PANDEMICS, TRAVEL RESTRICTIONS, AND THE DISTANCING FROM INTERNATIONAL LAW

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ABSTRACT

History shows that governments confronted with a pandemic tend to impose travel restrictions. This tradition was taken to unprecedented extremes in response to COVID-19. However, contrary to common perceptions, travel restrictions are not effective and at most delay the peak of a pandemic by a few days or weeks. The International Health Regulations (hereinafter "IHR") were created to strike a balance between the protection of public health and the maintenance of international mobility. Yet, States Parties almost universally disregarded the Regulations, imposing measures that only added to the economic and social disruption caused by the pandemic. In recent months, "social distancing" became a household expression. This article argues that the widespread implementation of travel restrictions during the COVID-19 crisis is also a symptom of a different type of distancing—that of states from their international law obligations. It examines some potential explanations for the astonishingly high rate of non-compliance with the IHR and urges states to take their international law obligations more seriously.

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I. A REMEDY WORSE THAN THE DISEASE

In early 2020, the World Health Organization (hereinafter "WHO") declared COVID-19 a public health emergency of international concern.[1] The temporary recommendations issued by the organization underlined that there was "no reason for measures that unnecessarily interfere with international travel and trade."[2] This was consistent with both the rationale of the International Health Regulations (2005) (hereinafter "IHR") (avoiding unnecessary interference with international traffic and trade) and the purpose of the temporary recommendations (minimizing interference with international traffic).[3]

Historically, governments confronting a pandemic respond with a "knee-jerk" reaction of imposing travel limitations or even outright bans. This time-honored tradition was taken to unprecedented extremes in response to COVID-19: almost every country in the world implemented travel restrictions.[4] These measures ranged from banning passengers coming from certain countries or of specific nationalities, suspension of flights, to the partial or even complete closure of borders. In the context of scientific uncertainty about the dangerousness and magnitude of a pandemic, governments implement such measures to avoid accusations of "not doing anything" to prevent the spread of a virus.[5]

Travel contributes significantly to the proliferation of infectious diseases,[6] especially air travel.[7] However, contrary to common perceptions, travel restrictions are not effective and at most delay the peak of a pandemic

[1] *WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. [hereinafter WHO] (Jan. 30, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov).
[2] *Id.*
[3] International Health Regulations arts. 2, 1, May 23, 2005, 2509 U.N.T.S. 79 [hereinafter IHR or Regulations].
[4] *Covid-19 Response: 96% of Global Destinations Impose Travel Restriction, UNWTO Reports*, WORLD TOURISM ORG. (Apr. 17, 2020), https://www.unwto.org/news/covid-19-response-travel-restrictions.
[5] Catherine Z. Worsnop, *Domestic Politics and the WHO's International Health Regulations: Explaining the Use of Trade and Travel Barriers During Disease Outbreaks*, 12 REV. INT'L ORG. 365, 373 (2017).
[6] Mary E. Wilson, *Travel and the Emergence of Infectious Diseases*, 1(2) EMERGING INFECTIOUS DISEASES 39, 39 (1995).
[7] Rebecca F. Grais et al., *Assessing the Impact of Airline Travel on the Geographic Spread of Pandemic Influenza*, 18(11) EUR. J. EPIDEMIOLOGY 1065, 1068-70 (2003).

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by a few days or weeks.[8] In addition, they have disastrous economic effects,[9] hamper the flow of medical supplies and health workers,[10] and affect the rights of migrants and refugees.[11] Like its historical predecessors, the IHR seek to strike a balance between the protection of public health and the maintenance of international mobility, emphasizing the need to avoid "unnecessary interference" with international travel and trade.[12] Pursuant to Article 43 of the Regulations, health measures implemented by states should not restrict international traffic more than any reasonable alternatives, and they should be based on scientific principles, available scientific evidence, and any available guidance or advice from the WHO. If they significantly interfere with international traffic, states have to provide the WHO with the public health rationale and relevant scientific information justifying such measures.[13] Importantly, the following measures are generally considered to involve "significant interference": "refusal of entry or departure of international travelers, baggage, cargo, containers, conveyances, goods, and the like, or their delay, for more than 24 hours."[14]

Several authors have argued that the myriad of travel restrictions put in place worldwide breach the IHR.[15] Flight bans and the closure of borders are not even mentioned in the Regulations. Such measures are not supported by scientific evidence, and even if they were, more effective alternatives could have been adopted with less restrictive effects, including procedures recommended by the WHO such as screening at ports of entry and exit.[16]

News of a disease outbreak trigger a sharp reduction in international movement as people voluntarily refrain from traveling and airlines adjust to new market conditions. However, extreme measures imposed by governments all around the world are a self-inflicted wound that only adds

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[8] Ana L.P. Mateus et al., *Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: a Systematic Review*, 92 BULL. WORLD HEALTH ORG. 868, 872-73 (2014); Matteo Chinazzi et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, 368(6489) SCI. 395, 398-400 (2020).

[9] Jong-Wha Lee & Warwick McKibbin, *Estimating the Global Economic Costs of SARS*, *in* LEARNING FROM SARS: PREPARING FOR THE NEXT DISEASE OUTBREAK: WORKSHOP SUMMARY 91, 92 (Stacey Knobler et al. eds., 2004).

[10] Morenike Folayan & Brandon Brown, *Ebola and the Limited Effectiveness of Travel Restrictions*, 9(1) DISASTER MED. & PUB. HEALTH PREPAREDNESS 92, 92 (2015).

[11] Ling San Lau et al., *COVID-19 in Humanitarian Settings and Lessons Learned from Past Epidemics*, 26 NATURE MED. 647, 648 (2020).

[12] IHR, *supra* note 3, art. 2.

[13] *Id.* art. 43.

[14] *Id.* art. 43(3), *in fine*.

[15] Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 396 LANCET 664, 665 (2020); Benjamin Mason Meier et al., *Travel Restrictions Violate International Law*, 367(6485) SCI. 1436, 1436 (2020).

[16] For a more nuanced approach, emphasizing the unprecedented nature of the pandemic and the need to take into account several factors when assessing the scientific justification and proportionality of any measures implemented, see Barbara von Tigerstrom & Kumanan Wilson, *COVID-19 Travel Restrictions and the* International Health Regulations (2005), 5(5) BMJ GLOB. HEALTH 1, 2 (2020).

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to the economic and social disruption caused by a pandemic. During the Covid-19 crisis, thousands of travelers were stranded because of an unprecedented halt in global mobility. Some governments chartered flights to bring them home.[17] This revealed a parochial, nationality-based approach to public health and contradicts the alleged value of travel restrictions—an exception was opened to "repatriate" some travelers, mostly nationals. Others, such as migrant workers, were not so lucky. Filipino domestic workers in Hong Kong are a case in point: while some lost their jobs because they were unable to return to work, others could not travel back home after being dismissed.[18] Only time will tell how much economic and social harm and suffering could have been avoided or at least mitigated had countries not rushed to close their borders and shut down air travel.

In recent months, "social distancing" became a household expression. This article argues that the almost universal implementation of travel restrictions during the COVID-19 crisis is also a symptom of a different, equally challenging type of distancing—that of states from their international law obligations and, therefore, from each other. The IHR seek to avoid unnecessary interference with both international traffic and trade. This article is limited to the first dimension—that is, travel restrictions. The limited scope of this analysis has to do with the fact that travel restrictions became the "weapon of choice" for most states around the world, while the imposition of trade measures was an incomparably less significant problem. The second section of this article examines some potential explanations for the astonishingly high rate of non-compliance with the IHR. Some potential remedies to ensure states uphold their international law obligations are discussed in the third section. The last section calls on the international community to make better use of international law instruments to protect international mobility during pandemics.

II. CHRONIC NON-COMPLIANCE

One goal of the IHR is to achieve an appropriate level of protection against a pandemic while minimizing interference with international travel. However, how to actually operationalize this requirement is not clear, nor is the definition of what is considered an "appropriate" level of protection.[19]

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[17] *Overview of Repatriation Flights*, EUR. COMMISSION (Dec. 7, 2020), https://ec.europa.eu/info/files/overview-repatriation-flights_en; Michael Goldstein, *US State Department Brings Home over 85,000 Americans in Coronavirus Crisis*, FORBES (Apr. 10, 2020, 4:13 PM), https://www.forbes.com/sites/michaelgoldstein/2020/04/10/us-state-department-brings-home-more-than-50000-americans-in-coronavirus-crisis/#40c87d865d93.

[18] *See, e.g.*, Ivana Davidovic, *Coronavirus: 'If I Can't Work, I Can't Feed My Family'*, BBC (Apr. 24, 2020), https://www.bbc.com/news/business-52388835.

[19] This principle is especially difficult to operationalize when countries are faced with "an unusual outbreak." *See* Raymond C.F. Yiu et al., *Evaluating the WHO's Framing and Crisis Management*

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Furthermore, asymptomatic individuals are a major concern as they reveal no symptoms and therefore may go undetected by health surveillance systems.[20] Travel bans are imposed blindly, regardless of an individual's health condition, and seem to operate on the presumption that each and every international traveler is an asymptomatic carrier of the disease—when statistically that is clearly not the case. Regardless of whether the individual indeed represents a real danger to public health, their freedom of movement is suppressed. As argued by one author, "restrictions should be applied only to people suffering from the disease, or likely carriers, and not to regions or nations as a whole."[21]

Caution recommends that risk should be minimized. Ensuring that cautionary measures are proportionate is especially difficult in emergency situations.[22] Still, it seems particularly difficult to argue that the principle of proportionality is respected in the application of travel bans.[23] Many governments seem to assume that strong measures are strictly necessary and that, in case of doubt, public health is best served by favoring the harshest measure.[24] There are, however, alternatives—some expressly suggested by the WHO—that would be less restrictive of international travel, including social distancing, regular testing, quarantine, and contact tracing.[25] Quarantine and isolation also raise their own legal and ethical quandaries, but at least there is a public health rationale to them: individuals are separated

Strategy During the Early Stage of COVID-19 Outbreak, 4(1) POL'Y DESIGN & PRAC. 94, 100 (2021). *See also* Jaya Ramji-Nogales & Iris Goldner Lang, *Freedom of Movement, Migration, and Borders* 19(5) J. HUM. RTS. 593, 597 (2020) (emphasizing the scientific uncertainty surrounding COVID-19).

[20] *See* Hongjun Zhao et al., *COVID-19: Asymptomatic Carrier Transmission Is an Underestimated Problem*, 148(e116) EPIDEMIOLOGY & INFECTION 1, 1 (2020); Andreas Kronbichler et al., *Asymptomatic Patients as a Source of COVID-19 Infections: A Systematic Review and Meta-Analysis*, 98 INT'L J. INFECTIOUS DISEASES 180, 180 (2020).

[21] Polly Price, *Infecting the Body Politic: Observations on Health Security and the Undesirable Immigrant*, 63(4) KAN. L. REV. 917, 926 (2015).

[22] Alessio M. Pacces & Maria Weimer, *From Diversity to Coordination: A European Approach to COVID-19*, 11(2) EUR. J. RISK REG. 283, 286 (2020).

[23] Eric Richardson & Colleen Devine, *Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights*, 42(1) MICH. J. INT'L L. 105, 137 (2021); Habibi et al., *supra* note 15, at 664.

[24] "[G]overnments may have an incentive to engage in spectacular interventions in the face of a public health crisis. The penalty, in terms of public opprobrium, for underreacting might be very much greater than the penalty for overreacting." Neil Levy & Julian Savulescu, *Epistemic Responsibility in the Face of a Pandemic*, 7(1) J. L. & BIOSCIENCES 1, 13 (2020).

[25] Meier et al., *supra* note 15, at 1436; Lawrence O. Gostin & James G. Hodge Jr., *US Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties*, 323(12) J. AM. MED. ASS'N 1131, 1132 (2020); Micha Kaiser et al., *Interventions with Positive Side-Effects: COVID-19 Non-Pharmaceutical Interventions and Infectious Diseases in Europe* 12 (Inst. Lab. & Econ., Discussion Paper Series No. 13927, 2020); Jakub Hlávka & Lisa Bari, *Travel Bans Should Be Based on Evidence, Not Politics or Fear*, STAT (Jan. 22, 2021), https://www.statnews.com/2021/01/22/travel-bans-should-be-based-on-evidence-not-politics-or-fear.

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because they have been exposed to an infectious disease (quarantine) or because they have already been infected (isolation).[26]

Travel bans qualify as examples of additional health measures that significantly interfere with international traffic.[27] Therefore, governments who decide to implement such measures must provide the WHO with the public health rationale and relevant scientific information justifying any measure within forty-eight hours of implementation.[28] If States Parties decide to disregard specific guidance or advice from the WHO, they bear the burden of justifying their decision. It is not enough to laconically claim to be intervening in the name of public health.[29] Additional health measures must be "evidence-based"[30] and the explanation of their public health rationale should be "adequate."[31]

The imposition of excessive travel restrictions, disregarding the IHR, is not exactly novel—indeed, it is a routine reaction to epidemic outbreaks.[32] In addition, countries frequently breach their obligations to inform the WHO about such additional measures[33] and to explain their scientific and public

[26] Wendy Parmet & Michael Sinha, *Covid-19—The Law and Limits of Quarantine*, 382(e28) NEW ENG. J. MED. 1, 1 (2020); Annelies Wilder-Smith & David O. Freedman, *Isolation, Quarantine, Social Distancing and Community Containment: Pivotal Role for Old-Style Public Health Measures in the Novel Coronavirus (2019-nCoV) Outbreak*, 27(2) J. TRAVEL MED. 1, 1 (2020). *See* Lindsay Wiley, *Public Health Law and Science in the Community Mitigation Strategy for Covid-19*, 7(1) J. L. & BIOSCIENCES 1, 7 (2020) ("Imposing a travelers' quarantine . . . requiring individuals entering the area to be separated from others for a reasonable incubation period, would provide a less restrictive alternative to completely closed borders."); Lawrence O. Gostin et al., *Responding to Covid-19: How to Navigate a Public Health Emergency Legally and Ethically*, 50(2) HASTINGS CTR. REP. 8, 11 (2020) ("Quarantine and isolation for Covid-19 should be ordered only if the person is known or highly suspected to have been exposed to the disease, and only for the maximum duration of incubation.")

[27] IHR, *supra* note 3, art. 43(3).

[28] *Id.* arts. 43(3), (5). The WHO shall share this information with other States Parties and share information regarding the health measures implemented. *See id.* art. 43(3).

[29] Brigit Toebes, *Human Rights and Public Health: Towards a Balanced Relationship*, 19(4) INT'L J. HUM. RTS. 488, 496 (2015).

[30] WHO, *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009*, ¶ 28, WHO Doc. A64/10 (May 5, 2011), https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf?ua=1.

[31] WHO, *Implementation of the International Health Regulations (2005): Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, at 80, WHO Doc. A69/21 (May 13, 2016), https://apps.who.int/gb/ebwha/pdf_files/WHA69/A69_21-en.pdf.

[32] Lawrence O. Gostin, *Influenza A(H1N1) and Pandemic Preparedness Under the Rule of International Law*, 301(22) J. AM. MED. ASS'N 2376, 2378 (2009).

[33] WHO, STRENGTHENING RESPONSE TO PANDEMICS AND OTHER PUBLIC-HEALTH EMERGENCIES: REPORT OF THE REVIEW COMMITTEE ON THE FUNCTIONING OF THE INTERNATIONAL HEALTH REGULATIONS (2005) AND ON PANDEMIC INFLUENZA (H1N1) 2009, at 62 (2011).

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health justification.[34] Authors talk about a "pathological" lack of compliance[35] or even an "epidemic of legal non-compliance."[36]

The major problem is the lack of enforceability of the duties imposed on States Parties. As expressly stated in the first provision of the IHR, temporary recommendations are non-binding. The WHO has historically favored the formulation of recommendations over the imposition of binding obligations: if countries decide to disregard such recommendations, they face no consequences. Despite being an international legal instrument, the IHR resemble a soft law document,[37] compliance with which is based on persuasion.[38] The WHO has been careful not to antagonize members about the decisions they make.[39] While the WHO has the power to "name and shame" violating states, this tool has not been used.[40] The focus seems to be on engaging states in multilateral cooperation without impinging on their sovereignty. However, this "soft", diplomatic approach has not been effective in convincing states to comply with the Regulations.

Like any international agreement, the IHR seek to strike a compromise between the sovereignty of states and the need for international cooperation to tackle global challenges. It has been suggested that the fight against infectious diseases calls for "shared sovereignty."[41] However, states only comply with international law obligations when they align with their interests.[42] While Fidler argues that the international response to the Severe Acute Respiratory Syndrome (SARS) outbreak of 2002-2003 ushered in an era of "post-Westphalian" health governance,[43] the reality is that the fight against contagious diseases is still very much state-centric.[44] Indeed, it can

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[34] WHO, *Report of the Ebola Interim Assessment Panel*, ¶ 17 (July 7, 2015), https://www.who.int/csr/resources/publications/ebola/ebola-panel-report/en.

[35] Andrea Spagnolo, *(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility*, 18(1) GLOB. JURIST 1, 1 (2018).

[36] David L. Heymann et al., *Global Health Security: The Wider Lessons from the West African Ebola Virus Disease Epidemic*, 385 LANCET 1884, 1888 (2015).

[37] David P. Fidler, *The Role of International Law in the Control of Emerging Infectious Diseases*, 95(2) BULL. INST. PASTEUR 57, 63-64 (1997).

[38] David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV.771, 849 (1997).

[39] Antoine Puyvallée & Sonja Kittelsen, *"Disease Knows No Borders": Pandemics and the Politics of Global Health Security*, *in* PANDEMICS, PUBLICS, AND POLITICS: STAGING RESPONSES TO PUBLIC HEALTH CRISES 59, 66 (Kristian Bjørkdahl & Benedicte Carlsen eds., 2019).

[40] Adam Kamradt-Scott, *WHO's to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa*, 37(3) THIRD WORLD Q. 401, 411 (2016).

[41] WHO, *supra* note 33, at 10.

[42] Nathan Paxton & Jeremy Youde, *Engagement or Dismissiveness? Intersecting International Theory and Global Health*, 14(4) GLOB. PUB. HEALTH 503, 506 (2019).

[43] David P. Fidler, *SARS: Political Pathology of the First Post-Westphalian Pathogen*, 31(4) J. L. MED. & ETHICS 485, 485 (2003).

[44] Simon Rushton, *Global Governance Capacities in Health: WHO and Infectious Diseases*, *in* GLOBAL HEALTH GOVERNANCE: CRISIS, INSTITUTIONS AND POLITICAL ECONOMY 60, 61 (Adrian Kay et al. eds., 2009).

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be said that the measures implemented in response to COVID-19 still bear the marks of the Westphalian public health approach, characterized by the traditional principles of sovereignty, non-intervention, and consent-based international law.[45] The WHO and the IHR (and international law, more broadly) have been trumped by nationalism and sovereignty.[46]

Travel restrictions reveal a national security approach to a global problem. Contagious diseases are perceived as threats to the well-being of national communities that require an exceptionally vigorous response.[47] While the IHR is based on solid scientific evidence and seeks to emphasize epidemiology over sovereignty,[48] states still see border control measures as effective tools to protect their citizens by "keeping the disease out." The problem is that pathogens are strangers to the concepts of "territory" or "sovereignty."[49] The challenge is to find ways of moving beyond the prism of state-centricity that has characterized international reactions to global epidemics.

III. THE DISTANCING FROM INTERNATIONAL LAW

International cooperation in the field of infectious diseases has a long history, dating back to the mid-nineteenth century.[50] International law has been playing a central role in this endeavor. When the IHR were revised and adopted by the World Health Assembly in 2005, some authors welcomed them as "unprecedented in the history of the relationship between international law and public health."[51] Today, they remain the only international binding agreement on infectious diseases, and nearly every nation in the world subscribes to the agreement.[52] Still, despite being the

[45] DAVID P. FIDLER, SARS, GOVERNANCE AND THE GLOBALIZATION OF DISEASE 47 (2004).
[46] Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation Under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, ASIL INSIGHTS (June 5, 2020), https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations.
[47] Colin McInnes & Anne Roemer-Mahler, *From Security to Risk: Reframing Global Health Threats*, 93(6) INT'L AFF. 1313, 1314 (2017).
[48] David P. Fidler, *Epic Failure of Ebola and Global Health Security*, 21(2) BROWN J. WORLD AFF. 179, 184 (2015).
[49] Obijiofor Aginam, *Bio-Terrorism, Human Security and Public Health: Can International Law Bring Them together in an Age of Globalization*, 24(3) MED. & L. 455, 461-62 (2005).
[50] *See* David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4(2) CHINESE J. INT'L L. 325, 325 (2005).
[51] David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: A Historic Development for International Law and Public Health*, 34(1) J. L. MED & ETHICS 85, 93 (2006).
[52] *See States Parties to the International Health Regulations (2005)*, WHO, https://www.who.int/ihr/legal_issues/states_parties/en/ (last visited Apr. 10, 2021).

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"centerpiece" of global health security,[53] the Regulations seem to be irredeemably "broken."[54]

The application of excessive travel restrictions may have a negative impact on the relations between states and even give rise to international disputes. However, states do not normally file any formal complaints about such measures.[55] Since almost every country on earth has breached the IHR, it would be hypocritical for any of them to point fingers at others. In any case, it can be said that the imposition of unwarranted measures puts the IHR, once again, to the test. Going against the express recommendations of the WHO, countries underplayed collective action in favor of nationalistic responses, creating unnecessary economic damage and breaching the rights of individuals. In doing so, states distanced themselves from international law and, thereby, from each other.

If states were willing to cooperate voluntarily, there would be no need to deploy the instruments of international law to tackle contagious diseases.[56] The response to COVID-19 reveals, once again, the intrinsic fragility of international law in striving for global health.[57] Naturally, non-compliance with international law is not exclusive to the IHR.[58] Any international agreement depends on states' willingness to comply with binding obligations and thereby limit their sovereignty. Global health security also relies on states that may not necessarily have sufficient resources and infrastructure.[59] This may explain, at least partially, the historic reluctance of the WHO to utilize international law to achieve its purposes.[60] The organization is endowed with "impressive normative powers"[61] but appears to envision its legislative role as merely passive.[62] While it has been argued that the adoption of the Framework Convention on Tobacco Control, a binding treaty, was a watershed moment regarding the use of international law

[53] Fidler, *supra* note 48, at 189.
[54] Trygve Ottersen et al., *Ebola Again Shows the International Health Regulations Are Broken: What Can Be Done Differently to Prepare for the Next Epidemic?*, 42 AM. J. L. & MED. 356, 356 (2016).
[55] WHO, *supra* note 33.
[56] Robert Frau, *Law as an Antidote: Assessing the Potential of International Health Law Based on the Ebola-Outbreak 2014*, 7(2) GOETTINGEN J. INT'L L. 225, 265 (2016).
[57] Allyn Taylor, *Global Health Law*, *in* GLOBAL HEALTH DIPLOMACY: CONCEPTS, ISSUES, ACTORS, INSTRUMENTS, FORA AND CASES 37, 48 (Ilona Kickbusch et al. eds., 2013).
[58] Shawn Harmon, *International Public Health Law: Not So Much WHO as Why, and Not Enough WHO and Why Not?*, 12(3) MED. HEALTH CARE & PHIL. 245, 250 (2009).
[59] *See* Arielle Silver, *Obstacles to Complying with the World Health Organization's 2005 International Health Regulations*, 26(1) WIS. INT'L L. J. 229, 239-41 (2008).
[60] David P. Fidler, *The Future of the World Health Organization: What Role for International Law*, 31(5) VAND. J. TRANSNAT'L L. 1079, 1104 (1998).
[61] Lawrence O. Gostin et al., *The Normative Authority of the World Health Organization*, 129 PUB. HEALTH 854, 856 (2015).
[62] Allyn Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18(4) AM. J. L. & MED. 301, 343 (1992).

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instruments,[63] it stands as a rare exception to the WHO's traditional hesitation towards exercising its "hard" legislative powers.[64]

There have been repeated calls for the WHO to make better use of international law in the fight against infectious disease, starting with a revamp of the IHR. Several remedies have been recommended to cure its ailments. For instance, the suggestion has been made to give a "veto power" to the WHO before the adoption of any additional measures.[65] This proposal goes against the traditional ethos of the WHO, which favors a non-binding approach, and would probably be received with suspicion by States Parties, wary of losing their sovereign discretion to decide how to react to an outbreak. Another possibility is to make temporary recommendations binding.[66] However, the same reservations from States Parties might be expected. More extreme proposals—even more unlikely to be accepted—are the removal of voting privileges[67] and the revocation of recalcitrant States' membership of the World Health Assembly.[68]

While these bold proposals seek to increase compliance with the IHR, they should be considered with caution. It is doubtful that States Parties are interested in starting a discussion over the revision of the IHR.[69] In addition, states are probably not keen on limiting their sovereign powers and giving more teeth to the Regulations.[70] Additionally, an overhaul of the IHR would entail a long, bureaucratic process, likely to drag on for several years.[71] Even less feasible seems the ambitious idea of creating a framework convention on global health.[72] This proposal would integrate the IHR into a broader regulatory field that has been termed "global health law." In the formulation of an author,

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[63] Allyn Taylor, *Global Governance, International Health Law and WHO: Looking Towards the Future*, 80(12) BULL. WORLD HEALTH ORG. 975, 979 (2002).
[64] Gostin et al., *supra* note 61, at 855.
[65] WHO, *The International Response to Epidemics and Application of the International Health Regulations: Report of a WHO Informal Consultation*, at 10, WHO Doc. EMC/IHR/96.1 (1995).
[66] Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94(2) MILBANK Q. 264, 306 (2016).
[67] Lane Feler, *Ebola Postmortem: Treating the World Health Organization's Regulatory Maladies*, 54 COLUM. J. TRANSNAT'L L. BULL. 13, 28 (2015).
[68] Jennifer B. Nuzzo & Gigi Kiwik Gronvall, *Global Health Security: Closing the Gaps in Responding to Infectious Disease Emergencies*, 4(2) GLOBAL HEALTH GOVERNANCE 1, 10 (2011).
[69] Adam Kamradt-Scott, *The International Health Regulations (2005): Strengthening Their Effective Implementation and Utilisation*, 16 INT'L ORG. L. REV. 242, 252-53 (2019).
[70] Catherine Z. Worsnop, *Provoking Barriers: The 2014 Ebola Outbreak and Unintended Consequences of WHO's Power to Declare a Public Health Emergency*, 11(1) GLOBAL HEALTH GOVERNANCE 7, 21 (2017).
[71] Lawrence O. Gostin et al., *The International Health Regulations 10 Years on: The Governing Framework for Global Health Security*, 386 LANCET 2222, 2223 (2015).
[72] Lawrence O. Gostin, *A Proposal for a Framework Convention on Global Health*, 10(4) J. INT'L ECON. L. 989, 993, 996-98 (2007).

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> Global health law consists of a limited set of binding and non-binding instruments adopted in the framework of the World Health Organization (WHO), in an interaction with both hard and soft law standards recognized in other branches of international law, including human rights law, international humanitarian law, international environmental law, international trade, property and investment law.[73]

One of the essential features of this field is its multidisciplinary nature. International health law, by definition, needs to connect and engage with other fields of international law such as trade and human rights, the rights of migrants, and environmental protection.[74] One of the main goals of international cooperation in the field of public health has always been to facilitate trade flows while protecting public health. The scientific requirements established in the IHR mirror similar conditions contained in the agreements of the World Trade Organization (hereinafter "WTO"), namely the Agreement on the Application of Sanitary and Phytosanitary Measures.[75] The connection between health and trade—that is, between the realms of the WHO and the WTO—has merited attention in academia[76] and in the WTO's caselaw.[77]

While international health law has traditionally been understood to have "issue linkages" with diverse fields of law, its connection with international mobility, and freedom of movement, has been largely ignored. Although "international travel law" is not an established realm of legal study, global health law needs to address its linkages to this particular area of concern. Travel restrictions not only breach the IHR but also the freedom of movement,[78] a right enshrined in the Universal Declaration of Human Rights[79] and the International Covenant on Civil and Political Rights.[80] The reference to freedom of movement as a human right is well established in

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[73] Brigit Toebes, *Global Health Law: Defining the Field*, *in* RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 2, 2-3 (Gian Luca Burci & Brigit Toebes eds., 2018).
[74] Julio Frenk & Suerie Moon, *Governance Challenges in Global Health*, 368(10) NEW ENG. J. MED. 936, 939 (2013).
[75] *See* Barbara von Tigerstrom, *The Revised International Health Regulations and Restraint of National Health Measures*, 13 HEALTH L.J. 35, 59-61 (2005).
[76] *See generally* Huei-chih Niu, *A Comparative Perspective on the International Health Regulations and the World Trade Organization's Agreement on the Application of Sanitary and Phytosanitary Measures*, 1(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 513 (2006).
[77] *See, e.g.*, Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 172, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).
[78] *See* LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 87-88 (1997); Alessandra Spadaro, *COVID-19: Testing the Limits of Human Rights*, 11(2) EUR. J. RISK REG. 317, 325 (2020).
[79] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 13.
[80] G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 19, 1966) (arts. 12 (2), (4)) [hereinafter ICCPR].

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doctrinal writings.[81] Some authors talk about a "right to travel".[82] In the words of the Human Rights Committee, "[l]iberty of movement is an indispensable condition for the free development of a person."[83] This right is not absolute and may be limited for public health reasons[84] but restrictions should be construed narrowly.[85] While states have an obligation to protect public health, they also have a duty to protect individual rights and interests.[86] Freedom of movement is one among such rights and may even be instrumental to the protection of other fundamental rights—including the right to health.

The IHR acknowledge the link between global health and human rights, stating that the Regulations should be implemented "with full respect for the dignity, human rights and fundamental freedoms of persons."[87] However, the references to human rights in the text are scarce and vague, probably because during the negotiations the WHO was afraid of antagonizing States Parties by accentuating human rights. Ensuring respect for fundamental individual rights was left to the goodwill of states.

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[81] *See generally, e.g.*, Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49(3) INT'L AFF. 341 (1973).

[82] *See generally, e.g.*, Ved P. Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, 1 DENV. J. INT'L L. & POL'Y 109 (1971). One author speaks of a "right to move"—Tamas Foldesi, *The Right to Move and Its Achilles' Heel, the Right to Asylum*, 8(2) CONN. J. INT'L L. 289 (1993).

[83] Office of the High Comm'r for Human Rights [hereinafter OHCHR], CCPR General Comment 27, Art. 12: Freedom of Movement, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999). *See also* Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12(1) MELB. J. INT'L L. 1, 29 (2011).

[84] ICCPR, *supra* note 80, art. 12 ¶ 3.

[85] OHCHR, *supra* note 83 ("[R]estrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant . . . " (¶ 11); they "must not impair the essence of the right" to move freely (¶ 13); and must "conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected." (¶ 14).) *See also* AM. ASS'N FOR THE INT'L COMM'N FOR THE JURISTS, SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1985), https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf, which reads as follow:

> Article 25
> Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.
>
> Article 26
> Due regard shall be had to the international health regulations of the World Health Organization.

[86] Toebes, *supra* note 29.

[87] IHR, *supra* note 3 (art. 3(1)).

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Freedom of movement has received some scholarly attention in select forums, such as discussions about the rights of migrants,[88] the right to obtain a passport,[89] and others mostly from a domestic law perspective.[90] In the context of epidemic outbreaks, this right has mostly been examined *vis-à-vis* another well-known threat to individual freedom: quarantine.[91] What is missing, however, is a thorough analysis of how travel restrictions impair the right to freedom of movement *per se*. Freedom of movement is critical to the functioning of the modern global order.[92] The "world order" in public health[93] also needs to be guided by the understanding that travel restrictions, while an old technique, pose problems to the contemporary global village, especially in the European Union, where freedom of movement is one of four cherished fundamental freedoms.[94]

In order to fully embrace its normative role in global health governance, the WHO needs to engage in an interdisciplinary effort to "translate epidemiology into international law."[95] This also entails taking lawyers more seriously. Traditionally the WHO has been mostly staffed with professionals with a medical background, and legal experts are clearly a minority.[96] This probably diminishes the ability of the Secretariat to give proper legal advice to States Parties, particularly advice about (un)lawful measures under Art. 43.[97] The WHO should involve more lawyers—including those with expertise in trade law and human rights—in its workforce.[98]

IV. PREPARING FOR THE NEXT PANDEMIC

The COVID-19 crisis, like any pandemic, is a teachable moment that demonstrates the intricate knot between science and politics.[99] In addition,

[88] *See generally, e.g.*, Colin Harvey & Robert Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19(1) INT'L J. REFUGEE L. 1 (2007).
[89] *See generally, e.g.*, Paul Lansing, *Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Governmental Prerogative*, 11 DENV. J. INT'L L. & POL'Y 15 (1981).
[90] *See, e.g.*, J. Nicholas Murosko, *Communicable Diseases and the Right to Re-Enter the United States*, 24(3) WILLIAM & MARY BILL RTS. J. 913, 920 (2016).
[91] *See generally, e.g.*, Kathleen Choi, *A Journey of a Thousand Leagues: From Quarantine to International Health Regulations and Beyond*, 29(4) U. PA. J. INT'L L. 989 (2008).
[92] Satvinder S. Juss, *Free Movement and the World Order*, 16(3) INT'L J. REFUGEE L. 289, 290 (2004).
[93] *See generally* David P. Fidler, *Constitutional Outlines of Public Health's New World Order*, 77 TEMPLE L. REV. 247 (2004).
[94] Rosemary C.R. Taylor, *The Politics of Securing Borders and the Identities of Disease*, 35(2) SOC. HEALTH & ILLNESS 241, 242 (2013).
[95] Fidler, *supra* note 37, at 57.
[96] David P. Fidler, *International Law and Global Public Health*, 48 U. KAN. L. REV.1, 22 (1999).
[97] Kamradt-Scott, *supra* note 69, at 260-61.
[98] Gostin et al., *supra* note 61, at 861.
[99] Jonathan E. Suk, *Sound Science and the New International Health Regulations*, 1(2) GLOBAL HEALTH GOVERNANCE 1, 2 (2007).

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this "once in a century pandemic"[100] exuberantly illustrates the tension between health security and freedom of movement. It has been argued that "minimum interference with international movement" is "the leading principle in the field of international travel."[101] Globalization facilitates international travel, but mobility is also the engine of globalization. On the other hand, traveling facilitates the emergence or re-emergence of infectious diseases. The spread of an epidemic across borders leads to conflicts between sanitary measures, economic interests, and the freedom of movement. The creation of spurious obstacles to international mobility, denying the freedom of movement, has a long tradition.[102] While breaches of the IHR have occurred in previous outbreaks, the scale of violations during the COVID-19 crisis is simply baffling. Maximum interference became an almost universal rule. The actions by states clearly exceeded the recommended control measures, despite uncertain and potentially negative consequences for the global economy and with little, if any, benefit to public health. Pandemics already bring about terrible suffering to communities; breaching human rights such as freedom of movement only makes things worse.[103]

Leaders of the G20 have recently proclaimed their commitment to "facilitate international trade and coordinate responses in ways that avoid unnecessary interference with international traffic and trade."[104] The danger is that, like in other pandemics, panic and anxiety will be followed by short-memory laxness.[105] It is time to recognize that pandemics, by definition,[106] affect everyone, including those on the move. In a globalized world, pandemic outbreaks are not a national affair but rather an international challenge. They test the capabilities of governments but also the resilience of the international community. While international travel has not yet emerged as a specific field of study and practice, it is definitely time to give it the importance it deserves in the international legal order. National measures should not be imposed against the *lege artis*: they should conform to evidence-based medical knowledge and respect international legal frameworks.

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[100] Bill Gates, *Responding to Covid-19—A Once-in-a-Century Pandemic?*, 382(18) NEW ENG. J. MED. 1677, 1677 (2020).
[101] Aart Hendriks, *The Right to Freedom of Movement and the (Un)Lawfulness of AIDS/HIV Specific Travel Restrictions from a European Perspective*, 59 NORDIC J. INT'L L. 186, 191 (1990).
[102] Lauren Asher, *Confronting Disease in a Global Arena*, 9(1) CARDOZO J. INT'L & COMP. L. 135, 153 (2001).
[103] Joseph Dute, *Communicable Diseases and Human Rights*, 11(1) EUR. J. HEALTH L. 45, 51 (2004).
[104] *G20 Leaders' Statement, Extraordinary G20 Leaders' Summit Statement on COVID-19* (2020), G20, https://reliefweb.int/sites/reliefweb.int/files/resources/G20_Extraordinary%20G20%20Leaders'%20Summit_Statement_EN%20%283%29.pdf.
[105] Kathryn Jacobsen, *Will COVID-19 Generate Global Preparedness?*, 395 LANCET 1013, 1013 (2020).
[106] A pandemic is defined as "[a]n epidemic occurring over a very wide area, crossing international boundaries, and usually affecting a large number of people . . . ." *See* A DICTIONARY OF EPIDEMIOLOGY 209 (Miquel Porta ed., 6th ed. 2014).

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The IHR lay down vague standards on appropriate behavior for States Parties during a public health emergency. Governments are under pressure to act rapidly without having clear instructions about whether certain measures unnecessarily interfere with international traffic and thereby breach the IHR. There is an excessive degree of uncertainty surrounding the precise scope and correct interpretation of Article 43 of the Regulations.[107] What measures achieve the same or greater level of health protection than WHO recommendations? When are they "not more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection?" What do the expressions "significant" and "significant interference" mean? How are "scientific principles" and "available scientific evidence of a risk to human health" defined? When is there "insufficient evidence?" What are "relevant intergovernmental organizations and international bodies" that can offer information? To what degree should States Parties comply with available specific guidance or advice from the WHO? Conducting a balancing exercise under medical and legal uncertainty may understandably cloud one's assessment of the values and risks involved in a decision and result in an unsuitable outcome.

Is it necessary to enhance the regime's clarity? The Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response is currently conducting an article-by-article analysis of the Regulations. The goal is to "examine whether the perceived shortcomings in their effectiveness during the COVID-19 response stem from the design of the Regulations or from challenges in their implementation." [108] The WHO should share the Review Committee's suggestions with States Parties and encourage their active participation in the discussion about a potential reform of the IHR. The goal should be to create visible markers outlining how and when States Parties may implement additional health measures that interfere with international mobility.[109]

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[107] Asher, *supra* note 102, at 143; Jennifer Shkabatur, *A Global Panopticon? The Changing Role of International Organizations in the Information Age*, 33(1) MICH. J. INT'L L. 159, 172 (2011); Allyn Taylor et al., *Solidarity in the Wake of COVID-19: Reimagining the International Health Regulations*, 396 LANCET 82, 83 (2020); Caroline Foster, *Justified Border Closures Do Not Violate the International Health Regulations 2005*, EJIL:TALK! (June 11, 2020), https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/.

[108] WHO, *Strengthening Preparedness for Health Emergencies: Implementation of the International Health Regulations (2005), Interim Progress Report of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, ¶ 14, WHO Doc. EB148/19 (Jan. 12, 2021), https://reliefweb.int/report/world/strengthening-preparedness-health-emergencies-impl ementation-international-health.

[109] *See* Fernando Dias Simões, *Protecting International Travelers During Pandemics: Charting the Way Forward*, 31(1) MINN. J. INT'L L. (forthcoming 2022).

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Unfortunately, pandemics are "a regular feature of human existence."[110] The WHO should work together with States Parties to provide clearer guidance on the precise meaning and scope of each one of the concepts used in the IHR. It is vital to ensure that norms express a well-defined, operable normative commitment. Otherwise, when the next pandemic hits, the IHR will once more be effectively treated as a "dead letter."

[110] Adam Kamradt-Scott, *Preparing for the Next Pandemic*, *in* THE HANDBOOK OF GLOBAL HEALTH POLICY 539, 541 (Garrett W. Brown et al. eds., 2014).

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