assemblies or executive councils, and instead is spread among the bureaucratic components of international organizations, privately funded NGOs and hybrid entities, and more diffuse epistemic communities. The claims to authority made by these emergency governors lean heavily on their asserted expertise, whether in aid delivery, refugee law, fiscal policy, or public health. The state certainly does not disappear, and indeed state officials are often found working alongside or in collaboration with international institutions.⁴⁶ Nevertheless, the accumulation of emergency power at the international level may bypass some sections of national government or civil society in favor of others.⁴⁷ All of these themes will emerge in the case study of the WHO that follows below.

These trends, though often seen as practical necessities in the high-pressure environment of emergencies, nonetheless carry certain costs. First, the bureaucratic organs of international organizations and other institutions of global governance are relatively attenuated from the ordinary legal and political accountability mechanisms of international politics.⁴⁸ Depending on the particular institutional structure at play, experts may be capable of shaping understandings, framing issues, and even taking costly decisions with little oversight from member governments, much less from other affected interests.⁴⁹ Second, the relative autonomy of international bureaucracies may create inequality among states (or among other relevant actors),

Contagion, in CRITICAL CASES: INNOVATION IN GLOBAL HEALTH GOVERNANCE 23 (Andrew F. Cooper & John J. Kirton eds., 2009).

44. See, e.g., Margot Cohen et al., *Cracking the Case: Attack on SARS Shows Bureaucracy Sometimes Works*, WALL ST. J., May 2, 2003, at A1; Robert A. Weinstein, *Planning for Epidemics — The Lessons of SARS*, 350 N.E. J. MED. 2332, 2332–34 (2004).

45. International Health Regulations, *supra* note 9, arts. 12–17, 48–49.

46. See, e.g., Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. 1051, 1082 (2009) (noting collaboration between IMF experts and technocrats within the Indonesian government to effect broad revisions to domestic economic policy in the wake of the Asian Financial Crisis of the late 1990s).

47. See generally Abigail Deshman, *Horizontal Review Between International Organizations: Why, How, and Who Cares About Corporate Regulatory Capture*, 22 EUR. J. INT'L L. 1089 (2011) (addressing this dynamic as it relates to the WHO).

48. See generally EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014). Whether we should be confident in those ordinary accountability mechanisms even in the domestic context is another question.

49. See, e.g., Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 355, 371–74 (Veijo Heiskanen & Jean-Marc Coicaud eds., 2001) [hereinafter *LEGITIMACY OF IOS*] (discussing this problem in the context of the WTO).

insofar as some states have greater capacity to influence experts.⁵⁰ In this way, governance by nonstate actors may serve as a back door for hegemonic influences or for horse-trading among powerful states.

In response to these costs, lawyers and scholars have developed an impressive array of procedural, substantive, and structural principles meant to make global governance institutions just and legitimate.⁵¹ It is tempting to simply assume that such principles apply to emergency governance, and to gauge an organization's compliance with some or all of them.⁵² This approach would miss far too much: it would fail to diagnose relevant tensions, and it would therefore also risk recommending the wrong sorts of reform. If the purpose is to diagnose, critique, and reform international bodies, then a better view begins with an investigation into the way power is organized in any particular case, proceeds to identify the most pressing tensions and problem areas, and then develops specific proposals based on this diagnosis.⁵³ The following sections, and the case study beyond, adopt this latter approach.

B. *Pathologies of Expert Emergency Governance*

The rise of the emergency governor highlights, often in a particularly dramatic way, the uncomfortable partnership between expertise and politics. Emergency power, at least as it is normally conceived, requires decisions about what should or must be done to address a pressing problem.⁵⁴ These

50. E.g., von Bernstorff, *supra* note 27, at 1946 ("Strong states oftentimes have an interest in autonomous decision making in expert bodies because they have more influence in these informal processes through higher scientific and bureaucratic resources."); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597 (2007).

51. These might include: procedural principles such as transparency, accountability, and participation; substantive principles such as respect for human rights, requirements of global justice, and decision-making rules like proportionality; and structural principles such as subsidiarity. See generally HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 13 (5th rev. ed. 2011) (surveying constitutionalist, administrative law, and public-authority approaches); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006) (stressing diversity and pluralism in the values applied to global institutions). Views vary as to whether these principles are actually enshrined in positive law, or whether they are simply normative demands that will or ought to be made upon public bodies. For reasons that should become clear, this Article does not address these questions.

52. See, e.g., Joost Pauwelyn & Ayelet Berman, *Emergency Action by the WTO Director-General*, 6 INT'L ORGS. L. REV. 499, 512 (2009) (finding the WTO Director-General to be, in general, appropriately "sensitive" to administrative law principles in his response to the financial crisis).

53. The method adopted here, which is useful beyond the context of emergency governance, is described in detail and defended in J. Benton Heath, *Institutions as Arguments: From Legitimacy to Legitimation in the Study of Global Governance*, presented at the University of Bremen Conference on the Legitimation and Delegitimation of Global Governance Institutions, Sept. 13, 2013 (on file with author).

54. As will become clear, I do not mean by this sentence to advocate a kind of *decisionism*—a theoretical perspective holding that decisions cannot be constrained by law. Emergency action is never a single decision, but is a series of decisions, often taken by various actors, channeled through various fora, and revised or reaffirmed over time. This view, contrary to decisionism, sees law as a method for channeling this series of decisions, and therefore as crucial to the control of emergency power. For a perspective

decisions, in turn, require some sort of political process, even if it is a truncated one.⁵⁵ Once knowledge is transformed into decision by channeling it through a political process, expertise no longer supplies a coherent and complete justification for an institution's authority. In this way, a global governor who operates in the space between expertise and political decision risks taking action that cannot be justified on either ground. This section defends this set of claims in general terms.⁵⁶

In current debates concerning global governance institutions, expertise is often seen as a "source" of legitimacy or a "basis" of authority,⁵⁷ but this perspective risks obscuring the ways in which expert knowledge actually *creates* legitimation problems for public institutions.⁵⁸ Such problems arise when expert authority claims are employed to justify a process of political decision making, rather than one of ongoing scientific debate.⁵⁹ Global governance institutions are increasingly called upon to make decisions implicating deeply held values under conditions of extreme uncertainty,⁶⁰ of which emergency decisions are a particularly salient subset. In light of these conditions, reference to specialized knowledge in any particular field cannot fully determine the appropriate course of action. Indeed, where different perspectives suggest varying conclusions, mediating between these perspectives is a fundamentally political task.⁶¹ Therefore, claims to expertise, when advanced as a means to legitimate such decisions, necessarily exaggerate the extent to which expert knowledge dictates policy outcomes.⁶²

The problem also operates in the other direction, in the sense that the legal and institutional tools required for modern political decision making

taking a similar approach to the nature of emergency decision making—but not necessarily to law—as that taken here, see BONNIE HOENIG, *EMERGENCY POLITICS* 65–111 (2009).

55. That political process may be as simple as: the supreme political actor (that is, the executive or the sovereign) will decide. Even this type of process entails ideas of legitimate authority.

56. A more detailed examination is set forth in Part III in connection with the case study.

57. See, e.g., BARNETT & FINNEMORE, *supra* note 16, at 24–25; Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490, 1517 (2006); Daniel Bodansky, *The Legitimacy of International Governance*, 93 *AM. J. INT'L L.* 596, 619–23 (1999).

58. Versions of this claim are made in the law and society literature, including that which focuses on reflexive modernization and the production of risk in modern society. See, e.g., Wouter G. Werner, *The Politics of Expertise*, in *THE ROLE OF 'EXPERTS' IN INTERNATIONAL AND EUROPEAN DECISION-MAKING PROCESSES* 44, 47–51 (Monika Ambrus et al. eds., 2014) (synthesizing studies of Ulrich Beck and others, who suggest that the iterated use of expertise to justify decision making produces new uncertainties and contributes to an erosion of expert authority).

59. This difficulty was at least recognized in the first wave of legitimacy studies in global governance. See Bodansky, *supra* note 57, at 621 (observing that answers to scientific questions "do not necessarily determine any particular decision about what to do").

60. See, e.g., NICO KRISCH, *BEYOND CONSTITUTIONALISM* 221 (Martin Loughlin et al. eds., 2010) (noting the threat to democratic commitments that may arise if highly politicized risk-regulation decisions are transferred to the international level).

61. For overviews of this problem in the area of risk regulation, see generally Jacqueline Peel, *International Law and the Legitimate Determination of Risk: Is Democratizing Expertise the Answer?*, 38 *VICTORIA UNIV. WELLINGTON L. REV.* 363, 365–68 (2007) (surveying notions of democratized expertise in global governance).

62. E.g., David Kennedy, *Challenging Expert Rule*, 27 *SYDNEY L. REV.* 5, 19–20 (2005).

do not necessarily produce scientifically justifiable outcomes. In a recent article, Oren Perez aptly explains the dilemma in a discussion of “hybrid” regulatory-scientific institutions.⁶³ Perez’s work examines, among other bodies, the Intergovernmental Panel on Climate Change (“IPCC”)—a body whose function is hybrid in the sense that it is meant to both produce scientific studies on climate change and to serve as a focal point for political decision.⁶⁴

Perez finds that the procedure for reviewing and publishing IPCC reports is beset by tensions between scientific and legal-political values.⁶⁵ He observes that the conflict between the scientific values of objectivity and intellectual merit, on the one hand, and the legal-political values of “voice, participation, and transparency,” on the other, have produced contradictions and instability in the review processes employed for panel reports.⁶⁶ In addition, he notes, the very idea of *decision*, so central to the operation of political institutions, is at odds with the scientific traditions of open-ended deliberation and deferred judgment.⁶⁷ These tensions threaten any effort to craft a decision-making structure that can produce both scientifically and politically justifiable outputs.⁶⁸

In emergency decision making, this tension makes authority fundamentally unstable and risks producing dangerous consequences. As in the climate change example, emergency response usually involves problems that are in some sense “massive”; that is, suffering is driven by multiple sources, related to multiple causal mechanisms, difficult to measure, and often susceptible to feedback loops.⁶⁹ Such problems often admit of no single correct solution, and whether or not a problem has been solved may be the subject of substantial debate.⁷⁰ Furthermore, emergencies are by their very nature politically salient: public attention is focused on the problem and on the

63. Oren Perez, *The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions*, 26 EUR. J. INT’L L. 391, 413 (2015).

64. *See id.* at 401 (describing the indirect normative force of IPCC reports).

65. *See id.* at 403–06.

66. *Id.* at 404–09.

67. *Id.* at 412–13.

68. These tensions also lie at the heart of a recent article by public health scholars Steven Hoffman and John-Arne Røttingen on the future of the World Health Organization. *See* Steven J. Hoffman & John-Arne Røttingen, *Split WHO in Two: Strengthening Political Decision-making and Ensuring Independent Scientific Advice*, 128 PUB. HEALTH 138 (2014). The authors argue that the tension within the WHO between political responsiveness and independent, technically-sound scientific advice demonstrates that “the postwar experiment of combining technical and political mandates within a single multilateral institution for health has largely failed,” and they argue for a bifurcation of technical and political activities. *Id.* at 190–91. Notably, it does not appear that the authors’ proposed institutional solutions resolve the tensions within global emergency management, which implicate both technical and political functions. *See id.* at 190–92.

69. *See* J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State*, 98 CAL. L. REV. 59, 73–92 (2010) (describing the contours and types of massive problems in a nonemergency context).

70. *See, e.g.,* Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155, 161–67 (1973); Peter Tatham & Luke Houghton, *The Wicked Problem of Humanitarian Logistics and Disaster Relief Aid*, 1 J. HUMANITARIAN LOGISTICS & SUPPLY CHAIN MGMT. 15, 19 (2011).

agencies tasked with responding, such that it is not possible to avoid notice by ignoring the issue.

In this situation—where problems are complex, solutions are tenuous, and public attention is heightened—actors outside the decision-making machinery will often see critique as an easy way to score political points.⁷¹ Decision makers engaged in this hybrid balancing act will be especially vulnerable because their decisions can be made to seem either scientifically unsound or politically illegitimate.

This vulnerability arises in at least three dimensions of emergency governance. The first is the *gatekeeping* decision: that is, the question of whether an emergency exists, continues to exist, or has ceased to exist. Regardless of the precise context, the relevant question for the gatekeeping decision is whether a situation exists that justifies the exercise of extraordinary power. This is a fundamentally nonscientific question. Although it is in theory possible to draw up criteria for determining the existence of an emergency,⁷² such criteria necessarily will involve a substantial degree of open texture, where there is room for interpretation and contestation.⁷³ In this interpretive space, the question is at bottom a normative and political one: is extraordinary power justified under the circumstances?

The second set of decisions involves identifying the relevant power wielders. Generally, of course, the ultimate decision maker in an emergency will be specified in a founding document or other basic regulation, though there are notable exceptions.⁷⁴ But these documents are only the beginning of the inquiry. In modern emergencies, characterized by massive data collection, thorny scientific problems, and deep uncertainty, the question of access becomes all the more important: who is advising the ultimate decision maker, what are their preferences, and to whom are they accountable? The law of emergency power, moreover, might grant a privileged status to a specific group of advisers, as in the WHO.⁷⁵

71. See e.g., J. Benton Heath, *Managing the 'Republic of NGOs': Accountability and Legitimation Problems Facing the U.N. Cluster System*, 47 VAND. J. TRANSNAT'L L. 239, 279–80 (2014) (discussing this dynamic, and one possible institutional response, in the context of humanitarian relief).

72. In the context of the WHO, see International Health Regulations, *supra* note 9, at 43–46 (providing a “decision instrument” for states to determine whether an event constitutes a potential international health emergency).

73. See GROSS & NÍ AOLÁIN, *supra* note 2, at 45 (“Review of the existing classifications of states of emergency reveals a substantial degree of vagueness, ambiguity, and overlap between the different categories as may be expected in light of the definitional difficulties which inhere in the term ‘emergency.’ Some of the key terms used in this context, such as ‘danger’ and ‘imminent threat,’ are broad enough to make the choice between the possible categories mostly a political issue.”).

74. The U.S. Constitution’s silence on emergency power is the most obvious example. See generally Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1006 (2004) (referring to the “suspension clause” of the U.S. Constitution, and noting that written constitutions before the twentieth century often said little about emergency powers).

75. See *infra* Part III (describing the way in which emergency power at the WHO is channeled through a formal expert committee of advisers).

This set of decisions reflects a process of inclusion and exclusion, from which political considerations cannot be reliably banished. Modern responses to humanitarian emergencies, for example, require the advice of persons with rich experience and expertise in medicine, logistics, environmental science, nutrition, education, and the professional practice of disaster response, among many other issues.⁷⁶ At the same time, the systemic issues of human rights, distributive justice, and political empowerment implicated in large-scale response efforts give rise to legitimate demands that lay publics, rather than experts, should drive decision making.⁷⁷ No specific field of expertise alone can resolve these competing demands conclusively.

Finally, an institution must justify the decisions it takes pursuant to this emergency power. Should a refugee camp be closed or kept open? Should travelers be cautioned to avoid certain destinations, or would that cause too much panic and financial harm? Should countries mobilize immense expenditure on vaccines and antivirals, or should they save their resources for other matters? Although expertise is indispensable to these questions, such decisions cannot be reached by the application of specialized knowledge alone.

Each of these issues holds out the potential for pathological decision making. The legal procedures necessary to reduce knowledge to decision will inject political considerations of prudence, responsiveness to empowered interests, lay participation, and so forth,⁷⁸ such that any action taken in emergency often cannot be defended on purely scientific grounds. At the same time, to the extent an organization relies on its own claims to expert authority, its decision-making structure is likely to lack the sort of democratic pedigree or responsive procedure that are frequently demanded of legitimate governance.

These pathologies leave an emergency governor vulnerable to contestation by opposing political forces. In some cases, this vulnerability may go unexploited: as long as an institution's activities remain relatively low-profile, its decisions may attract minimal scrutiny and critique from those actors powerful enough to challenge its authority.⁷⁹ As a greater degree of emergency power accrues at the international level, however, the pool of affected actors becomes greater, the stakes get higher, and the likelihood of challenge increases.⁸⁰ Where the outside pressure becomes particularly intense, the insti-

76. See generally Heath, *supra* note 71, at 248–50 (setting out the various issue areas implicated in the U.N. “Cluster Approach” to disaster response).

77. *Id.* at 275 & n.180 (noting these criticisms of the U.N. approach to disaster response).

78. See generally Perez, *supra* note 63, at 404–09.

79. See Esty, *supra* note 57, at 1511–12; see also Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L L. 489, 530 (2001) (arguing that organizations that are less “integrated”—roughly meaning institutionalized, powerful, and politically salient—attract only “muted” demands for legitimacy and democratization).

80. See, e.g., Stein, *supra* note 79 (suggesting a directly proportional relationship between the level of international integration and the intensity of legitimacy critiques); Esty, *supra* note 57, at 1509.

tution may be driven toward a crisis of authority—that is, a revelation that its organizing principles are either incoherent or incompatible with the external environment.⁸¹ In the highly visible context of emergency governance, the possibility of such crises of authority becomes acute, and the costs can be devastating.

We can think about vulnerability and crisis from two perspectives. From the view of the institutional designer, the goal is to shore up the organization's authority, to stabilize its ability to govern under the pressure of catastrophe, and to insulate it from critiques by opportunistic states and other self-interested actors who seek to benefit by undermining the organization's authority.⁸² Understanding an institution's vulnerability assists in these efforts. From the perspective of the outsider, these vulnerabilities provide a manual for crafting effective critique, and they can provide insight into the types of reforms that might be demanded.

C. *The Role of Law in Emergency Governance*

The foregoing suggests that a core normative challenge of global emergency governance is one of institutional design. By delegating crisis management to global bodies made up of experts who are nonetheless subject to various political and legal controls, emergency-powers mechanisms risk generating decisions that are justifiable on neither scientific nor political grounds. This tension, which is probably insoluble in modern politics, can be particularly acute in the high-pressure environment of emergency management. This section contends that, in order to mitigate this tension, legal analysis must take a renewed interest in the features of international institutional design that structure the interaction between expert knowledge and political demands in emergency governance.

International institutional law offers at least two responses to the problem of emergency power beyond the state. Traditionally, the law of international organizations has focused on the idea of “powers” to constrain the activities of international organizations.⁸³ To quickly summarize a complex field, treaty-based international organizations may lawfully exercise only those powers that are granted to them by their member states.⁸⁴ As a strictly legal matter, international institutions are not permitted to exercise power be-

81. See, e.g., JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 7 (1973).

82. For example, Werner refers to the emergence of so-called “merchants of doubt”: self-interested actors who seek, for their own reasons, to undermine confidence in scientific conclusions about climate change, the dangers of smoking, etc. Werner, *supra* note 58, at 48. In emergencies, these actors may emerge to downplay the seriousness of a disease or to question the motives of humanitarian actors.

83. See generally Jan Klabbers, *The Changing Image of International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 221 (Veijo Heiskanen & Jean-Marc Coicaud eds., 2001).

84. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 687–88 (7th ed. 2008). Similar rules might be applied by analogy to other non-treaty-based actors. See Armin von Bogdandy, *General Principles of International Public Authority*, 9 GER. L.J. 1909, 1933–36 (2008).

yond what is granted in their constituent instruments.⁸⁵ This view of international institutions, at least conceptually, holds some promise for discipline and constraint, insofar as some emergency actions might be said to fall outside an organization's delegated authority.⁸⁶

A second, more contemporary, approach is not satisfied with the rudimentary tools of powers doctrine. Instead, it draws on lessons from domestic constitutional and administrative law to discipline the activities of international institutions.⁸⁷ These new approaches emphasize, *inter alia*, public-law norms of due process, proportionality, and non-arbitrariness in global decision making.⁸⁸ These substantive and procedural norms, it is thought, provide a blueprint for controlling the actions of international bureaucracies, and, in the process, for stabilizing their authority and mediating between expert and lay perspectives.

Both the powers doctrine and the contemporary public-law approaches must contend with a more skeptical view of legality, which doubts that law has any serious role to play in constraining emergency governance, either within or beyond the state. The skeptical view, which has come into fashion once again in the years following the September 11 attacks, holds that the practical demands of crisis management make it both impractical and unreasonable to seek to govern executive action through specific legal rules, norms, and authorizations laid down in advance.⁸⁹ If emergency power is in any way elevated to the global stage, then, on this view, we can expect the

85. *E.g.*, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 78 (July 8) (stating, in reply to the World Health Organization, that "international organizations . . . do not, unlike States, possess a general competence" and are endowed only with particular powers). *But see* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11, 1949) (stating that an organization's powers may be inferred "by necessary implication as essential to the performance of its duties").

86. This perspective is central to the approach recently articulated in Kreuder-Sonnen & Zangl, *supra* note 1, at 575–77.

87. *See generally* David Kennedy, *The Mystery of Global Governance*, in RULING FOR THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 37 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (offering a critical survey of the varying approaches).

88. For examples of administrative-law, constitutionalist, and public-authority perspectives, see Kingsbury et al., *supra* note 5, at 37–42; Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT'L L. 907, 917–27 (2004); von Bogdandy, *supra* note 84, at 1929–36.

89. This oft-repeated line of critique is summarized in Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1101 (2009) ("Emergencies cannot realistically be governed by ex ante, highly specified rules, but at most by vague ex post standards; it is beyond the institutional capacity of lawmakers to specify and allocate emergency powers in all future contingencies; practically speaking, legislators in particular will feel enormous pressure to create vague standards and escape hatches—for emergencies and otherwise—in the code of legal procedure that governs the mine run of ordinary cases in the administrative state, because legislators know they cannot subject the massively diverse body of administrative entities to tightly specified rules, and because they fear the consequences of lashing the executive too tightly to the mast in future emergencies."). This view, as its title suggests, is indebted to CARL SCHMITT, *POLITICAL THEOLOGY* 1–15 (George Schwab trans., Chi. Univ. Press 2005) (1922).

infirmities of legality to follow.⁹⁰ Politics, not law, will constrain the actions of global governors in catastrophes.⁹¹

The skeptical view cannot be dismissed out of hand, and it brings to light serious problems for both the powers doctrine and the public-law approaches to global governance. With respect to the powers doctrine, the skeptical view points out, any grant of *emergency* power will have to be broadly framed to capture all possible contingencies and to allow maximum flexibility in the face of novel circumstances.⁹² The very breadth of these grants of emergency power, moreover, will make it difficult to discern by ordinary methods of interpretation any meaningful limitations on the exercise of power by global emergency governors.⁹³ Indeed, as the ongoing controversy over the Security Council's power to address matters of "international peace and security" indicates, broad authorizations prove exceedingly malleable to address new threats and to justify new responses.⁹⁴ In short, the powers doctrine alone seems ill-suited to the challenges of global crisis management.

The public-law approach fares better but still runs into potentially debilitating problems in the context of emergency governance. In theory, norms such as transparency, due process, and non-arbitrariness may continue to apply to shape and discipline political power even in the midst of catastrophe.⁹⁵ But, according to the skeptical view, these sorts of norms can easily be adjusted downward in light of practical exigencies and used to justify any exercise of power.⁹⁶ In other words, given the pressure of a crisis situation, a wide range of questionable policies and processes can be deemed "non-arbi-

90. This appears to be the critique raised in Ming-Sung Kuo, *The Moment of Schmittian Truth: Conceiving of the State of Exception in the Wake of the Financial Crisis*, in *THE EUROPEAN CRISIS AND THE TRANSFORMATION OF TRANSNATIONAL GOVERNANCE* 83 (Christian Joerges & Carola Glinski eds., 2014). Other scholars, influenced by the Copenhagen School of security studies, have expressed anxiety about global emergency power, though they reject the hard Schmittian view and see constitutionalism as a normatively attractive alternative. See Kreuder-Sonnen & Zangl, *supra* note 1, at 575–77; Tine Hanrieder & Christian Kreuder-Sonnen, *Securitization and Emergency Governance in Global Health*, 45 *SECURITY DIALOGUE* 331, 342–43 (2014).

91. In the domestic context, see Eric A. Posner & Adrian Vermeule, *Crisis Governance and the Administrative State*, 76 *U. CHI. L. REV.* 1613, 1679 (2008).

92. Vermeule, *supra* note 89, at 1101.

93. E.g., Klabbers, *supra* note 83, at 234 ("[A]n *ultra vires* finding presupposes a sharp separation of powers, sharper perhaps than the constitutions of many organizations can be seen to support. One can only make an argument that someone has exceeded his or her powers if those powers are clearly delimited; where the lines are fuzzy, the argument faces an uphill battle.")

94. E.g., Julian L. Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 *INT'L J. CONST. L.* 627, 646–50 (2012) (noting the difficulty of constraining the Security Council's power based on argument about the proper interpretation of the constitutional text).

95. David Dyzenhaus, for example, contends that courts may supervise national executives in times of emergency by application of common law principles of legality. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW* 7 (2010).

96. Vermeule, *supra* note 89, at 1118. Contrary to Vermeule and others, I do not see this as a fundamental weakness of the public-law approach, but rather as a symptom of the need to spell out with greater clarity the ways that non-arbitrary, procedurally correct, and proportionate decision making can be accomplished given the practical realities of emergency. Against the skeptical view represented in

trary” or “proportionate.” If these public-law norms are to be made effective in disciplining global emergency governance, they must be combined with a richer understanding of what can be reasonably demanded of decision-making processes under conditions of intense time pressure and uncertainty.

This is where a revitalized approach to international institutional law becomes both useful and necessary. The skeptical view, incisive though it may be, moves too quickly to dismiss altogether the role of law in structuring emergency management. It presumes that the relevant law of emergency governance is made up of broad legal authorizations and vaguely worded public-law standards, which the view then proceeds to critique. By making this assumption, the skeptical view misses the other dimensions of institutional law: law itself structures decision-making procedures, channels dissent, and constitutes the relevant authorities that act during emergencies.⁹⁷ An approach that captures these structural dimensions of legality may find a greater use for legal analysis in the discussion of emergency governance.

The skeptical view’s blind spots are twofold. First, procedural rules arguably are not subject to the same critiques as substantive standards.⁹⁸ Unlike broadly worded authorizations and vague standards, procedural rules identify relevant decision makers, set forth a specific process for rendering decisions, and impose obligations of consultation, review, disclosure, and so forth. This is not to say that these rules will always be complied with in emergencies; rather, compliance with these procedural rules is what distinguishes ordinary emergency governance from a mere power grab.⁹⁹ As yet, the skeptical view has not provided any reason to reject the role of procedural law in structuring and disciplining the exercise of emergency powers, either domestically or internationally.¹⁰⁰

Vermeule’s work, I argue in the following paragraphs that this specification is possible, if the public-law approach is connected with a deeper focus on institutional structure and design.

97. This oversight is typical of many contemporary and colloquial views of law, which tend to think of “the law” as rules that proscribe conduct (e.g., “no vehicles in the park”), rather than as rules that constitute actors and processes (e.g., “there shall be a parks commission, which may from time to time issue rules concerning parks”). On constitutive, prescriptive, and technical rules, see ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 68–69 (1976).

98. In the domestic context, see, for example, William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61, 66 (2006) [hereinafter Scheuerman, *Rule of Law*] (“In fact, many present-day constitutional emergency clauses arguably deemphasize the importance of some legally pre-given substantive definition of what specific events or occurrences deserve to be described as emergencies in favor of underlining the importance of a legally regulated process of political and institutional give-and-take in which special powers are delegated to some actors (typically, the executive) while being made accountable to others (judges and legislators). This approach relies less on trying to define prospectively the particular contours of all conceivable emergencies. Instead, it establishes procedural mechanisms whereby political actors themselves can determine whether or not a particular development at hand constitutes an emergency.”); William E. Scheuerman, *Emergency Powers*, 2006 ANN. REV. L. & SOC’Y 257, 270–73 (2006) (describing “legal formalism” in emergency regulation).

99. Andrew Arato, *The Bush Tribunals and the Specter of Dictatorship*, 9 CONSTELLATIONS 457, 470–71 (2002).

100. Scheuerman makes a similar argument in his work on national emergency powers, contending that greater focus on the “political and constitutional structure of the liberal democratic executive” or “political and constitutional structure . . . of the executive” is key to rejecting Schmittian skepticism

Second, the skeptical view holds that “politics,” not law, will constrain emergency action, but it does not stop to consider what this means. Political action, if it takes place at all, does so only in relation to formal institutions, either by operating through those institutions or by circumventing them.¹⁰¹ In other words, if “politics” affects and disciplines emergency action, then it does so by making use of national bureaucracies, administrative agencies, international secretariats, privately constituted bodies, NGOs, regulatory networks, and other such institutions.¹⁰² Emergency politics is thus a “structured politics.”¹⁰³ It is therefore not only sensible but also necessary to pay careful attention to the constitutional and subconstitutional rules that make up this structure because these rules channel dissent and authority claims through a political process.

The inquiry undertaken in the remainder of this Article considers seriously these questions of institutional design. It does not reject altogether the ongoing efforts to nail down transcendent principles of attributed powers, due process, and non-arbitrariness, but it gives greater attention to the institutional mechanisms that are most likely to affect the exercise of emergency powers. These are, first, the procedural rules that guide emergency decision making, and, second, the rules and principles that give structure to the ongoing contest for authority in the global space. The result of this investigation is not an overarching theory of what makes emergency action legal, but a toolbox of institutional-design principles that may be adapted to emergency governance in a variety of settings.¹⁰⁴

about the role of law in emergencies. Scheuerman, *Rule of Law*, *supra* note 98, at 80. In Scheuerman’s account, the executive is a complex and multifaceted entity, whose very pluralist structure creates possibilities for inefficiency and, perhaps, contestation. *See id.* at 79–80. The same observation applies to international bureaucracies and holds out the possibility of taming global emergency power through a renewed focus on institutional procedures.

101. On the role of politics in domestic emergency contexts, see Mark Tushnet, *The Political Constitution of Emergency Powers: Some Conceptual Issues*, in EMERGENCIES AND THE LIMITS OF LEGALITY 145, 151 (Victor V. Ramraj ed., 2008) (suggesting that moralized politics in bureaucracies, legislatures, and civil society can, under certain conditions, constrain emergency action); Nomi Claire Lazar, *A Topography of Emergency Power*, in EMERGENCIES AND THE LIMITS OF LEGALITY 156, 156 (Victor V. Ramraj ed., 2008) (calling for greater attention to the interaction between formal and informal constraints on power).

102. *See* Tushnet, *supra* note 101.

103. MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 9 (2013).

104. On this method in international institutional law, see SCHERMERS & BLOKKER, *supra* note 51, § 8. *See also* NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 14–28 (2d ed. 2005); C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 14–21 (2d ed. 2005); JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 31–37 (2d ed. 2009); Niels Blokker, *Comparing Apples and Oranges? Reinventing the Wheel? Schermers’ Book and Challenges for the Future of International Institutional Law*, 5 INT’L ORGS. L. REV. 197 (2008); Bogdandy, *supra* note 84.

II. EMERGENCY POWERS IN THE WHO

The emergency powers of the World Health Organization, when formalized in 2005, were hailed as a great leap forward for global governance,¹⁰⁵ and they have been used as a standard to judge the emergency response capacities of other organizations.¹⁰⁶ The organization's power is particularly remarkable given the fact that, at the end of the 1990s, many had written the WHO off as a relic.¹⁰⁷ But, during the successful fight against SARS in 2003, the WHO emerged as a key actor in global health, able and willing to use its name and expertise to influence governments and individuals in the fight against disease.¹⁰⁸ In response to this success, members endowed the organization with the legal authority to declare a global public health emergency and to manage such emergencies through recommendations that, while not technically binding, could have substantial economic and political effects on states and individuals.¹⁰⁹

These powers are now reflected in the International Health Regulations ("IHR"), a treaty administered by the WHO and adopted by the organization's membership using a procedure set forth in the WHO Constitution.¹¹⁰ The International Health Regulations place emergency authority squarely in the hands of the WHO secretariat—the organization's administrative body—which is dominated by medical specialists.¹¹¹ The secretariat is headed by the Director-General, who is selected by member states and is

105. *E.g.*, David P. Fidler, *From International Sanitary Conventions to Global Health Security*, 4 CHINESE J. INT'L L. 325 (2005).

106. *See, e.g.*, Bunn & Heinson, *supra* note 10, at 1581.

107. For a portrait of the WHO at the end of the twentieth century, see Stein, *supra* note 79, at 496–99.

108. *See, e.g.*, Margot Cohen et al., *supra* note 44; Robert A. Weinstein, *Planning for Epidemics — The Lessons of SARS*, 350 NEW ENG. J. MED. 2332 (2004); David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations*, 34 J.L. MED. & ETHICS 85, 85 (2006) (describing the response as a "roll-out" of the planned revisions to the International Health Regulations); Gian Luca Burci, *Institutional Adaptation Without Reform: WHO and the Challenges of Globalization*, 2 INT'L ORGS. L. REV. 437, 443 (2005).

109. *E.g.*, Fidler & Gostin, *supra* note 108, at 85. For background concerning the re-emerging concern with infectious diseases in the 1990s, and the resulting revision of the WHO's governance structure, see David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771 (1996-1997); Allyn L. Taylor, *Controlling the Global Spread of Infectious Diseases: Toward a Reinforced Role for the International Health Regulations*, 33 HOUS. L. REV. 1327 (1996-1997); Laurie Garrett, *The Return of Infectious Disease*, 75 FOREIGN AFF. 66 (1996); WORLD HEALTH ORGANIZATION, *The World Health Report 1996: Fighting Disease, Fostering Development* (1997), <http://www.who.int/whr/1996/en/index.html>.

110. *See* Constitution of the World Health Organization, arts. 21–22, July 22, 1948, 14 U.N.T.S. 185 [hereinafter WHO Constitution] (setting out the procedure for adopting health regulations). For discussions of this procedure, see Charles E. Allen, *World Health and World Politics*, 4 INT'L ORG. 27, 43 (1950); Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT'L L. 669, 677–78 (2012).

111. *See* Hoffman & Røttingen, *supra* note 68, at 189 n.* (noting that 47.8% of the WHO's professional staff are "medical specialists," with most of the remainder listed as "administrative specialists," and with very few lawyers, economists, or social science experts). *See generally* WHO Constitution, *supra* note 110, arts. 30–37.

expected to have “qualification and experience in international public health and organizational management.”¹¹² The IHR empower the Director-General, with the assistance of a committee of experts, to declare an international state of emergency, and to issue public policy statements, known as “temporary recommendations,” once an emergency is declared.¹¹³

As might be expected, the IHR define a “public health emergency” in only general terms, without providing any concrete rules as to when an emergency is to be declared.¹¹⁴ The Regulations state only that a “public health emergency of international concern” must pose a risk of the “international spread of disease,” and must “potentially require a coordinated international response.”¹¹⁵ The secretariat is required to consider certain categories of information when deciding on the existence of an emergency, but no particular source is binding on the Director-General’s determination.¹¹⁶ The treaty also provides that the organization may declare a public health emergency even in the absence of official reports from the affected state.¹¹⁷

An emergency declaration, in turn, empowers the WHO Director-General to issue public “temporary recommendations” to member states.¹¹⁸ According to the IHR, these recommendations should be calibrated to “prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic.”¹¹⁹ Temporary recommendations may include travel advice, suggestions that states deny entry into a certain re-

112. GIAN LUCA BURCI & CLAUDE-HENRI VIGNES, WORLD HEALTH ORGANIZATION 50 (2004); see also WHO Constitution, *supra* note 110, art. 31.

113. See International Health Regulations, *supra* note 9, arts. 12–17, 48–49.

114. *Id.* art. 12.

115. The International Health Regulations, in full, define a “public health emergency of international concern” as an “extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.” *Id.* art. 1. “Disease” is defined more broadly than one might expect, as “an illness or medical condition, *irrespective of origin or source*, that presents or could present significant harm to humans.” *Id.* (emphasis added). “Public health risk” is also defined in ways that do not narrow the scope. See *id.* In practice, commentators have noted, the term “public health emergency” is susceptible of broad or narrow interpretations, and the WHO may be taking a relatively narrow approach to its legal scope or practical application. See Wilson et al., *supra* note 13, at 506.

116. See International Health Regulations, *supra* note 9, art. 12(4).

117. *Id.* art. 9(1); see also DAVID P. FIDLER, *supra* 43, at 134 (noting that the move to include nongovernmental sources was motivated by the need to harness new information technologies, such as the Internet and SMS, and the need to “overcome the historical pattern of states not reporting infectious disease outbreaks”). Although the Director-General must consult with the affected state, a declaration may be made over its objection. International Health Regulations, *supra* note 9, arts. 12, 49.

118. International Health Regulations, *supra* note 9, art. 15. The Director-General must issue at least one recommendation in a declared emergency. *Id.* art. 12. The Director-General may also issue standing recommendations at any time for “routine or periodic” measures. *Id.* art. 16. In issuing recommendations, the WHO must consult the views of the state concerned, the advice of relevant expert committees, “scientific principles,” the availability of less restrictive measures, and, if there is time, other relevant international instruments and decisions of other international bodies. *Id.* art. 17.

119. *Id.* art. 15(2).

gion, vaccination procedures, matters relating to food safety, recommendations on quarantine, and customs measures.¹²⁰

WHO emergency recommendations, though technically nonbinding,¹²¹ have the capacity to alter both the behavior of individuals and the legal obligations of states.¹²² Of these two sorts of effects, the former is likely the most significant. A recommendation by the WHO that individuals avoid certain destinations can seriously impact local economies and global travel patterns.¹²³ Statements by the WHO may also create political pressure on governments to provide certain vaccines,¹²⁴ or to impose certain controversial emergency measures, such as quarantines.¹²⁵ Many of these direct effects of WHO action may be unintended, such as effects on consumer confidence or behavior as the result of an emergency declaration.¹²⁶ All of these effects can take place in a more or less unmediated manner, that is, without the implementation of WHO recommendations by member states.¹²⁷

In addition, WHO recommendations also affect states' legal obligations, although any corresponding effect on actual state behavior is relatively muted. For example, states must explain and justify national emergency response measures that are taken in excess of WHO recommendations, and

120. See *id.* arts. 15, 18(1).

121. *Id.* art. 1 (characterizing recommendations as "non-binding advice").

122. For studies unpacking the effect of temporary recommendations, see Barbara von Tigerstrom, *The Revised International Health Regulations and Restraint of National Measures*, 13 HEALTH L.J. 35 (2005); Lawrence O. Gostin, *Influenza A(H1N1) and Pandemic Preparedness Under the Rule of International Law*, 301 J. AM. MED. ASS'N 2376 (2009); see also JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 222 (2005) (noting in international institutions "a conscious effort to side-step the question of binding effect in favor of standard-setting that intentionally lies along a spectrum of authority from binding to non-binding").

123. This sort of power was most prominent in the organization's response to SARS, in which the WHO issued "travel advisories" recommending that individuals avoid certain destinations, including Toronto, Hong Kong, and several provinces in China. See World Health Organization, Update 92: Chronology of Travel Recommendations, July 1, 2003, http://www.who.int/csr/don/2003_07_01/en/index.html; see also Colleen M. Flood & Anthea Williams, *A Tale of Toronto: National and International Lessons in Public Health Governance from the SARS Crisis*, 12 MICH. ST. J. INT'L L. 229, 242-43 (2004) (assessing the costs to Toronto from WHO travel advisories during SARS).

124. See Sheryl Gay Stolberg, *Shortage of Vaccine Poses Political Test for Obama*, N.Y. TIMES, Oct. 28, 2009, at A4, http://www.nytimes.com/2009/10/29/us/politics/29shortage.html?_r=0 (noting demand for swine flu vaccines).

125. See, e.g., Ulrich Beck, *World at Risk: The New Task of Critical Theory*, 37 DEV. & SOC'Y 1, 15-18 (2008) (noting political demands for control measures in Hong Kong during SARS).

126. See, e.g., *The Butcher's Bill*, ECONOMIST (Apr. 30, 2009), <http://www.economist.com/node/13576491> (noting the effect of flu scares on consumer confidence).

127. In this respect, it is notable that the IHR provide that recommendations be directed to states, as opposed to individuals or the general public. See International Health Regulations, *supra* note 9, art. 18. This is most likely a reaction by member states to the organization's response to SARS, in which it issued travel advice directly to the public at large, rather than phrasing its prescriptions exclusively as policy recommendations to national governments. See *supra* note 123 at sources cited therein. The 2005 IHR may therefore be read as a modest attempt to roll back some of the more expansive power asserted by the WHO during that response. Nevertheless, because the organization's temporary recommendations are ultimately made public, they still may have a substantial direct effect on individuals. See International Health Regulations, *supra* note 9, art. 49. For example, a recommendation that a state "refuse entry" to an affected area is identical in substance, if not in form, to a recommendation that travelers avoid that same area. See *id.* art. 18.

compliance with WHO recommendations constitutes a safe harbor for states responding to health emergencies.¹²⁸ However, states have many competing incentives to shirk their obligations under the International Health Regulations, and it appears that they often do so.¹²⁹ The IHR themselves provide no mechanism for requiring states to comply with their obligations in this respect.¹³⁰ For this reason, WHO recommendations are far more likely to affect state behavior when they serve a policy-coordinating role by nudging states already predisposed to act to adopt certain measures in response to diseases.¹³¹ The discussion that follows therefore focuses primarily on the direct effect of WHO emergency actions on individual and group behavior, as well as on the policy-coordinating function of WHO recommendations.

The International Health Regulations also establish a procedure for channeling and, to some degree, checking the Director-General's emergency

128. The IHR distinguish between national health measures taken "pursuant to these Regulations" and "additional health measures." International Health Regulations, *supra* note 9, arts. 42–43. Only "additional health measures" trigger the set of duties in article 43, which include a requirement to consider "reasonably available alternatives" that are less restrictive on travel and trade, and an obligation to report the measure to the WHO, provide a justification, and to review the measures within three months of their implementation. *Id.* art. 43. It would appear that measures that directly implement WHO recommendations would be taken "pursuant to" the IHR, and thus would not constitute "additional health measures." *See id.* art. 15(2) (stating that temporary recommendations may include "health measures to be implemented" by States Parties to the IHR). This structure creates a "safe harbor" for States that strictly comply with temporary recommendations during emergencies, rather than introducing alternative measures or seeking higher levels of health protection.

129. *See, e.g.*, Arielle Silver, Note, *Obstacles to Complying with the World Health Organization's 2005 International Health Regulations*, 26 WIS. INT'L L.J. 229, 234–237 (2008) (explaining these obstacles in game-theoretic terms); Bradley J. Condon & Tapen Sinha, *The Effectiveness of Pandemic Preparations: Legal Lessons from the 2009 Influenza Epidemic*, 22 FLA. J. INT'L L. 1 (2010) (finding spotty compliance by states during the swine flu pandemic); Jennifer Shkabatur, *A Global Panopticon?: The Changing Role of International Organizations in the Information Age*, 35 MICH. J. INT'L L. 159, 169–73 (2011) (arguing that, because of the incentives for shirking, the IHR do not establish a reliable system for monitoring disease outbreaks). *But see* Adam Kamradt-Scott & Simon Rushton, *The Revised International Health Regulations*, 24 GLOBAL CHANGE, PEACE & SECURITY 57, 69 (2012) (arguing that the compliance rates with WHO recommendations in swine flu suggest an "incomplete" process of norm internalization, perhaps with promises of greater compliance in the future).

130. This is a commonly heard complaint. *See, e.g.*, World Health Organization Ebola Interim Assessment Panel, *Report of the Interim Assessment Panel*, ¶¶ 16–19 (July 2015) [hereinafter *Ebola Interim Assessment*], <http://www.who.int/csr/resources/publications/ebola/ebola-panel-report/en/>; Gostin, *supra* note 122, at 2377.

131. In the ongoing response to polio, for instance, the WHO has recommended that a number of countries declare states of emergency and begin imposing restrictive travel measures. World Health Organization, *Statement on the Meeting of the IHR Emergency Committee Concerning the International Spread of Wild Poliovirus* (May 5, 2014), <http://www.who.int/mediacentre/news/statements/2014/polio-20140505/en/>. Moreover, national governments may partner with the WHO to give even greater effect to policy-coordinating recommendations, as when the United Kingdom signed supply contracts with pharmaceutical companies that triggered automatically upon the declaration of an emergency. Nick Triggle, *Swine Flu Vaccines 'Lacked Get Out Clauses'*, BBC NEWS (July 1, 2010), <http://www.bbc.co.uk/news/10474155>; Paul Rodgers & Smitha Mundasad, *Billions Wasted on Swine Flu Pandemic that Never Came*, THE INDEPENDENT (May 16, 2010), <http://www.independent.co.uk/life-style/health-and-families/health-news/billions-wasted-on-swine-flu-pandemic-that-never-came-1974579.html>. However, given the hostile political reaction to these arrangements, it is unlikely that governments will give up this much power again in the near term.

power.¹³² Before exercising her emergency powers, the Director-General must obtain the advice of an Emergency Committee, whose membership is selected by the Director-General from a preexisting “roster” of experts.¹³³ In selecting the members, the Director-General must consider “the fields of expertise and experience most relevant to the specific event that is occurring,” along with “principles of equitable geographic representation.”¹³⁴

The Emergency Committee can, in theory, provide a political check on the Director-General’s power.¹³⁵ The IHR require the Director-General to consult with the committee before deciding whether to declare an emergency, to terminate an emergency, or to issue or modify a temporary recommendation.¹³⁶ The committee prepares a report summarizing its deliberations and any advice given to the WHO.¹³⁷ Although the Director-General makes the final call, the committee’s report is published along with her decision.¹³⁸ Therefore, if she disagrees with the Emergency Committee, she must, as a practical matter, either explain her disagreement or change her position to avoid embarrassment. In practice, the committee and the Director-General have always avoided this potential conflict by speaking with one voice.

The IHR thereby obscure and fragment state control over the WHO, potentially driving state power to the back channels of global governance. Formally, under the IHR, member states have far less direct control over the emergency decision-making process than they do over other matters at the WHO. For example, a state in whose territory the emergency arises has only a limited right to notice and an opportunity to be heard by the Emergency Committee, and it has no control over the outcome of the committee’s deliberations.¹³⁹ Nevertheless, certain states may continue to exercise signifi-

132. Note that although the SARS response was widely seen as a “test drive” of these new emergency powers the procedural framework imposed by the 2005 IHR was not present in that response.

133. International Health Regulation, *supra* note 9, arts. 47–49. The Director-General also selects the persons on the roster on the basis of technical qualifications, with a view toward attaining a balanced international representation. *Id.* art. 47; WORLD HEALTH ORGANIZATION, *Regulations for Expert Advisory Panels and Committees*, in BASIC DOCUMENTS (47th ed. 2010) [hereinafter Expert Committee Regulations], <http://apps.who.int/gb/bd/>. Each member state may also request the appointment of one member, which the Director-General is obliged to honor. International Health Regulation, *supra* note 9, art. 47. International organizations may also propose experts. *Id.* It appears that individuals who are not on the roster may nonetheless be selected for the Emergency Committee if they already are serving on other WHO expert advisory panels. *Id.* art. 48(2). The Director-General may also appoint technical experts to advise the Emergency Committee. *Id.* art. 48(3).

134. International Health Regulation, *supra* note 9, arts. 48(2), 49(1). At least one member “should” be an expert nominated to the roster by a state party within whose territory the emergency arose. *Id.* art. 48(2).

135. This is less likely given that the power to appoint committee members lies with the Director-General. Nonetheless, Part V explores some reforms, short of treaty amendment, that may enable the Emergency Committee to act as a real check on the Director-General’s authority.

136. International Health Regulation, *supra* note 9, art. 48(1).

137. *Id.* art. 49(3).

138. *See id.* art. 49(3), (5)–(6).

139. *Id.* art. 49(4). The rules, moreover, expressly prevent member states from abusing this right to postpone meetings. *Id.*

cant influence, particularly governments that have professional or personal ties to WHO experts or the Director-General¹⁴⁰ or those that constitute invaluable sources of financing for the organization.¹⁴¹ Private foundations and individuals that regularly contribute to the WHO budget may also exercise substantial power over the organization's activities through the same back channels.¹⁴²

Finally, the procedures place time limits on any declared emergency. All temporary recommendations sunset after three months, subject to extensions, and in no case can they continue past two years.¹⁴³ The Director-General may seek to issue standing recommendations, but these must be submitted to the organization's plenary body.¹⁴⁴ The emergency response is also subject to a nonbinding review by another expert committee (the "Review Committee"), whose final report is public.¹⁴⁵

The regulations thus provide a framework for the global governance of health emergencies, away from the direct formal control of states.¹⁴⁶ This framework involves the exercise of emergency power by an international bureaucracy, with the advice of a hand-selected "expert" committee of advisers. This emergency power can affect states' legal obligations, though, as we have seen, the organization's ability to secure compliance with those obligations is limited in practice.¹⁴⁷ More important, the WHO's emergency-powers mechanism places the organization in a position to influence the behavior of consumers, international travelers, and other individuals.¹⁴⁸ This power was on display in the behavior of travelers during SARS, and in the demand for vaccines during swine flu, and its absence was a topic of much discussion amid the WHO's recent belated response to Ebola. We now turn to the strategies employed by the WHO to justify this emergency authority.

III. EXPERTISE AND DECISION IN DISEASE CONTROL

The tension between knowledge and decision, outlined in abstract terms above, emerges in potentially debilitating ways when the WHO exercises its

140. Some observers have made this allegation in connection with the Ebola response. See, e.g., Editorial, *Reform After the Ebola Debate*, N.Y. TIMES, Feb. 10, 2015, at A20 ("Dr. Margaret Chan, the director general and a Hong Kong pediatrician who got her job thanks to pressure from the Chinese government, failed to respond quickly when Ebola first emerged in West Africa.")

141. See, e.g., CHARLES CLIFT, CHATHAM HOUSE, WHAT'S THE WORLD HEALTH ORGANIZATION FOR? 28 (2014) (noting the substantial rise in voluntary contributions from states and private foundations).

142. See *id.* at 28–29 (noting that the Gates Foundation had become the single largest contributor to the WHO by 2012–2013).

143. International Health Regulations, *supra* note 9, art. 15(3).

144. *Id.* arts. 16, 53.

145. *Id.* arts. 50–53.

146. See BARNETT & FINNEMORE, *supra* note 16, at 1–3 (noting this trend in the WHO); FIDLER, *supra* note 43; Kingsbury & Casini, *supra* note 1, at 336.

147. See *supra* text accompanying notes 128–31.

148. See *supra* text accompanying notes 121–27.

emergency power. The International Health Regulations authorize the WHO Director-General to declare a state of emergency, to take emergency measures, and to identify the relevant categories of decision makers. With respect to each dimension of this power, the treaty rules provide nothing close to a step-by-step guide for reaching decisions. In high-profile responses to swine flu and Ebola, the WHO has attempted to fill the gap between knowledge and decision through various improvised tactics. These included adopting a stance of deference to other actors, employing a detailed, rule-bound decision-making framework, and attempting to depoliticize the role of the WHO's expert advisers. These improvisations often proved pathological, bringing to light inconsistencies between the WHO's role as an expert body and its power to make wide-ranging political decisions, and threatening to produce policy that could be justified from neither perspective. The WHO's experience in this respect highlights fundamental challenges facing global emergency governors.

A. *Declaration of Emergency*

The first point at which this tension arises is the decision to declare a public health emergency. The idea of emergency, as argued above, is a fundamentally political and legal concept, referring not to a particular set of facts but to a justification for using extraordinary power.¹⁴⁹ The law of the World Health Organization does not provide a concrete and systematic mechanism for deciding when an emergency should be declared, nor can it be expected to do so. It provides only the outlines of a decision-making procedure and a list of sources to consult.¹⁵⁰

In practice, the WHO has improvised two principles of decision making to guide it down the path from expert knowledge to political decision: *deference* and *rules*. These principles played out in different ways in the swine flu and Ebola responses, but in each the end result was nearly disastrous for the organization. This section focuses on the role of each principle during the Ebola outbreak; the WHO's use of rules to organize the swine flu response is addressed below.

The overriding criticism of the 2014 Ebola outbreak was that the WHO was slow to wake up to its severity.¹⁵¹ Médecins Sans Frontières warned of a massive Ebola outbreak of "unprecedented" scale as early as March 2014, but the WHO continually downplayed the matter and did not activate its international emergency powers for months.¹⁵² The WHO's activity during

149. See *supra* Part I.B.

150. See *supra* Part II.

151. See, e.g., *Ebola Interim Assessment*, *supra* note 130, ¶¶ 20–21; see also *supra* note 11.

152. See, e.g., *Ebola Outbreak in Guinea Unprecedented—MSF*, BBC NEWS (Mar. 31, 2014), <http://www.bbc.com/news/world-africa-26825869>; Saliou Samb, *WHO Says Guinea Outbreak Small as MSF Slams International Response*, REUTERS (Apr. 1, 2014), <http://news.yahoo.com/says-guinea-ebola-outbreak-small-msf-slams-international-202515910.html>; Imogen Foulkes, *WHO Under Fire Over Response to Epidemic*, BBC NEWS (Oct. 20, 2014), <http://www.bbc.com/news/world-europe-29691044>.

those months was later described as “somnambulant” and a failure of leadership, and even the organization itself admitted that it botched the response.¹⁵³ Several factors have been blamed for the WHO’s inaction.¹⁵⁴ Here, however, the Article focuses on the strategies used, implicitly or explicitly, to justify inaction, not on the factors that appear most likely to have caused this inaction in the first place.

In normative terms, the organization’s strategy during the spring of 2014 was one of deference to regional and local authorities.¹⁵⁵ For much of that time, the organization purportedly allowed its regional office in Africa to take the leadership role, with some support from the organization’s global outbreak network of experts.¹⁵⁶ It also stressed the primary responsibility of states to determine the urgency of public health threats in their own territory.¹⁵⁷ This policy of deference might have appeared sensible given the dire economic and social consequences experienced by states that declare public health emergencies.¹⁵⁸ And this approach makes implicit reference to princi-

153. Garrett, *supra* note 11; Marie Cheng & Adam Geller, *WHO Draft Report: We Botched the Response to Africa’s Ebola Outbreak*, ASSOCIATED PRESS (Oct. 18, 2014), http://www.denverpost.com/nationworld/ci_26750734/who-draft-report-we-botched-response-africas-ebola.

154. See, e.g., *Ebola Interim Assessment*, *supra* note 130, ¶ 13 (noting, among other factors, weak national health systems, political resistance at the country level, WHO politics and culture, and international indifference). In addition to the factors mentioned in the Interim Assessment, accusations that the WHO had overhyped the swine flu pandemic likely made officials think twice before declaring another high-profile emergency. See, e.g., Daniel Flynn & Stephanie Nebehay, *Aid Workers Ask Where Was WHO in the Ebola Outbreak*, REUTERS, (Oct. 5, 2014), <http://www.reuters.com/article/2014/10/05/us-health-ebola-who-idUSKCN0HU03Q20141005> (“Some diplomats suggest the WHO may have hesitated to flag up the Ebola outbreak after it was accused of overhyping the 2009 H1N1 swine flu epidemic and pandering to pharmaceutical firms.”). And budget cuts in the wake of the global financial crisis had hit key emergency response units in Geneva especially hard, leaving the organization understaffed and underfunded. Sheri Fink, *Cuts at W.H.O. Hurt Response to Ebola Crisis*, N.Y. TIMES, Sept. 3, 2014, at A1, http://www.nytimes.com/2014/09/04/world/africa/cuts-at-who-hurt-response-to-ebola-crisis.html?_r=0.

155. See generally World Health Organization, *ONE YEAR INTO THE EBOLA EPIDEMIC 29–34* (2015), <http://www.who.int/csr/disease/ebola/one-year-report/ebola-report-1-year.pdf> [hereinafter *WORLD HEALTH ORGANIZATION, ONE YEAR*]; Stewart M. Patrick, *Ebola Reveals Gaps in Global Epidemic Response*, THE INTERNATIONALIST (Sept. 10, 2014), <http://blogs.cfr.org/patrick/2014/09/10/ebola-reveals-gaps-in-global-epidemic-response/>.

156. See World Health Organization, *ONE YEAR*, *supra* note 155, ch. 3; Somni Sengupta, *Effort on Ebola Hurt W.H.O. Chief*, N.Y. TIMES, Jan. 6, 2015, at A1, <http://www.nytimes.com/2015/01/07/world/leader-of-world-health-organization-defends-ebola-response.html> (“Dr. Chan defended her record on Ebola, saying that she had followed protocol by leaving it to the Africa office to respond in the early months of the virus. She acknowledged that getting a grip on the W.H.O.’s regional offices, which are effectively controlled by local governments, was the most intractable political issue in the organization and that, in hindsight, she wished she had acted a little earlier to ‘mount a much stronger, more aggressive response.’”).

157. See, e.g., Fink, *supra* note 154 (“Dr. Chan said that governments have the primary responsibility ‘to take care of their people,’ calling the W.H.O. a technical agency that provides advice and support.”); Maria Cheng & Raphael Satter, *Emails Show the World Health Organization Intentionally Delayed Calling Ebola a Public Health Emergency*, ASSOCIATED PRESS (Mar. 20, 2015), <http://www.businessinsider.com/report-the-world-health-organization-resisted-declaring-ebola-an-international-emergency-for-economic-reasons-2015-3> (noting “a tendency within WHO to reward those who deferred to local authorities”).

158. See, e.g., Ebola Interim Assessment Panel, *First Report of the Panel*, ¶ 31, WHO Doc. A68/25, Annex, (May 8, 2015) (noting the “significant disincentives” for governments to be transparent about the existence of health emergencies); Sara Gorman, *Is Margaret Chan Really to Blame for the Delayed Ebola*

ples of international law, under which national governments retain the primary role to address emergencies on their own territory.¹⁵⁹

The trouble was that the WHO's policy of deference rested on an institutional architecture that everyone had for years agreed was defective. The regional offices have long been a source of tension in WHO governance, as they often are headed by political appointees, are largely unaccountable to headquarters in Geneva, and lack technical capacity.¹⁶⁰ As past experience might have predicted, the regional offices issued inconsistent statements concerning the severity of the situation and appeared to many observers to have been captured by interests within the local governments.¹⁶¹ The principle behind the early months of the Ebola response thus remained centered on deference, despite the fact that this approach could not fit with well-understood institutional realities.¹⁶²

As the outbreak escalated, the justification for the WHO's decision-making structure began to crumble, and headquarters had to search for a reason to withdraw its deference and take action. It found its justification in what seemed to be a strict, rule-bound interpretation of its emergency authority. On July 20, 2014, as political pressure on the WHO ratcheted upward, an airline passenger from Liberia brought Ebola to Lagos, marking the first time the virus was known to cross international borders by air travel.¹⁶³ The WHO treated this event as a paradigm shift, which converted the disease from a problem affecting an isolated geographical region spread across three countries into an international incident justifying an exercise of global emergency power.¹⁶⁴ Now that someone with Ebola managed to get on an international flight, it was suggested, the situation justified global emergency power—the International Health Regulations, after all, are concerned with the *international* spread of disease.

Response?, PLOS BLOGS: SPEAKING OF MEDICINE (Jan. 16, 2015), <http://blogs.plos.org/speakingofmedicine/2015/01/16/margaret-chan-really-blame-delayed-ebola-response/>.

159. On the "primary responsibility" concept in another context, see J. Benton Heath, *Disasters, Relief, and Neglect*, 43 N.Y.U. J. INT'L L. & POL. 419, 436 (2011).

160. Fiona Goodlee, *The Regions: Too Much Power, Too Little Effect*, 309 BRIT. MED. J. 1566, 1567 (1994) ("The autonomy enjoyed by the regions has for a long time been portrayed as one of WHO's major strengths. It is increasingly being seen, however, as an important structural flaw. Critics say that it not only risks producing seven different WHOs, each directed by the whims of its constituents, but encourages political manipulation and abuse of power."); Flynn & Nebehay, *supra* note 154 ("Insiders say the WHO is amongst the most politicized of U.N. agencies, with governments holding sway over its regional operations. The director of its regional African bureau (AFRO) based in Brazzaville, Congo, is appointed by governments and has access to locally raised funds, allowing autonomy from Geneva.")

161. See, e.g., Cheng & Geller, *supra* note 153; Foulkes, *supra* note 152.

162. Recently leaked internal communications show that a staff member in the Africa regional office recognized a need for an escalated response and attempted to raise this issue with headquarters officials in Geneva. See Cheng & Geller, *supra* note 153; Sarah Boseley, *World Health Organization 'Intentionally Delayed Declaring Ebola Emergency'*, THE GUARDIAN (Mar. 20, 2015), <http://www.theguardian.com/world/2015/mar/20/ebola-emergency-guinea-epidemic-who>. Nonetheless, as discussed above, the strategy of deference prevailed, led in large part by Geneva officials who counseled restraint.

163. World Health Organization, ONE YEAR, *supra* note 155, ch. 3.

164. Sengupta, *supra* note 156.

This justification was paper thin, and it did little if anything to quell international criticism of the WHO's delayed response. First, there is no legal requirement that cross-border transmission take place before a public health emergency is declared; there need only be a risk associated with the international spread of disease.¹⁶⁵ Second, it was undisputable that the disease had already spread across at least three countries and that further spread by air travel was only a matter of time.¹⁶⁶ It did little to redeem the WHO to suggest that a single regional flight to Lagos marked the difference between an international health emergency and a localized event.

This rule-bound solution to the failure of the WHO's earlier deference strategy compounds the perception that the WHO's approach to its own emergency power is unprincipled and undisciplined. In the abstract, of course, there might be good reasons to delegate downward in the management of emergencies. A principle of institutional subsidiarity, for example, might provide that regional and local authorities take the lead, unless and until their capacities are proven to be overwhelmed. The decision to activate the WHO's global emergency powers, then, would be premised on an assessment of the operational and informational capacities of local offices and local governments.¹⁶⁷ The trouble is that the WHO, at present, appears to lack both the normative vocabulary and the institutional architecture to make potentially contentious decisions about the capacities of local governments, and it therefore has had to fall back on legalistic triggers and ad hoc rules. Accordingly, the Director-General's decision to assert some control, although welcomed by most observers, appears just as unprincipled and unscientific as the decision to accord deference to the local authorities and regional bureaucracy in the first place.

B. *Emergency Policymaking*

The law of the WHO also grants substantial discretion to the organization in deciding what steps to take in response to emergencies.¹⁶⁸ The measures that public authorities might take in response to health threats, such as quarantine, social distancing, travel bans, and experimental drug treatment, implicate serious economic, civil rights, and ethical concerns, which are subject to deep political contestation.¹⁶⁹ The potential problems with delegating such decisions to a group of international experts are obvious,

165. See International Health Regulations, *supra* note 9, art. 1.

166. See, e.g., World Health Organization, ONE YEAR, *supra* note 155, at 11–28.

167. See *infra* Part IV.A. for one possible approach based on these principles.

168. See International Health Regulations, *supra* note 9, art. 19.

169. See, e.g., Jason W. Sapsin et al., *SARS and International Legal Preparedness*, 77 TEMP. L. REV. 155 (2004); Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. (forthcoming 2015). For a comprehensive set of recommendations engaging a wide range of issues of social policy, see World Health Organization, Statement on the 1st Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa, Aug. 8, 2014, <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>.

and the WHO has improvised certain tactics to discipline and legitimate its authority in this respect. The organization's response to swine flu provides an example in which these tactics went awry, producing decisions that were difficult to justify scientifically or politically.

In the swine flu response, the WHO sought to cast in neutral terms its emergency decisions by framing them as the result of a strict application of a clear and transparent framework of rules known as a "pandemic plan."¹⁷⁰ This pandemic plan had been developed by the WHO, in collaboration with experts and public health officials, to guide global, national, and local responses to a severe influenza outbreak.¹⁷¹ It featured an escalating level of six pandemic "phases," clear criteria for escalation and de-escalation, and specific policy recommendations for each stage.¹⁷² These recommendations included the production and stockpiling of vaccines, control of mass gatherings, triage systems, entry and exit screening, and so on.¹⁷³

From 2009 to 2010, the WHO's emergency policy consisted largely of adjusting the pandemic alert level according to this plan.¹⁷⁴ Although the plan itself was not designed to be used in conjunction with the WHO's emergency powers,¹⁷⁵ this approach had the benefit of making the organization's exercises of authority seem like the epitome of a rule-of-law response: mechanical application of clear and general rules set down in advance. This strategy served to clear the pathway from knowledge to decision by automating policy and cutting off other conceptual approaches to crisis management.

This rule-bound approach was built on a weak foundation, however, and the cracks soon began to show. The foremost problem was the pandemic plan itself. The rules had been developed in response to increased fears of a global bird flu outbreak in the first decade of the twenty-first century, and it was obvious that the policies expressed in the planning documents were founded on the expectation that a pandemic virus would be severe and deadly.¹⁷⁶ It soon became clear that these rules did not fit the reality of

170. See World Health Organization, PANDEMIC INFLUENZA PREPAREDNESS AND RESPONSE: A WHO GUIDANCE DOCUMENT (2009) [hereinafter 2009 PANDEMIC PLAN].

171. See *id.* at 15.

172. *Id.* at 27; see also *id.* at 43.

173. See *id.* at 31–44.

174. See, e.g., World Health Organization Director-General, DG Statement Following the Meeting of the Emergency Committee (June 11, 2009), http://www.who.int/csr/disease/swineflu/4th_meeting_ihr/en/.

175. See, e.g., David P. Fidler, Editorial, *H1N1 After Action Review: Learning from the Unexpected, the Success and the Fear*, 4 FUTURE MICROBIOLOGY 767, 768 (2009) (noting that the response raises policy questions about the relationship between the pandemic plan and the IHR).

176. World Health Organization, *Global Influenza Preparedness Plan*, 2, 4, WHO Doc. WHO/CDS/CSR/GIP/2005.5 (2005) [hereinafter 2005 *Pandemic Plan*], http://www.who.int/csr/resources/publications/influenza/WHO_CDS_CSR_GIP_2005_5.pdf (treating "severity" as a factor to be considered when elevating the alert level); see also World Health Organization, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, at 101–02, WHO Doc. A64/10 (May 5, 2011) [hereinafter *Review Committee*] (noting language to this effect in the

swine flu, which proved to be a relatively mild disease.¹⁷⁷ At the same time, worldwide overreaction—such as bans on pork products from Mexico—was increasing skepticism about the global policy toward swine flu.¹⁷⁸ The WHO's actions quickly became the subject of public scrutiny, and attention turned to the plan itself, which seemed to be a machine that, once running, could not be switched off.¹⁷⁹

The WHO's initial response to this problem highlighted the contradictions of imposing a rule-bound system on an expert-driven response. It could have acknowledged the inappropriateness of the pandemic plan for the current outbreak and simply changed tack. Instead, as the WHO was escalating its response, it began quietly removing references to "severity" from its pandemic-related materials.¹⁸⁰ It published a new pandemic plan, which omitted any reference to severity, and it began deleting language on its website that associated a pandemic with "enormous numbers of deaths and illness."¹⁸¹ These maneuvers would recast a pandemic as a technical term, divorced from any meaning it might have in popular usage. The WHO thus placed itself in the uncomfortable position of insisting, no matter how silly it sounded, that swine flu was a "mild" pandemic.¹⁸²

1999 and 2005 plans); U.S. DEP'T HEALTH & HUM. SERVS., PANDEMIC INFLUENZA IMPLEMENTATION PLAN 16 (2006), <https://www.hssl.org/?abstract&did=13688> (predicting 200,000 to 2,000,000 American deaths in "the next severe influenza pandemic"); Paul Flynn, Social, Health and Family Affairs Committee Rapporteur, Memo to the Parliamentary Assembly of the Council of Europe on the Handling of the H1N1 Pandemic, ¶ 20, Doc. No. AS/Soc 12 (June 7, 2010) [hereinafter Flynn Report], http://assembly.coe.int/CommitteeDocs/2010/20100329_MemorandumPandemie_E.pdf (quoting Dr. Klaus Stoehr, in charge of WHO pandemic preparedness until 2007: "The pandemic planning I was involved with was always based on a severe public health event.").

177. LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 203 (2014) ("Fortunately H1N1 was not highly pathogenic in most populations. But that fact did not influence the WHO's pandemic phase progression."). *But see* Richard P. Wenzel, *What We Learned From H1N1's First Year*, N.Y. TIMES, Apr. 12, 2010, at A25 (arguing that claims of overreaction ignored the experience of developing countries).

178. E.g., Rebecca Katz & Julie Fischer, *The Revised International Health Regulations: A Framework for Global Pandemic Response*, GLOBAL HEALTH GOVERNANCE 1, 6 (2010) (detailing overreactions by states).

179. Foulkes, *supra* note 152 ("[T]he voices raising doubts went largely unheard. The WHO's pandemic preparedness had been long in the planning and, once up and running, seemed unstoppable.").

180. For discussions of the criticism surrounding this change, see David M. Morens et al., *What Is a Pandemic?* 200 J. INFECTIOUS DISEASES 1018 (2009); Laurie Garrett, *When Is a Pandemic Not a Pandemic?*, N.Y. TIMES (June 10, 2009), <http://www.nytimes.com/2009/06/11/opinion/11iht-edgarrett.html>; Imogen Foulkes, *WHO Faces Questions over Swine Flu Policy*, BBC NEWS (May 20, 2010), <http://news.bbc.co.uk/2/hi/world/europe/10128604.stm> (reporting the criticism of these actions).

181. *Review Committee*, *supra* note 176, at 103.

182. This rhetorical shift was apparent, but unacknowledged, in the WHO's own communications. Compare World Health Organization Director-General, *Influenza A (H1N1)* (Apr. 29, 2009), http://www.who.int/mediacentre/news/statements/2009/h1n1_20090429/en/ ("[I]t really is all of humanity that is under threat during a pandemic") with *Review Committee*, *supra* note 176, at 58 (quoting Dr. Keiji Fukuda, a WHO official, in June 2009: "And here I want to point out that by going to Phase 6, what this would mean is that spread of the virus has continued and that activity has become established in at least two regions of the world. It does not mean that the severity of the situation has increased and that people are getting seriously sick at higher numbers or higher rates than they are right now . . . You would think that by going up scale would mean that the level of concern should go up, but really what the going up a scale would mean is that we are seeing greater spread of the virus. . . . As I discussed last week, right at this time, we considered the situation and the impact on countries to be relatively moderate, and this is again a critical point.").

With this move, the WHO brought to the surface the incoherence in its own efforts to navigate the conflicting demands of science and politics. From a political perspective, the shifting descriptions of a pandemic undermined any claims that the organization might have to clarity, to predictability, and to the rote, umpire-like application of rules. Instead, the shifting rules gave the impression of an ad hoc, improvised response conducted with a minimum amount of transparency. At the same time, the WHO struggled to justify its move from a public-health perspective: if the original pandemic plan's decision-making criteria were inappropriate to swine flu, then surely their policy prescriptions also were not designed with swine flu in mind. If that was the case, then why not simply change the criteria to fit the new disease? Why not change other elements of the plan, or ditch the plan altogether?¹⁸³

The failure of the pandemic plan was a microcosm for the pathologies of emergency power. The exercise of emergency authority cannot be organized according to precise, prearranged sets of rules; the very nature of catastrophe demands improvisation and flexibility. But, once the rules appear to be malleable, it becomes clear that the governor who purports to be applying the rules is actually making policy. For an expert body like the WHO secretariat, the rules provided valuable political cover, giving a sense that policy was both automatic and transparent, taking place according to a plan vetted by scientists and public health experts worldwide. With that cover stripped away, it becomes clear that the organization exercises discretion in ways that could have a broad range of social, political, and economic effects. The identity of the decision maker, then, becomes a key political issue.

C. *Emergency Decision Makers*

The identity of the WHO's emergency decision makers may well be the next battleground in the ongoing saga of the organization's emergency powers. The issue first arose in the context of swine flu, when the WHO kept the membership of its Emergency Committee secret, fueling legitimate concerns about conflicts of interest and ties to major pharmaceutical companies.¹⁸⁴ The WHO no longer follows this practice, and it publicizes the

183. Cf. Donald G. McNeil, Jr., *W.H.O. to Rewrite Its Pandemic Rules*, N.Y. TIMES, May 22, 2009, at A9 (quoting one high-level WHO official: "There's nothing like reality for telling you whether something is working or not. Rigidly adhering to something that is not working would not be very helpful.").

184. *Review Committee*, *supra* note 176, at 78–79; Deborah Cohen & Philip Carter, *WHO and the Pandemic Flu 'Conspiracies'*, BRIT. MED. J. (June 3, 2010), <http://www.bmj.com/content/340/bmj.c2912.full> ("This secret committee has guided WHO pandemic policy since [2009]—including deciding when to judge that the pandemic is over."); see also Flynn Report, *supra* note 176, ¶ 30 ("[D]ue to WHO's refusal to release the names and declarations of interest of persons concerned, any current research on [conflicts of interest] depends entirely on the results of investigative journalism."). The WHO initially defended this practice as necessary to depoliticize the committee. See, e.g., Press Release, World Health Organization, *The International Response to the Influenza Pandemic: The WHO Responds to the Critics* (June 10, 2010) ("[E]xperiences during the SARS outbreak demonstrated the considerable economic and social

names and discloses conflicts of all committee members at the outset.¹⁸⁵ This improvement in transparency, however, leaves deeper problems unsolved. In particular, the composition of the WHO's emergency decision-making bodies largely determines the scope of its moral and political competence. We may wonder, for example, what a small group of public-health experts and scientists is doing when it issues policy having broad political, economic, and social impact.

The law does not provide any detailed guidance for identifying the emergency decision makers, giving the organization maximum flexibility in this regard. In theory, the Emergency Committee that advises the Director-General on crisis policy could provide a set of outside perspectives capable of checking the secretariat's power.¹⁸⁶ As a practical matter, the ability of the committee to do this may be limited by two factors. First, the Director-General herself picks the members of this advisory committee. Second, the organization has, to date, given a narrow interpretation to what counts as "relevant" expertise for Emergency Committee members, drawing its members largely from the hard sciences, medicine, and health policy fields.¹⁸⁷ This practice reflects an effort to keep a narrow focus and is manifest in the current Director-General's broader attempt to characterize the WHO as a "technical agency."¹⁸⁸

The official review of the swine flu response noted but did not deal with this issue. Some members of the Emergency Committee reportedly felt uncomfortable with the political implications of their advice.¹⁸⁹ It was even suggested that, in future emergencies, the WHO divide up its advisers, convening one committee for scientific and technical advice, and another to discuss broader policy implications.¹⁹⁰ Naturally, no one pressed for the implementation of this suggestion, which could double the number of meet-

disruption caused by some public health emergencies, meaning that experts could well be lobbied or pressured for commercial or political reasons, potentially compromising the objectivity of their advice.").

185. See, e.g., Emily A. Brummer & Allyn L. Taylor, *Institutional Transparency in Global Health Law-making*, in *TRANSPARENCY IN INTERNATIONAL LAW* 271, 286 (Andrea Bianchi & Anne Peters eds., 2013) (noting the recommendations of an external review committee in this respect); World Health Organization, IHR Emergency Committee Concerning Middle East respiratory syndrome coronavirus (June 16, 2013), http://www.who.int/ihr/ihr_ec_2013/en/ (providing links to a list of members and short bios of each member).

186. As noted above, the committee's recommendations are published along with any final WHO policy. This creates a kind of "soft" political check, which in practice would require the Director-General to either agree with the experts or explain the deviation. In practice, uniformity has proved important. See *supra* Part II.

187. See, e.g., World Health Organization, List of Members of, and Advisers to, the International Health Regulations (2005) Emergency Committee regarding Ebola [hereinafter World Health Organization, List of Members and Advisors], http://www.who.int/ihr/procedures/emerg_comm_members_20140806/en/.

188. E.g., Sheri Fink, *W.H.O. Leader Describes the Agency's Ebola Operations*, N.Y. TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/04/world/africa/who-leader-describes-the-agencys-ebola-operations.html>.

189. See *Review Committee*, *supra* note 176, at 78.

190. *Id.* ("Respondents observed that the EC was charged with making epidemiological conclusions that had political and financial ramifications. Some suggested that there should be separate groups of

ings that top WHO officials would have to attend and would create difficult conflicts of authority. But the suggestion makes clear that a certain tension arises in these expert advisory committees, which, given the right sorts of internal or external pressure, could erupt in the middle of a crisis response.

In the recent Ebola response, the WHO took very small, cautious steps toward broadening its perspectives. For the first time since the entry into force of the IHR, the Director-General appointed a bioethicist to the Emergency Committee as an “adviser.”¹⁹¹ The recognition that bioethics, which addresses deeply contested matters of political and moral commitment, plays a substantial role in the WHO’s emergency response may constitute a step toward staffing decisions that acknowledge the broader implications of the WHO’s activities.

* * *

Each of the vignettes in the foregoing section saw the WHO struggling with the gap between knowledge and decision. In the case of Ebola, the WHO sought to avoid this gap by purporting to delegate decision making downward, only to be confronted with a pathological institutional structure. In the case of swine flu, the WHO streamlined emergency policy using a clear set of rules, but circumstances undermined the foundation for these criteria. And, as Part III.C noted, the WHO will continue struggling to define the boundaries of what kinds of expertise is “relevant” for emergency response: is relevance determined by the core competencies of WHO medical and scientific staff, or is it determined by the broad political consequences of the organization’s activities? The law provides no clear answer to these questions, and the WHO has taken a different approach in each successive emergency response.

The foregoing discussion also permits a prediction about global emergency governance in general. A common theme in any discussion of emergency power and crisis management is that of uncertainty: regarding the nature of the problem, proper solutions, and even appropriate goals. The foregoing demonstrates the extent to which global emergency governors like the WHO also suffer from normative uncertainty. There is no guide or set of institutional best practices for reliably justifying and maintaining emer-

scientific and policy advisers for future ECs.”); cf. Hoffman & Røttingen, *supra* note 68, at 190–93 (making a more radical version of this argument).

191. World Health Organization, List of Members and Advisors, *supra* note 187. On these issues, see generally Jon Cohen, *Ebola Vaccine: Little and Late*, 345 SCI. 1441 (2014); James G. Hodge, Jr., *Global and Domestic Legal Preparedness and Response: 2014 Ebola Outbreak*, DISASTER MED. & PUB. HEALTH PREPAREDNESS (Oct. 10, 2014), <http://journals.cambridge.org/action/displaySpecialArticle?jid=DMP&bespokeId=11228>; Annette Rid, *Ethical Considerations of Experimental Interventions in the Ebola Outbreak*, THE LANCET, (Aug. 22, 2014), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61315-5/](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61315-5/); World Health Organization, *Ethical Considerations for Use of Unregistered Interventions for Ebola Virus Disease* (Aug. 12, 2014), <http://www.who.int/mediacentre/news/statements/2014/ebola-ethical-review-summary/en/>.

gency authority beyond the state. This means that, in the short term, we should expect the kind of improvisation and ad hoc approach that we continue to see in the WHO as global emergency governors experiment with new techniques for honing and channeling their expert knowledge into discrete political decisions. But this prognosis should not deter the ambition for politically competent authority beyond the state.

IV. PRINCIPLES FOR EMERGENCY GOVERNANCE

The first ten years of the WHO's newfound emergency powers have given us a great deal of data about global crisis management. We have identified a key tension between the knowledge of global expert governors and the legal-political burdens of decision, and we have identified that tension in at least three dimensions of emergency power. We have also seen the way the WHO, over the course of multiple global outbreaks, has improvised strategies to manage this tension. We have seen those strategies succeed,¹⁹² and we have seen them fail, sometimes dramatically. This experience gives us the raw material we need to begin building alternative principles of legal and institutional design, which may guide future reforms in global emergency governance, both within the WHO and beyond.

In this project, the tension between knowledge and decision remains our key problem. We may never be able to eliminate this tension, but we can mitigate it through creative institutional design. The lasting lesson of the WHO's experience may be that hard-and-fast solutions are unlikely to work: experts will bend rigid rules to fit the facts, and, in an emergency, strong principles of deference may come to be seen as willful blindness.¹⁹³ Therefore, we might seek design principles that court uncertainty without descending into anarchy, and organizational forms that justify themselves on the basis of their ability to adapt and change. This effort is all the more challenging in the midst of emergency, where the perceived need for rapid and definitive action is at its peak.¹⁹⁴

192. On the WHO's largely successful response to SARS, see *supra* notes 43–44.

193. See *supra* Part III.A.–B.

194. Indeed, each of the following principles emphasizes some degree of contestation, argument, and revision, which may seem incompatible with the idea of an emergency as requiring a quick response. Although the need for rapid reaction and deployment should not be trivialized, this perception must not be permitted to overtake the importance of continually revisiting and revising decisions in emergency management. In humanitarian practice, the overemphasis on rapidity is sometimes referred to as the “myth of speed.” See generally Inter-Agency Standing Committee, *Cluster Approach Evaluation 2 Synthesis Report* 38 (Apr. 2010), <https://www.humanitarianresponse.info/system/files/documents/files/Cluster%20Approach%20Evaluation%202.pdf>; MARY B. ANDERSON & PETER J. WOODROW, *RIISING FROM THE ASHES: DEVELOPMENT STRATEGIES IN TIMES OF DISASTER* 49 (1989). To be sure, emergencies often involve a great deal of rapid reaction. But they also require the institution of best practices or standard operating procedures, communication across units and among levels of government, revision in light of new information, long meetings, and heated arguments. Furthermore, the process of deliberation and revision stretches over substantial periods of time; in the context of the WHO, SARS took several months to contain, and, at the time of this writing, the WHO continues to maintain a state of emer-

This Part suggests three such design principles: managed decentralization, epistemic openness, and forced dissent. These principles address the problems encountered by the WHO when declaring emergency, selecting the emergency decision makers, and making emergency policy, respectively. The principles build on the organization's experience in each area, and they correct for certain problems observed in the swine flu and Ebola responses. The reforms suggested here also seek to work within the WHO's current constitutional legal framework, although it should be noted that failures in the response to the Ebola outbreak have spurred calls for a broader overhaul.¹⁹⁵

The principles discussed herein also could apply beyond the confines of the WHO. The concepts of managed decentralization, epistemic openness, and forced dissent represent conceptual efforts to manage the interaction between expert knowledge and political demands that avoid the pitfalls of grafting traditional public-law solutions, such as rule-based decision making or deference, onto expert governance.¹⁹⁶ They embrace a commitment to searching inquiry, provisional decision making, and revision that is common across all modern fields of expertise. The following three principles therefore deserve a place in a toolbox of new design principles for the emerging form of global emergency governance.

A. *Managed Decentralization*

The power to declare a global state of emergency entails unresolved questions about the proper allocation of authority among the international, transnational, and national levels of governance. At the international level, the WHO's status as the leading institution in public health is subject to challenge, and it is now working alongside and potentially in competition with other bodies, such as the U.N. Security Council and the World Bank.¹⁹⁷ National health systems, meanwhile, remain essential though often tragically incapacitated in the fight against infectious disease and other health threats.¹⁹⁸ In the space between, a number of transnational networks,

gency with respect to Ebola. See Denise Grady, *U.S. Scientists See Long Fight Against Ebola*, N.Y. TIMES, Sept. 13, 2014, http://www.nytimes.com/2014/09/13/world/africa/us-scientists-see-long-fight-against-ebola.html?_r=0; Int'l Health Org. [WHO], Statement on the 7th meeting of the IHR Emergency Committee regarding the Ebola outbreak in West Africa (Oct. 15, 2015), <http://www.who.int/mediacentre/news/statements/2015/ihr-ebola-7th-meeting/en/>. The principles developed herein are meant simply as guidelines for structuring that process in global emergency governance.

195. See, e.g., Rebecca Katz & Scott F. Dowell, Comment, *Revising the International Health Regulations: Call for a 2017 Review Conference*, 3 THE LANCET GLOBAL HEALTH 352 (2015), [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61315-5/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61315-5/fulltext).

196. See *supra* notes 30–50 for other examples of global emergency governance that demonstrate the tension between expertise and political decision.

197. See, e.g., Rahul Chandran, *It's Not There, So Build It: Pandemic Response, the UN, and the World Bank*, U.N. U. CTR. FOR POL'Y RES. (July 8, 2015), <http://cpr.unu.edu/its-not-there-so-build-it-pandemic-response-the-un-and-the-world-bank.html> (proposing linkages between the WHO, other U.N. agencies, the Security Council, and the World Bank to fund pandemic response).

198. See Gostin, *supra* note 12.

composed of regulators, laboratories, NGOs, and international organizations, operate to share knowledge and best practices, enhance local capacities, and manage lower-profile health threats.¹⁹⁹ The principle of deference that appeared to animate the early Ebola response prefers the national to the international, and informal network arrangements to leadership by formal international organizations.

A principle of managed decentralization, by contrast, would permit greater flexibility among these various fora, and could make more effective use of emerging transnational network structures. This design principle would comprise two components: (i) a preference, articulated in law or policy, for national leadership assisted by informal transnational cooperation; and (ii) a focal point for debate and decision over whether to escalate to an international response.

The first component recognizes the benefits of decentralized responses in resolving the tension between the dictates of expert knowledge and the demands of political decision. Decentralization encourages the development of multiple sites of innovation and puts a brake on overly aggressive international policymaking.²⁰⁰ Network structures, coupled with national responsibility, appear tailor made for the kind of context sensitivity and finesse that many critics thought lacking in the swine flu response. These arrangements do not require diverse scientific and principled opinions to coalesce around a single decision point. Rather than attempting to capture the opinions of all experts in a set of univocal recommendations, networks can thrive on difference in implementation, and learn from experimentation and local adaptation.²⁰¹

The second component, meanwhile, recognizes a need for greater international leadership where the benefits of decentralization fail.²⁰² The identification of a competent institution at the international level early in a potential emergency provides a focal point for debate over whether decentralized structures are adequate to the task. In addition, to the extent an internationalized response is the disfavored option, the possibility of declaring an international state of emergency would supply a credible incentive that would urge continued decentralized cooperation.²⁰³

199. Often, the WHO convenes or participates in these networks. See, e.g., Chiara Giorgetti, *International Health Emergencies in Failing States*, 44 GEO. J. INT'L L. 1347, 1379–83 (2013); Gian Luca Burci, *Public/Private Partnerships in the Public Health Sector*, 6 INT'L ORGS. L. REV. 359, 366 (2009).

200. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 255–57 (2004); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 315–23 (1998).

201. See, e.g., SLAUGHTER, *supra* note 200, at 208–12.

202. See generally Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 920–24 (2004) (explaining this dynamic in terms of a principle of “subsidiarity”).

203. For a similar analysis in other contexts, see generally IAN AYERS & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 103 (1992); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 81 (2011); Kenneth W. Abbott & Duncan Snidal, *Taking Responsive Regulation Transnational*, 7 REG. & GOVERNANCE 95 (2013).

The contrasting reactions to the WHO's responses to swine flu and Ebola demonstrate the ways in which the organization has heretofore failed to establish a reliable structure for managing decentralization. The WHO's response to swine flu, critics charged, consisted of too much international governance, as WHO decisions triggered a series of actions at the domestic level, sometimes without review by national authorities.²⁰⁴ The opposite charge emerged during the Ebola response, with many in the public health profession alleging that the WHO's decision to declare a public health emergency in August 2014 was too little, too late.²⁰⁵ These opposing critiques exploited the same vulnerability: the inability of the WHO to justify, either in scientific or political terms, the decision to trigger or not to trigger an international emergency.

Applying a principle of managed decentralization, the WHO's emergency powers framework itself could provide a focal point for debate about the proper allocation of authority. Where possible, an Emergency Committee could be established under the IHR at a much earlier stage, before it became clear whether a state of emergency actually existed.²⁰⁶ The committee could provide a central clearinghouse for information and argument about the capacities of national health systems and the activities of transnational networks in combatting an outbreak. The preference would be for a decentralized response, even for relatively severe diseases. The decision to declare an *international* state of emergency—which under the current IHR would still rest with the WHO—would turn on whether the capacities of national governments, operating with the assistance of transnational networks, had been overwhelmed. This reform could be made explicit in procedural rules that require consultation between the committee and the networks, and that premise a declaration of emergency on findings about the relative capacities of national systems.

This reconfiguration would bring the WHO's emergency powers into much closer alignment with the growing number of networks in global health governance.²⁰⁷ One such partnership, the WHO Global Outbreak

204. *Hearing on "The Handling of the H1N1 Pandemic: More Transparency Needed?" Before the Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe* (Jan. 26, 2010) (introductory statement of Dr. Ulrich Keil), http://www.assembly.coe.int/CommitteeDocs/2010/20100126_ContributionKeil.pdf (decision to call a pandemic "triggered a cascade of actions" at the domestic level); *Review Committee, supra* note 176, at 87 (recommending that "triggers" for country-level operations be disentangled from global pandemic phases, which should be used as a general assessment of risk).

205. *See supra* note 11.

206. This would be permissible under the International Health Regulations, *supra* note 9, art. 48(1). The response to Middle East Respiratory Syndrome (MERS), in which the WHO convened a committee in 2013 but has yet to declare an international health emergency, may provide a nascent version of this approach. *See, e.g.*, World Health Organization, Statement on the Ninth Meeting of the Emergency Committee Regarding MERS-CoV (June 17, 2015), <http://www.who.int/mediacentre/news/statements/2015/ihr-ec-mers/en/> (finding that the conditions for an international health emergency had not been met).

207. *See supra* note 199 at sources cited therein.

Alert and Response Network, has been extremely active when compared with the organization's exercise of its treaty-based emergency powers, having responded to more than fifty outbreaks worldwide since 2000.²⁰⁸ After the Ebola fiasco, member states have expressed a willingness to strengthen this and other networks and to coordinate their emergency activities through the establishment of a centralized "global health emergency workforce" with more reliable funding and stronger emergency-response capacity.²⁰⁹ Establishing an Emergency Committee at a much earlier stage in an outbreak would provide a public focal point for evaluating and contesting the work of these networks and the need to scale up response further.

In the wake of the Ebola outbreak, a number of reform proposals have been introduced along these lines. The panel of experts appointed by the WHO Director-General to assess the Ebola response has proposed that the determination of an international public health emergency should no longer be a "single binary decision," and that an intermediate level should be established "that would alert and engage the wider international community at an earlier stage in a health crisis."²¹⁰ Another approach would establish a "semi-autonomous" (meaning separately funded) body within the WHO that would be responsible for deciding whether an emergency exists and would make such decisions publicly.²¹¹ The concept of managed decentralization provides an organizing framework for such reforms.

The foregoing is not meant to suggest that placing the WHO in a more prominent leadership role will solve the normative challenges facing the organization. Certainly, more frequent use by an international organization of its ability to judge national crisis responses and to declare a global state of emergency will only generate demands for further procedural and substan-

208. World Health Organization, Global Outbreak Alert and Response Network, <http://www.who.int/csr/outbreaknetwork/goaenglish.pdf>.

209. See, e.g., World Health Organization Director-General, Report, Global Health Emergency Workforce, ¶¶ 11–18, 44–47, WHO Doc. A68/27 (May 15, 2015); World Health Organization Exec. Board, Spec. Sess. on Ebola, Res. EBSS3.R1, ¶ 42 (Jan. 25, 2015); *Review Committee*, *supra* note 176, at 136–37. See generally Charles Clift, *Devil in the Detail for WHO's Ebola Resolution*, CHATHAM HOUSE (Jan. 27, 2015), <http://www.chathamhouse.org/expert/comment/16763>.

210. *Ebola Interim Assessment*, *supra* note 130, ¶ 23; see also Lawrence O. Gostin et al., *Ebola, the World Health Organization, and Beyond: Toward a Framework for Global Health Security* 6 (O'Neill Inst. for Nat'l & Global Health L., Briefing Paper No. 11, 2015) (calling for a "graduated response" to health emergencies rather than an "all-or-nothing" emergency declaration, which would invite focused discussion on the benefits of an internationalized response, and proposing a "shadow committee" to advise the Director-General on whether and when to implement the organization's emergency powers).

211. See Sarah Bosely, *Plan to Reform WHO After Ebola to Be Unveiled by Angela Merkel*, THE GUARDIAN (May 18, 2015), <http://www.theguardian.com/world/2015/may/18/angela-merkel-plan-restructure-world-health-organisation>. This body might also build tighter links with transnational networks. See Laurie Garrett, *The Ebola Review, Part II*, FOREIGN POL'Y, (June 6, 2015), <http://foreignpolicy.com/2015/06/06/ebola-review-part-ii-g-7-merkel-world-health-organization/> (describing plans for strengthening the network, granting it greater authority and independent funding, and enabling it to take a "range of actions" in response to emergencies, "rather than WHO's current all-or-nothing limitations that WHO Director-General Margaret Chan has blamed for her failure to declare a Public Health Emergency of International Concern for Ebola until Aug. 8, 2014").

tive reform.²¹² For example, as discussed in greater detail below, the identities of emergency decision makers, the procedure for their selection, and the quality of internal deliberations will likely come under increasing scrutiny.²¹³ And any reforms that empower transnational networks of researchers and health experts will raise questions about accountability and transparency within those diffuse structures.²¹⁴ There is thus no doubt that further institutionalizing the principle of managed decentralization implies that procedural and substantive reform—in particular, demands for transparency regarding all aspects of WHO emergency activity—will remain on the agenda for the foreseeable future.

The principle of managed decentralization, however, better equips an organization to respond and adapt to these critiques. It provides stability and intelligibility to the exercise of emergency power, thereby mitigating the sense of an ad hoc, arbitrary approach that seemed to attend the WHO's decision to declare or not to declare emergencies in recent public health crises. Managed decentralization defines the categories of information that are most relevant to an emergency declaration, thus giving substance to debates surrounding transparency and the quality of deliberation in emergency governance. The principle identifies the relevant actors whose activities are crucial to the response and who must be held accountable. And, by recasting the organization as a focal point for continued debate, it both empowers critics and enables the organization to adjust to criticism as an emergency response unfolds.

B. *Epistemic Openness*

The WHO's emergency powers, as we have seen, also raise questions about who is qualified to make emergency policy choices.²¹⁵ In the WHO, emergency decisions are made by a Director-General required to have medical expertise, a secretariat composed largely of medical professionals, and an expert committee likewise composed of professionals drawn from public health, medicine, and the life sciences.²¹⁶ However, the organization's activities affected a range of political and ethical considerations that lie far outside this relatively narrow band of expert perspectives. This mismatch between composition and consequences contributed to the organization's legitimization woes during the swine flu and Ebola crises.²¹⁷

212. See generally *supra* note 79.

213. See *infra* Part IV.B.–C.

214. For perspectives on this issue, see Phillip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); Anne-Marie Slaughter, *The Accountability of Global Governance Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001).

215. See *supra* Part III.C.

216. See *supra* notes 111–12.

217. Cf. Charles Dupras & Bryn Williams-Jones, *The Expert and the Lay Public: Reflections on Influenza A (H1N1) and the Risk Society*, 102 AM. J. PUB. HEALTH 591 (2012).

Although these problems may never be eliminated entirely, a principle of epistemic openness responds to the realities of emergency governance by challenging narrow expert perspectives. This principle would demand that a policymaker's competence match, as far as possible, the repercussions of her decisions. If emergency policy will directly implicate issues concerning human rights, development, and economics, then it would be appropriate to include those perspectives directly in the decision-making process.

This principle would entail several concrete reforms at the WHO. First, the WHO or its members could issue interpretive guidance as to what constitutes "relevant" expertise under the International Health Regulations, and the roster of potential committee members could be reconfigured accordingly.²¹⁸ This guidance could emphasize a context-sensitive approach to expertise, which recognizes non-health-based perspectives, and even those of indigenous populations and other groups not ordinarily recognized as experts. Second, the WHO could implement the recommendations of an earlier review committee that all appointments to the committee be made provisionally, with a "probationary" period for public comment.²¹⁹ Finally, procedural rules could require continued reexamination of the committee membership in light of changed circumstances, thereby making the composition of this advisory body a permanent problem subject to continued revision.²²⁰

To date, reformers both within and outside the WHO, though recognizing the issue, have focused less on internal governance reforms and more on building linkages with other entities in global governance. For example, the emergence of the Parliamentary Assembly of the Council of Europe—a regional body composed of domestic legislators—as a major critic of the WHO during the swine flu outbreak is seen as a welcome development, with one commentator convincingly arguing that, unlike experts, legislators "are uniquely placed to question whether the executive and its delegated decision makers are acting in the public interest as broadly defined."²²¹ Likewise, the WHO counsel welcomed the Security Council's role in the Ebola response using similar terms, stressing a separation between the

218. See International Health Regulations, *supra* note 9, art. 47.

219. Review Committee, *supra* note 176, at 134. Extending this recommendation slightly further, the organization could invite comments as to what perspectives are missing, or even invite public nominations, though this latter reform might require a treaty amendment. See International Health Regulations, *supra* note 9, arts. 47, 48(2).

220. In fact, the law already provides that the composition of the Emergency Committee remain open and malleable. The International Health Regulations state that the Director-General shall "select the members of the Emergency Committee on the basis of the expertise and experience required for any particular session." International Health Regulations, *supra* note 9, art. 48(2) (emphasis added). In practice, however, the WHO committees have stayed relatively stable throughout a response.

221. Dushman, *supra* note 47, at 1113 (noting that some states had distanced themselves from the WHO after swine flu); see also Hanrieder & Kreuder-Sonnen, *supra* note 90, at 12–13.

WHO's "technical" role and the broader political mandate of the U.N. mission.²²²

The principle of epistemic openness, however, is not satisfied with design strategies that outsource political competence to other fora in this highly contingent manner. Legislative bodies or other outside institutions, such as the Security Council, must be motivated to intervene in the activities of global emergency governors, and such motivations may not emerge in most cases. Moreover, when these institutions do intervene, they will do so with their own motives, or with the motives of their members.

Furthermore, internal governance reform based on a principle of epistemic openness brings potential advantages that are not necessarily supplied by outside institutions. First, by fostering a "competitive epistemic environment," the principle of epistemic openness makes it more likely that external political demands will find a sympathetic ear within the institution, and lead to more robust internal debate over policy outcomes.²²³ This development holds out the possibility of giving voice to external actors while translating those inputs into policy that is better justified by reference to expertise. Second, this principle could be used to bring in decision makers whose backgrounds include policy implementation or crisis communication, and who are skilled at navigating the pathway from knowledge to decision.²²⁴ Third, by continually injecting new blood into the process, such a procedure could be destabilizing in a way that shakes up old habits and breaks through accepted patterns that have proved unhelpful.²²⁵

This approach no doubt creates administrative complications of its own. First, the piling on of expert perspectives may generate complicated or incomprehensible advice, rather than a more elegant or accurate arbitrage of

222. See, e.g., Gian Luca Burci & Jakob Quirin, *Ebola, WHO, and the United Nations*, ASIL INSIGHT (Nov. 14, 2014), <http://www.asil.org/insights/volume/18/issue/25/ebola-who-and-united-nations-convergence-global-public-health-and> (stating that Security Council action in Ebola response establishes "a functional relationship and distribution of competences, with the United Nations focusing on the international peace and security implications of the outbreak through the Council and the coordination of the Ebola response . . . and with WHO focusing on the technical side of the response").

223. See Perez, *supra* note 63, at 415–16; cf. MARK B. BROWN, *SCIENCE IN DEMOCRACY: EXPERTISE, INSTITUTIONS, AND REPRESENTATION* 235–56 (2009) (analyzing the role of scientific advisory bodies in the United States and the breadth of perspectives required in order to foster democratic deliberation vis-à-vis such bodies).

224. See RICHARD E. NEUSTADT & HARVEY V. FINEBERG, *THE SWINE FLU AFFAIR: DECISION-MAKING ON A SLIPPERY DISEASE* 77–79 (electronic ed., 2009) (1978), <http://biotech.law.lsu.edu/cphl/history/books/sw/12660.pdf> (noting, in an earlier outbreak, that the policymakers had little experience with implementation, and suggesting similar reforms in order to broaden the available expertise).

225. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decision-making, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 442–45 (2006) (analyzing the ways in which introducing new personnel can generate regulator responsiveness); cf. Gregg P. Macey, *Environmental Crises and the Paradox of Organizing*, 2011 B.Y.U. L. REV. 2061, 2098–2101 (describing the role of schemas in ossifying organizational cognition).

values.²²⁶ Nonetheless, in emergency-driven technical decision making beyond the reach of national politics, a proxy fight between experts may offer the best available substitute for democratic deliberation. Second, the success of epistemic openness depends on the ability to constantly translate a highly technical body of information into terms that can be understood by nonexpert parties.²²⁷ Translation failures can lead to the dominance of policymaking by the epistemic community with the greatest access to relevant knowledge. The following section discusses some mechanisms that may spur competition between expert perspectives and aid this translation process.

C. *Forced Dissent*

It does little good to manage an emergency through a committee of advisers if the members never disagree. Part II discussed the incentives for consensus or unanimity in the WHO emergency decision-making structure, which arose from the fact that a report of the expert emergency committee must be published alongside any decision issued by the Director-General.²²⁸ Such incentives are common in scenarios in which political decisions must be made on the basis of published expert advice.²²⁹ This dynamic, though not yet widely discussed in connection with the WHO, threatens to undermine any gains produced by increased epistemic openness or participation rights in connection with the organization's emergency framework.

A design principle that focuses on forcing dissent among political appointees and their advisers responds to this challenge. This principle recognizes the dangers posed by "groupthink"—the possibility that groups will reach decisions in the interest of maintaining harmony rather than for substantive reasons—to organizational capacities for creativity and responsiveness to outside input and criticism.²³⁰ By rendering disagreement visible, dissenting procedures seek to increase the possibility that outside political contestation, as well as diversity of perspectives within the organization, will lead to robust debate and creative problem solving.

According to published accounts, the decision-making procedure within WHO emergency committees has focused on seeking consensus, even rubber stamping, rather than encouraging dissent. During the swine flu response,

226. See Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOB. LEGAL STUD. 369, 374 (2001) ("[B]oth knowledge and passion generate perspectives that are not those of the rest of us. Few of us would actually enjoy living in a Frank Lloyd Wright house.").

227. NEUSTADT & FINEBERG, *supra* note 224, at 79.

228. See *supra* Part I. The committee reviewing the swine flu response, for example, found that, in retrospect, all committee members defended the committee's major decisions. See *Review Committee*, *supra* note 176, at 78.

229. See, e.g., Martin Shapiro, "Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?, 68 L. & CONTEMP. PROBS. 341, 343 (2005) (arguing that the presence of experts in policymaking forces the nonexpert politician to either appear to act arbitrarily or to seek consensus among rival experts).

230. See generally IRVING L. JANIS, *GROUPTHINK* (1982); PAUL 'T HART, *GROUPTHINK IN GOVERNMENT* (1994); AJREN BOIN ET AL., *THE POLITICS OF CRISIS MANAGEMENT* 45–48 (2005).

an emergency committee convened only at the request of the Director-General, usually to give advice on a specific proposal generated by the WHO secretariat.²³¹ All decisions were taken by consensus, and the Director-General's draft statement was circulated during the meeting, so that her position was made clear.²³² The committee members did not seem to coordinate with each other outside of meetings,²³³ so even if a dissenter had wished to mount opposition to the Director-General, doing so would not have been easy. From the description of the process in the WHO documents, it does not appear that a real give-and-take process between these advisers was expected, and it may have been actively resisted.²³⁴ This strategy may make things easier for the Director-General, but it undermines the utility of the Emergency Committee as a means for justifying expert decision making.

Modest procedural reforms would assist in transforming the Emergency Committee into a more robust deliberative forum.²³⁵ One set of proposals emphasizes the role of transparency in securing public accountability with respect to the Emergency Committee's deliberations.²³⁶ Indeed, rendering public the deliberations of the Emergency Committee could disable efforts by the Director-General to manufacture consensus and encourage more robust deliberation and exchange of alternative views. However, publicizing Emergency Committee deliberations may have negative consequences by driving the real deliberation to private and closed fora, while lending only a patina of legitimacy to the nominally "transparent" proceedings.

The principle of forced dissent can generate more targeted solutions by focusing on a specific result rather than a more generalized commitment to transparency. For example, each expert might be required to prepare, in advance of a meeting, a short statement outlining her proposed course of action and her reasons for that decision.²³⁷ Members might also be required to state what evidence would cause them to change their recommendation.²³⁸ A mechanism like this one would anchor individual positions, giving each member a stake in the debate and holding him or her accountable

231. *Review Committee*, *supra* note 176, at 78.

232. *Id.* ¶¶ 55–56.

233. *Id.* ¶ 66.

234. *See id.* ¶¶ 55–56.

235. On the need for internal debate even in the midst of crisis, see BOIN ET AL., *supra* note 230, at 49–51.

236. Gostin et al., *supra* note 210, at 6.

237. This is not at all impractical. *See Review Committee*, *supra* note 176, at 75 (indicating that the WHO already circulates agendas in advance of the Emergency Committee meeting, which include background materials and all "questions for which the Director-General [seeks] advice."). All that would have to change is that members send in their answers.

238. *See NEUSTADT & FINEBERG*, *supra* note 224, at 73 ("What evidence on which things, when and why, would make us change the course we now propose, and to what?"); *cf. Review Committee*, *supra* note 176, at 135 (suggesting a "basket of indicators" to gauge the anticipated severity of an outbreak, which could be continually reassessed with the emergence of additional data, and should be accompanied by estimates of confidence and uncertainty).

for the committee's final decision. This can serve to reduce groupthink tendencies and encourage individuals to try to influence decision making.²³⁹ The effect of this anchoring mechanism might be enhanced if the initial submissions were to be made public either immediately or at some future date. The principle of forced dissent would encourage these types of design features to counteract the tendency toward consensus and rubber stamping in expert governance.

Although it may seem counterintuitive, forcing dissent can actually strengthen the resilience of emergency governance institutions. The validity of the scientific enterprise itself is premised on robust dissent and contestation within and across disciplines.²⁴⁰ Expert knowledge, as discussed above, becomes a problem for political institutions precisely when science is used to present policies as foregone conclusions and to paper over any sense of uncertainty and dissent.²⁴¹ The swine flu crisis exposed this tendency, where the WHO displayed a singular inability to communicate or respond to uncertainty. Dissent-forcing mechanisms, such as the example sketched here, provide an avenue for embedding the open-ended and contested nature of scientific inquiry within an institutional framework that still allows for authoritative decision making.

This principle may provide still further benefits. A record of dissenting opinions, first, demonstrates that the institution is not oblivious to the deep uncertainties and policy choices that pervade emergency decision making. It makes the organization seem context-sensitive and competent. Second, that same store of dissenting opinions contributes to organizational flexibility, supplying a reservoir of alternative approaches if it turns out that the prevailing strategy for emergency management is not working. If these alternative opinions are generated from within the organizational framework, this may lower the reputational costs of switching among contradictory approaches and allow for more nimble responses to evolving threats.

* * *

These principles supply resources, not yet fully tapped, for further reforms of emergency governance structures in the WHO and beyond. The activation of emergency powers at the international level might be more closely tied to the effectiveness of decentralized forms of networked collaboration. This shift would focus WHO and public attention on the adequacy of approaches that rely on capacity building in the countries that need it most. Once the emergency powers mechanism is activated, procedures to ensure epistemic openness and to force dissent may avoid the pitfalls of earlier out-

239. Marceline B.R. Kroon, et al., *Managing Group Decision Making Processes: Individual Versus Collective Accountability and Groupthink*, 2 INT'L J. CONFLICT MGMT. 91 (1991).

240. See, e.g., Sheila Jasanoff, (No?) *Accounting for Expertise*, 30 SCI. & PUB. POL'Y 157, 161 (2003).

241. See *supra* Part I.

breaks and better navigate the path from knowledge to decision. As the foregoing discussion demonstrates, there is much to be learned from focusing on the internal structures and procedures of institutions engaged in global emergency governance.

CONCLUSION

The challenges of global emergency governance are not going away. In a multitude of fields, we are beginning to see the outlines of institutions that seek to coordinate or impose emergency policy from beyond the boundaries of the state.²⁴² There is no readily available handbook of methods for controlling or legitimating these institutions, particularly given the time pressures, political demands, and uncertainties that attend crisis management. If we are to address these emerging challenges, then lawyers must join the effort to develop new techniques of institutional design for the era of global emergency governance. The foregoing discussion, with its exploration of the knowledge/decision tension and its contribution of three design principles for emergency governance, represents an initial step in this direction.

This Article, in short, establishes a platform and orientation from which lawyers may tinker with the structures of global emergency institutions. It is not a guide for suing international organizations, or for demanding strict compliance with preexisting rules of international law. Rather, the analysis developed herein hopefully will be useful for the legions of legal practitioners, scholars, and judges who are involved in designing, maintaining, and revolutionizing the institutions of global governance. Public lawyers must face these emerging challenges with what Lon Fuller once called “the spirit of the Federalist Papers”: a critical, principled, and constructive engagement with the problems of institutional design.²⁴³

242. See *supra* Part II.A.

243. LON L. FULLER, *THE MORALITY OF LAW* 180–81 (rev. ed. 1969).

