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HEALTH CRISIS, LEGAL FRAMEWORK AND ECONOMIC ISSUES: RETHINKING THE ADMINISTRATIVE POWER OF THE WHO

ABSTRACT

The management of the pandemic by the World Health Organization (WHO) has provoked sharp criticism. Prominent scholars have suggested the urgent need for reform with more intrusive administrative powers to increase the authority of this organisation. On the contrary, observing the failure in the past of theories proposing a more authoritarian organisation, this paper argues that WHO needs sharing powers rather than intrusive powers. Given that the main international norms have arguably designated the WHO as a "non-authoritarian" authority aiming at the highest possible level of health individuals, the paper suggests that sharing administrative powers should be incentivised by involving all the relevant actors in the decision-making process, namely governments, national health authorities, and other non-state actors. In doing so, the paper also analyses the WHO organisational model in the light of the spillover effects of the health crisis on the global economy.

Keywords: WHO, emergency, administrative powers, economic effects, public health.

1. Introduction*

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The recent pandemic was the most severe emergency that the World Health Organization (WHO) has faced since its foundation.[1] Though the global health authority had addressed significant flu pandemics with SARS[2] and H1N1,[3] the unprecedented challenges of Covid-19 brought long-hidden weaknesses to light.

Scholars of public international law have raised a variety of criticisms, focusing essentially on the WHO's lack of transparency, its slow response to the spread of outbreaks, the lack of political cooperation, the light touch approach to the Chinese government, and consequently the absence of sanctions for Member States. Basically, scholars agree that there is an urgent need to reform the WHO and give it more intrusive powers.[4]

While these concerns are legitimate and well-founded, they do not seem to take due account of the current architecture of administrative powers as reflected in the international legal system of the WHO.

This paper argues that the main sources of international law – the Constitution of the World Health Organization[5] (hereinafter the "Constitution"),

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1 See R. HORTON, *The Covid-19 Catastrophe: What's Gone Wrong and How to Stop It Happening Again*, 2 ed., Cambridge and Medford, Polity Press, 2020, p. 9 and p. 50, where the author emphasises that the Covid-19 pandemic is one of the most catastrophic events since the Second World War.

2 See F.L. SMITH, *WHO Governs?: Limited Global Governance by the World Health Organization during the SARS Outbreak* (2003) 28(2) Social Alternatives pp. 9-12.

3 See S. ABEYSINGHE, *An Uncertain Risk: The World Health Organization's Account of H1N1*, (2014) 27(3) Science in Context, pp. 511-529.

4 Concerns about the implementation of intrusive powers in health matters are expressed by L. O. GOSTIN and L. F. WILEY, *Public Health Law: Power, Duty, Restraint*, 3rd ed., Oakland, University of California Press, 2016, pp. 11-12. Gostin argues that the theory of public health law often poses a paradox. The government is called upon to act effectively in order to promote the health of the people. To many, this role demands robust measures to address health risks. However, government must not unreasonably infringe upon the rights of individuals on account of the common good. Health regulation that exceeds, in the sense that it achieves a minimal health benefit with disproportionate human burdens, conflicts with ethical considerations and is not tolerated in a society based on the rule of law. Therefore, scholars often perceive a tension between the community's claim to reduce manifest health risks and the claim of individuals to be free from government interference. This perceived conflict may be agonising in some cases and absent in others.

5 Constitution of the World Health Organization, New York 22 July 1946, 14 UNTS 185, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-1&chapter=9&clang=_en.

and the International Health Regulations[6] (IHR) – did not designated the WHO as an authority that can exercise its administrative powers in an authoritarian and unilateral manner.[7]

Rather, the WHO was conceived as a democratic authority that seeks to provide the highest possible level of health for individuals through "sharing powers" policies with States Parties, enabling the broader participation of governments, national health authorities, non-state actors and persons in administrative proceedings.

I just mentioned the sharing powers of the WHO. By such powers I mean that administration should not *impose* public power through measures that negatively affect the subjective sphere and disproportionately restrict civil rights and freedoms. Rather, administration should *share* its power through measures that are the result of negotiated procedures with the various actors involved in the administrative proceedings.

In other words, administrative measures, even those taken by the WHO as an international health administration, should be the result of negotiation among different actors. As such, these actors could be put in a position to act on an equal footing with the administrative authority. To do so, the authority should share – rather than impose its powers in an authoritarian and intrusive way – with the other actors involved in the administrative proceedings.

In the context of a health emergency, sharing of administrative powers plays a crucial role both in managing the pandemic effectively and in avoiding undermining people's rights. Sharing administrative powers implies that actors in an emergency response need to share policies and strategies to achieve effective public health outcomes while minimising restrictions to individual rights.

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6 International Health Regulations (2005) https://www.who.int/publications/i/item/9789241580410.

7 In this context, the term "non-authoritarian" refers to the exercise of power by an administrative authority like the WHO. Here "non-authoritarian" means that the WHO is required to use administrative power not in a unilateral and intrusive way, but in a multilateral and shared one, as envisaged by international standards (Constitution and IHR).

I have also mentioned the intrusive powers of the WHO. Referring to such powers, I mean the legal tools that can invade the sphere of individuals by exploiting their rights in a way that is disproportionate to the ends that an administration seeks to achieve in using such powers. The reference is of course to the principle of proportionality[8] as applied in Western democracies, and especially in the jurisprudence of the European courts.[9]

Before analysing those powers in detail, let me begin by outlining the main features of the WHO's administrative action and organisation.

2. Administrative organisation and activity

The WHO and its regulatory policies were widely criticised during the recent emergency. In reality, I believe that this would demonstrate the need for a

8 See G. de BÚRCA, *The Principle of Proportionality and its Application in EC Law*, (1993) 13 Yearbook of European Law, p. 105; A. SANDULLI, *Eccesso di potere e controllo di proporzionalità. Profili comparati*, 1995 (2) Rivista Trimestrale di Diritto Pubblico, p. 329; N. EMILIOU, *The Principle of Proportionality in European Law*, Kluwer, Alphen aan den Rijn, 1996; D.-U. GALETTA, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo*, Giuffrè, Milano, 1998; E. ELLIS (ed), *The Principle of Proportionality in the Laws of Europe*, Hart, Oxford, 1999; J. JANS, *Proportionality Revisited* (2000) 27 Legal Issues of Economic Integration, p. 239; U. BERNITZ and J. NERGELIUS, *General Principles of European Community Law*, Kluwer, Alphen aan den Rijn, 2000; E. CASTORINA, D*iritto alla sicurezza, riserva di legge e principio di proporzionalità: le premesse per una "Democrazia europea"* 2003(3) Rivista Italiana di Diritto Pubblico Comunitario, p. 301; D.-U. GALETTA, *La proporzionalità quale principio generale dell'ordinamento* (2006) Giornale di Diritto Amministrativo, p. 1106; T. TRIDIMAS, *The General Principles of EU* Law, Oxford University Press, Oxford, 2nd edn, 2006, ch. 3; J. SCHWARZE, *European Administrative Law*, Sweet & Maxwell, London, revised edn, 2006, ch 5; A. STONE SWEET and J. MATHEWS, *Proportionality Balancing and Global Constitutionalism*, (2008) 47 Columbia Journal of Transnational Law, p. 73; T.I. HARBO, *The Function of the Proportionality Principle in EU Law*, (2010) 16 European Law Journal, p. 158; P. CRAIG, *EU Administrative Law*, 2nd edn, Oxford University Press, Oxford, 2012, 590-640; A. BARAK, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, 2012; M. KLATT and M. MEISTER, *The Constitutional Structure of Proportionality*, Oxford University Press, Oxford, 2012; W. SAUTER, *Proportionality in EU Law: A Balancing Act?* (2013) 15 Cambridge Yearbook of European Legal Studies, p. 439; B. PIRKER, *Proportionality Analysis and Models of Judicial Review: A. Theoretical and Comparative Study*, Groningen, Europa Law Publishing, 2013.

9 European Court of Justice (ECJ) case-law has acknowledged that proportionality is a general principle of EU law since the *Fedesa* judgement. See Case C-331/88 The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others [1990] ECR I-4023, where the ECJ stated as follows: "[i]n accordance with the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question."

better understanding of the WHO's architecture, at least in basic terms: though the criticisms are correct in the main, they have also failed to explain that the weaknesses of the WHO depend to a significant extent on the rules of its organisation and activities.

Scholars have suggested that the WHO be reformed, providing it with more intrusive powers by giving binding force to administrative decisions towards States Parties. Clearly, we need to realise how the WHO works. To this end, Section 2 outlines the main features of this organisation, analysing the Constitution, as the main and most relevant document of international law regulating this authority's organisation and activities.

Historically, the WHO was founded in 1948 as a specialised agency of the United Nations and currently has a membership of 194 States.[10] Structurally, it consists of three organs at the central level: the World Health Assembly (hereinafter "Assembly"), the Executive Board (hereinafter "Board") and the Secretariat under the authority of the Director-General. Conversely, at the decentralised level it consists of regional bodies created by the WHO or incorporated from previously existing administrative entities.[11]

The WHO as an International Organisation (IO) is designed to address public health concerns that States would struggle to tackle on their own.[12] The joint effort of the parties, in international public law matters.

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10 See G.L. Burci, *World Health Organization*, Kluwer, Alphen aan den Rijn, 2004. See also G.L. Burci and B. Toebes (eds), *Research Handbook on Global Health* Law, Edward Elgar, Cheltenham, 2018.

11 See J.P. Ruger, *Global Health Justice and Governance*, Oxford University Press, Oxford, 2018) p. 247. Ruger argues that the WHO has played a crucial role in coordinating global efforts to eradicate smallpox, handling international reporting, and managing the epidemic through the IHR. It has a unique coordinating function deriving from its Constitution. The WHO is the only agency with the authority to develop and implement international law and health norms and standards and facilitate ongoing discussion among States Parties on priorities.

12 In the doctrine of international law on IOs, see recently P. Gaeta, J.E. Viñuales, and S. Zappalá, *International Organizations* in P. Gaeta, J. E. Viñuales, and S. Zappalá (eds), *Cassese's International Law*, Oxford University Press, Oxford, 2020. See also M.P. Karns, K.A. Mingst and K.W. Stiles, *International Organizations: The Politics and Processes of Global Governance*, Boulder, Lynne Rienner, 2015.

I say this because the WHO would probably not have existed if there had not been the political will of the Member States to establish it. Arguably, the WHO came into being because Member States decided to cede some of their decision-making power in order to achieve common goals to protect and safeguard public health at a global level.[13] It is no coincidence that we are speaking of the largest international health agency, with the «*wide-ranging responsibilities to address global public health concerns*».[14]

Accordingly, this organisation exercises global governance only if and when Member States contribute to enabling it to do so: it is within their power to negotiate decisions on missions, delegate authority, set guidelines for its actions and agree on policy, such as how to become members or observers, the sources of funding, and rules of collaboration. Moreover, the organisation is streamlined to deal with specific issues according to the policy of the Member States.[15]

Basically, WHO works with Member States to achieve common goals and, as a result, are accountable to them.[16] Not surprisingly, every IO is set up

13 The research field of global health law has recently supplemented international health law. On this point, see the seminal book of L.O. Gostin, *Global Health Law*, Harvard University Press, Harvard, 2014). Previously, for a definition of Public Health Law, see L.O. Gostin and L.F. Wiley, *Public Health Law: Power, Duty, Restraint*, *supra note* 4, p. 4. Gostin defines Public Health Law as «*the study of the legal powers and duties of the state, in collaboration with its partners […] to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice*».

14 A.L. Taylor, *International Law and Public Health Policy*, in K. Heggenhougen and S. Quah (eds.), *International Encyclopedia of Public Health*, vol. 3, San Diego Academic Press, San Diedo, 2008, p. 674. In particular, Taylor claims that the comprehensive nature of Art. 19 combined with Art. 1 gives the WHO «*the legal authority to serve as a platform for […] agreements that potentially address all aspects of national and global objective*».

15 B. Koremenos, C. Lipson and D. Snidal, *The Rational Design of International Institutions*, (2001) 55 International Organization, p. 761.

16 See S. Negri, *International Health Law*, (2018) 1 Yearbook of International Disaster Law Online, p. 446. The Emergency Risk Management and Humanitarian Response Department of the WHO works closely with Member States, international partners, and local institutions to help communities prevent, prepare for, respond to, and recover from emergencies, disasters and crises. In 2016 the WHO's Health Emergencies Programme works with Member States and partners to manage and minimise the health risks associated with disasters. The Programme provides technical guidance and support and conducts operational and logistical mis-

by international law with this rationale.

Looking at legal grounds, we can see how the main objective of the Constitution of the WHO is «*the attainment by all peoples of the highest possible level of health*».[17] In turn, this «*highest level of health*» is defined by the Preamble as «*a state of complete physical, mental and social well-being*», and not merely the «*absence of disease or infirmity*».[18]

Reflecting the political and social vision of the Charter of the United Nations, the Preamble of the Constitution also enshrines principles that underpin the happiness, harmonious relations and security of all peoples.[19] However, as may easily to understood, the highest standard of health is an aspiration rather than a political reality, as the goals of global and national health systems change as society evolves.[20] Yet, as we shall see in Section 3, the governments of States Parties also play a decisive role, in addition to that played by the WHO.

Overall, the organisation is tasked with managing global coordination to prevent the spread of disease, especially pandemics. Hence, promoting knowledge on the prevention of disease is a key role carried out through rules based on scientific knowledge. Consequently, the WHO faces a crucial challenge in assisting governments to strengthen health services, provide appropriate tech-

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sions in order to help countries to further develop key health components of risk management across all phases of the disaster risk management cycle. These components include governance, policy, planning and coordination; information and knowledge management; health and related services; and resources.

17 Constitution of the World Health Organization, 22 July 1946, 14 UNTS 185, Art 1. The WHO's Constitution provides expansive legal authority in the field of global health standard-setting, starting with the mandate of Art. 1: the «*attainment by all peoples of the highest possible level of health*». In addition, the Constitution establishes that the Assembly «*shall have authority to adopt conventions or agreements with respect to any matter within the competence of Organization*».

18 Ibid, Preamble.

19 On these points see E. Bruemmer and A.L. Taylor, *Institutional Transparency in Global Health Law-making: The World Health Organization and the Implementation of the International Health Regulations* in A. Bianchi and A. Peters (eds.), *Transparency in International Law*, Cambridge University Press, Cambridge, 2013, p. 275. See also F. P. Grad, *The Preamble of the Constitution of the World Health Organization*, (2002) 80(12) Bulletin of the World Health Organization, p. 981.

20 X. Yi-chong and P. Weller, *International Organisations and State Sovereignty: The World Health Organisation and Covid-19*, (2020) 39(2) *Social Alternatives*, p. 51.

nical assistance and, in emergencies, offer the necessary aid.[21] Importantly, as we shall see later in Section 3, the WHO also verifies the information that governments provide.

For these purposes, the Constitution assigns the Assembly the functions of determining policies, research, and budgets as well as reviewing and approving the reports and activities of the Board.[22]

The organisation's staff of officials provides scientific and technical expertise, while political representation is ensured by delegates representing the States Parties. In this regard, the delegates of States Parties are «*chosen from among persons most qualified by their technical competence in the field of health*», and «*preferably representing the national health administration of the Member*».[23]

The WHO is in charge of leading and coordinating activities on health matters in the United Nations system in many ways. It provides guidance on global health issues, directs health research, and makes health policy choices based on the best scientific knowledge. Furthermore, it provides technical expertise to Member States, supervises and assesses health trends, finances medical research and supplies emergency aid in the event of an emergency.[24] It also contributes to improving the nutrition, housing, hygiene and working conditions of people around the world.[25]

Administrative activity is precisely outlined in Article 2 of the Constitution. It focuses on specific aspects of the coordination and management of health emergencies, as the major challenge that the WHO faces as an IO stems

21 WHO Constitution, Arts 1-2.
22 Ibid, Art. 18 indents (*a*), (*f*), (*k*).
23 Ibid, Art. 11.
24 Recently, with regard to the pandemic, see B. M. Meier, A. Taylor, M. Eccleston-Turner, R. Habibi, S. Sekalala, and L. O. Gostin, *The World Health Organization in Global Health Law*, (2020) 48(4) The Journal of Law, Medicine & Ethics, p. 799. The authors claim that «*[i]t will be crucial to reform global health law to prepare for future global health challenges, but WHO member states find themselves at a crossroads in their reforms: accept the divisive nationalist responses which have characterized the response to Covid-19 or recommit to international cooperation through global health governance*».
25 WHO Constitution, Art. 2 indent (*i*).

from its responsibility for eradicating epidemics.[26] Specifically, it acts as a co-ordinating authority to assist governments in strengthening health services and to provide appropriate technical assistance and support, as well as to establish and maintain administrative and technical services, including epidemiological and statistical services.[27]

In this context, the Assembly, while generally responsible for making "recommendations to Members with respect to any matter within the competence of the Organization,"[28] is specifically entrusted with crucial activities, such as the adoption of regulations concerning sanitary and quarantine requirements to prevent the international spread of disease.[29]

Similarly, the Board is responsible for the crucial activity of taking emergency administrative measures to deal with events, such as pandemics, that require an immediate response.[30] It authorises the Director-General to take the necessary administrative steps to combat pandemics and to participate in the organisation of health relief to the victims of a calamity.[31]

As part of its organisational structure, regional offices of the WHO played a particularly important role during the pandemic. We may mention in this respect the Report[32] of the Pan-European Commission on Health and Sustainable Development. This document sheds light on one of the most serious problems during the pandemic, namely the absence of an effective WHO cooperation and coordination strategy.

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26 For an overview see Y. Beigbeder, *World Health Organization (WHO)*, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. X, Oxford University Press, Oxford, 2012, pp. 928-930.
27 WHO Constitution, Art. 2 indents (*a*), (*d*), (*f*).
28 Ibid, Art. 23. On this point, see A. L. Taylor, *International Law and Public Health Policy*, *supra note* 14, p. 675. Taylor points out that, in making recommendations and adopting regulations, the WHO is "a fairly unique lawmaking device in the international system".
29 Ibid, Art. 21 indent (*a*).
30 Ibid, Art. 28 indent (*i*).
31 Ibid.
32 WHO Regional office for Europe, Drawing Light from the Pandemic: A New Strategy for Health and Sustainable Development (September 2021).

In the context of power sharing, regional coordination in health matters is particularly important. Not surprisingly, the European regional office played a crucial role in managing the outbreak of Covid-19 in Italy at the very beginning of pandemic, where the situation was worse than elsewhere. Despite these efforts, it is clear that there was a lack of effective coordination between offices. As we shall see later, this is precisely because of the lack of sharing of administrative powers between the various levels of government, especially regional and central.

In outlining the main features of the WHO's organisation and activities, we have learned a little more about how this organisation should function in responding to an emergency. The next step is to look at the role the WHO played in the recent pandemic. To this end, we will need to explore the administrative power accorded to it by the international legal system.

Not surprisingly, it has recently been argued that one of the main causes of the WHO's failure in managing the pandemic lies in its lack of "intrusive powers."[33] Nevertheless, claiming that achieving global health requires intrusive powers does not sound like a compelling argument.

My point here is that an analysis of the legal context of the main international standards teaches us that the Constitution and the IHR see the WHO as an authority that is not equipped with coercive or intrusive administrative powers, but with soft law powers. In order to avoid undermining the rights of persons.[34]

I aim to show that the WHO does not need more intrusive powers but rather sharing powers. In doing so, Section 3 analyses the legal grounds of the

33 See E. Benvenisti, *The Who-Destined to Fail?: Political Cooperation and the Covid-19 Pandemic*, 114(4) (2020*)* The American Society of International Law, p. 590, doi:10.1017/ajil.2020.66.
34 We can argue how the international health commitments extend to human rights law, with the IHR (Art. 3) requiring that domestic implementation «*be with the full respect for the dignity, human rights and fundamental freedoms of persons*». On this argument, see L. O. Gostin, R. Habibi and B. M. Meier, *Has Global Health Law Risen to Meet the Covid-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48(2) (2020)The Journal of Law, Medicine & Ethics, p. 378, doi:10.1177/1073110520935354.

administrative powers, concentrating on the main legal source of international law governing its exercise, the IHR.

3. Administrative powers

Though they are well known to all, we will nevertheless summarise here the main events relating to the outbreak of the Covid-19 pandemic in order to understand the WHO's course of action. To be concrete, we will briefly review the facts that we need to know in order to appreciate what I argue with regard to the lack of sharing of administrative powers.

On 31 December 2019, Chinese health authorities reported an outbreak of pneumonia cases of unknown origin in Wuhan. On 9 January 2020, China's Centre for Disease Control and Prevention (CDC) identified a new coronavirus as the aetiological cause of these illnesses. The Chinese health authorities also confirmed inter-human transmission of the virus.

On 30 January 2020, after the second meeting of the Safety Committee, the WHO's Director-General, Tedros Adhanom Ghebreyesus, declared the international outbreak of coronavirus a Public Health Emergency of International Concern (PHEIC), as enshrined in the IHR.[35] In particular, Article 1 of the IHR defines a PHEIC as an extraordinary event which is deemed, as provided in these Regulations:

(*i*) to constitute a public health risk to other States through the international spread of disease;

(*ii*) to potentially require a coordinated international response.

On 3 February 2020, the WHO issued a specific action plan for governments, the "Strategic Preparedness and Response Plan" containing measures needed to address the emergency. Specifically, the plan aimed to:

35 On the reform of the IHR, see L.O. Gostin, *International Infectious Disease Law. Revision of the World Health Organization's International Health Regulations*, 291(21) (2004) Health Law and Ethics, p. 2361, doi:10.1001/jama.291.21.2623. For the WHO's response to a previous pandemic, e.g. SARS, see S.E. Davies, A. Kamradt-Scott and S. Rushton, *International Norms and Global Health Security*, Johns Hopkins University Press, Baltimore, 2015) pp. 43-73; D.P. Filder, *Sars, Governance and the Globalization of Disease*, Macmillan Publishers, London 2004.

1) coordinate action across regions to assess, respond to, and mitigate risks;

2) improve country preparedness and response;

3) accelerate research and development.[36]

On 11 March 2020, the Director-General issued the pandemic declaration.[37]

Against this backdrop, I address the main criticisms levelled at the WHO and seek to explain them in the light of the current legal framework and the latitude of the administrative powers accorded to the WHO. In brief, I can say that the main criticisms focused on the lack of transparency,[38] as well as on the slow response to the spread of the outbreak,[39] the urgent need for "political cooperation" – as distinct from coordination activities,[40] and also on the "light

36 WHO, Strategic Preparedness and Response Plan, updated on 24 February 2021, https://www.who.int/publications/i/item/WHO-WHE-2021.02. Retrieved 16 November 2021.
37 WHO, Director-General's opening remarks at the Mission briefing on Covid-19, 12 March 2020, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19---12-march-2020. Retrieved 18 November 2021.
38 O. Jansen, Increasing the Legitimacy of the World Health Organization, *The Regulatory Review* (2020), https://www.theregreview.org/2020/04/22/jansen-increasing-legitimacyworld-health-organization/.
39 See D. N. Durrheim et al., *When Does a Major Outbreak Become a Public Health Emergency of International Concern?*, 20 (2020) Lancet Infectious Diseases, p. 888. See also Independent Panel for Pandemic Preparedness and Response, Covid-19: Make it the last pandemic. May 2021. https://theindependentpanel.org/mainreport. Retrieved 25 November 2021; and J. Wise, *Covid-19: Global Response was too Slow and Leadership Absent*, Report Finds, (2021) *British Medical Journal*, p. 373, https://doi.org/10.1136/bmj.n1234.
40 E. Benvenisti, *The Who-Destined to Fail?: Political Cooperation and the Covid-19 Pandemic*, *supra note* 33, p. 588. Though this argument is well founded and convincing, it does not seem sufficient to explain the actual extent of the WHO's failure. My point is that we have not only a political reason, but a legal one. See also J.P. Ruger, *Global Health Justice and Governance*, *supra note* 11, pp. 247-248. Ruger emphasises that WHO is weakened institution, riddled with budgetary problems and power politics. In addition, its reputation, effectiveness, and legitimacy have diminished greatly. In fact, the WHO's failing in addressing the 2014 West African Ebola outbreak showed that it lacks an emergency operation culture and the capacity to prevent and contain pandemics.

touch" approach to the Chinese government[41] or on the absence of sanctions for Member States breaching IHR provisions.[42]

Conceivably, it could be argued that although the first outbreak was reported in late December 2019, the WHO was ineffective in responding to the emergency. Indeed, as we have seen, the Director-General did not declare a PHEIC until 31 January 2020 even though the Emergency Committee had already been convened on 23 January 2020,[43] when the criteria for declaring a PHEIC had been met.[44] And yet, we know that the doctrine of international law holds that the PHEIC is the main legal tool, along with the pandemic declaration, empowering the Director-General to exercise the function of "international public authority."[45]

Further flaws were identified by those who noted that countries either delayed or did not implement the administrative containment and mitigation measures recommended by the WHO following the PHEIC.[46] This last point shows how the lack of effective sharing of administrative powers by WHO – which I discuss in this article – can result in poor cooperation by States Parties.

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41 X. Yi-chong and P. Weller, *International Organisations and State Sovereignty*, *supra note* 20, p. 50. We do not intend here to diminish the possible responsibilities of the WHO, nor of States Parties such as China, but rather to show that these responsibilities depend significantly on the current architecture of the international legal system set up by the IHR.

42 See J.E. Alvarez, *The WHO in the Age of the Coronavirus*, (2020) 20-30 New York University School of Law Public Policy & Legal Theory Paper Series Working Paper, p. 9.

43 See WHO, *Statement on the First Meeting of the International Health Regulations* (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)' 23 January 2020, https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

44 D.N. Durrheim et al., *When Does a Major Outbreak Become a Public Health Emergency of International Concern*?, *supra note* 39, p. 888.

45 P.A. Villareal, *Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions between Legitimacies*, (2016) 1 Goettingen Journal of International Law, p. 95.

46 O. Jansen, *Administrative Law Rules and Principles in Decisionmaking of the World Health Organization during the Covid-19 Pandemic*, (2021) 73(1) Administrative Law Review, pp. 183-185. Jansen noted that «*[t]he WHO has issued several temporary recommendations regarding Covid-19 that the addressee states have not consistently complied with*». See also C. Liu, *The World Health Organization: A Weak Defender Against* Pandemics, (2021) 28(2) Virginia Journal of Social Policy & the Law, pp. 174-219.

These and other criticisms offer an opportunity to analyse some of the key norms on the administrative powers that the WHO can exercise as an authority in charge of managing emergencies. For this purpose, exploring the regulatory power to determine a PHEIC granted by the IHR is crucial to understanding the role and responsibility of this authority.[47]

To do so, I can look upon the IHR as offering a comprehensive legal framework for coordinating disease detection, reporting and response at the global level.[48]

In this regard, Article 12(1) IHR establishes that the WHO's Director-General «*shall determine [...] whether an event constitutes a public health emergency of international concern*» according to the criteria and the procedure laid down in the IHR. However, Article 12(2) specifies that before determining such an emergency, the Director-General «*shall consult with the State Party in whose territory the event arises regarding this preliminary determination*».

To be sure, this is a key point to better understand the problem that occurred during the Covid-19 pandemic. It should be clear that, at the level of administrative action, the WHO does not generally commence an *ex officio* proceeding to ascertain whether there are facts leading to a PHEIC declaration. Rather, it is up to the States Parties to notify the WHO of the existence of a potential PHEIC within 24 hours (Article 6 IHR).

47 L.O. Gostin et al., T*he International Health Regulations 10 Years On: The Governing Framework for Global Health Security*, (2015) 386, Lancet, p. 2222. See also D.P. Fidler, *SARS, Governance and the Globalization of Disease*, Palgrave Macmillan, London, 2004, p. 32, where it is said that the IHR are «*the only set of international legal rules binding on WHO member States concerning the control of infectious disease*. See also G.L. Burci, J. Hasselgård-Rowe, *Through the Rule of Law Looking* Glass, 18(3) (2021) International Organizations Law Review, pp. 307-334, where the important parts of the IHR affecting their relevance and effectiveness, the lack of clarity for processes leading to sensitive executive decisions, the absence of compliance assessment mechanisms resulting in lack of accountability for states parties, and an inadequate inclusion of human rights guarantees are carefully examined.

48 E. Bruemmer and A.L. Taylor, *Institutional Transparency in Global Health Law-making*, *supra note* 19, pp. 277-280. The authors argue that the objective of the IHR is to develop a framework for national policies and global cooperation to manage potential health emergencies of international concern and to provide resources of the international community to dealt with such emergencies. To this end, Art. 2 provides «*a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade*».

Furthermore, in determining the public emergency, the Director-General acts «*on the basis of the information*» received from «*the State Party within whose territory an event is occurring*», in accordance with the provision of Article12(4) (a) IHR.

What does this last point mean? Of course, that without that information or with bad or otherwise unclear information, the procedure for determining the emergency by the WHO is inevitably flawed.

In addition, Article 12(2) IHR clarifies that the Director-General and the State Party should be «*in agreement*» regarding the PHEIC determination. If they are, the Director-General issues «*appropriate temporary recommendations*» (Article 15-18 IHR) by seeking the «*views*» of the Emergency Committee. In addition, according to Article 12(3) IHR, if no consensus is reached between the Director-General and the State Party within 48 hours, a determination must be made (Article 49 IHR).

Part IX, Chapter II (Articles 48-49) of the IHR provides for the composition and procedures of the Emergency Committee. Regarding the composition, pursuant to Articles 47(1) and 48(2) IHR, the Emergency Committee must be composed of experts in all relevant fields of expertise (the "Expert Roster") selected by the Director-General.[49] In particular, the Emergency Committee has an important role in providing its own views on three important issues: *i*) whether an event is a PHEIC; *ii*) deciding on the duration and therefore termination of the PHEIC; *iii*) proposing temporary recommendations as well as requesting their modification, extension or termination.

49 The IHR mandate the creation of an Expert Roaster from both the Emergency and Review Committees be drawn. The criticisms of the Emergency Committee brought the WHO's policies on experts into the spotlight. To face such criticisms while fulfilling its organisational objectives, the WHO must ensure that its regulations with respect to experts adequately address conflicts of interest and other transparency dilemmas. Currently, the Regulations for Expert Advisory Panels and Committees address the "International Status of Members" in Art. 4.6, which specifies that experts serve in their individual capacity and mandates that they "shall disclose all circumstances that could give rise to a potential conflict of interest as a result of their membership of an expert committee, in accordance with the mechanisms established by the Director-General for that purpose". In this regard, see E. Bruemmer and A.L. Taylor, *Institutional Transparency in Global Health Law-making*, *supra note* 19, pp. 290-291.

However, interpreting the provisions of this part of the IHR, I aim to argue that even here international law regards the State Party as having an important role in the decision-making process of determining a PHEIC. In this respect, Article 48(2) IHR clarifies that «*[a]t least one member of the Emergency Committee should be an expert nominated by a State Party within whose territory the event arises*». In addition, pursuant to Article 49(4) IHR, the same State Party may present its views to the Emergency Committee. In this connection, the State Party may submit temporary recommendations to the Director-General or propose the termination of a PHEIC [Article 49(7)].

Focusing on administrative emergency response measures, my point is to show that even the recommendations issued by the WHO need to be "shared" with Member States before being implemented. Indeed, the factors to be considered when «*issuing, modifying or terminating temporary or standing recommendations*» listed in the «*[c]riteria for recommendations*» set out in Article 17 IHR start with «*the views of the States Parties directly concerned*».

As matter of fact, during the last pandemic we learned that the State Party has a key role in PHEIC administrative procedure in terms of sharing crucial powers like administrative ones with the WHO and thus contributing to the correct determination of a global health emergency.

Arguably, sharing powers is a challenge for effective emergency management. This is especially true in view of the fact that the WHO lacks power to impose sanctions for breaches of sharing information committed by States Parties.[50]

We can believe, for instance, that the power to determine a PHEIC is largely dependent on the information submitted by the State Party, while the WHO does not enjoy sufficient freedom to consider other non-governmental sources. Admittedly, the WHO can consider other sources of information (so-

50 See P.A. Villarreal, *The 2019-2020 Novel Coronavirus Outbreak and the Importance of Good Faith for International Law*, *Völkerrechtsblog* 28 January 2020, doi: 10.17176/20200128-225858-0, who suggests «*[r]evisiting the importance of good faith for international law*» as a possible solution to ineffective information sharing between the WHO and States Parties.

called "reports") according to Article 9 IHR. Nevertheless, reasonable arguments on the ineffectiveness of verifying sources aside,[51] this power is significantly limited, and «*before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring*».[52] Furthermore, it is reasonable to assume that countries where a health emergency is occurring tend to take their time in passing on information that could be counterproductive to their interests, especially with regard to the economic consequences that may result from the PHEIC declaration.

My point is that looking at the architecture of the administrative powers granted to the WHO by the Constitution and IHR has been fruitful in appreciating how this authority is conceived in international law. I am quite aware of the legal limits that this authority faces in dealing with emergencies, and thus can make some suggestions for addressing the WHO's weaknesses.

To do so, in the next section we will analyse the impact of the pandemic on the global economy. We will then draw some conclusions.

4. Impact on the global economy

According to the World Bank the Covid-19 pandemic caused one of the biggest global economic crises in recent years.[53] Some of the main reasons include the restriction of mobility, lockdowns, and other public health measures needed to address the outbreak.[54] The world economy has been severely challenged, especially among developing countries. Looking at some data, in 2020 the world economy shrank by about 3%.[55] To try to limit the impact of the cri-

51 L.O. Gostin et al., *US Withdrawal from WHO Is Unlawful and Threatens Global and US Health and Security*, (2020) 396, *Lancet*, p. 293.
52 Cf. Art. 9 IHR.
53 The World Bank, World Development Report 2022, *Finance for an Equitable Recovery* available at https://www.worldbank.org/en/publication/wdr2022. See I.A. Moosa, *The Economics of COVID-19: Implications of the Pandemic for Economic Thought and Public Policy*, Elgar, Northampton 2021.
54 See E. Hudd, *The Economic Impact of COVID-19*, Abdo Publishing, Minnesota, 2021.
55 Global real GDP growth in 2020 is estimated at –3.1 % in the International Monetary Fund's World Economic Outlook (IMF 2021c) and –3.5 percent in the World Bank's Global Economic Prospects (World Bank 2021a).

sis on households and businesses, governments adopted rapid policy responses, accompanied by a combination of fiscal, monetary, and financial policies.[56]

Though this combination of policies has contributed to limiting the economic damage in the short term, the health crisis has also exacerbated a number of economic fragilities, such as rising public and private debt. As the crisis unfolded, it became clear that many households and businesses were not prepared to withstand the economic shock for long. In 2020, more than 50% of households around the world were unable to meet their basic expenses for more than three months due to the loss of income, while companies' cash reserves were able to meet expenses for less than two months.[57]

Still in 2020, the incidence of temporary unemployment was highest for workers who had completed primary education in 70% of the countries. In addition, undertakings in the informal economy and those with more limited access to the credit market were most affected by the economic crisis. On average, the informal economy accounts for an estimated 34% of Gross Domestic Product (GDP) in Latin America and Africa, 28% of GDP in South Asia. In India, over 80% of the labour force is informal. Many low-income countries struggled to mobilise the resources needed to combat the immediate effects of the pandemic and had to take on new debt to finance the crisis response. In middle-income countries, the fiscal response varied significantly, reflecting marked differences in the ability and willingness of governments to mobilise fiscal and spending resources for support programmes.[58]

In many cases, fiscal emergency measures were supported by monetary policy interventions: several central banks in major emerging economies used unconventional monetary policies as asset purchase programmes for the first time in history. These programmes supported the fiscal response and provided

56 See M.C. Apedo-Amah, B. Avdiu, X. Cirera, M. Cruz, E. Davies, A. Grover, L. Iacovone, et al., *Unmasking the Impact of COVID-19 on Businesses: Firm Level Evidence from across the World*, (2020) Policy Research Working Paper 9434, World Bank, Washington, DC.
57 The World Bank, World Development Report 2022, *Finance for an Equitable Recovery*, *supra note* 53.
58 *Ibid.*

liquidity when it was needed.[59] However, this monetary policy has resulted in growing inequality between countries, due to the constraints many governments have faced in assisting families and businesses.[60] Financial instability, household and corporate indebtedness, reduced access to credit and rising sovereign debt are the main risks to which governments will have to respond.[61] For many low-income countries, tackling sovereign debt will be the priority. Middle-income countries, whose financial sectors are more exposed to corporate and household debt, could, by contrast, focus on policies that support financial stability.[62]

Such a worst economic scenario was confirmed by the Organisation for Economic Co-operation (OECD), which estimated that world economic growth would fall by 0.5% during the health crisis, from 2.9% to 2.4%.[63] Furthermore, the International Monetary Fund (IMF) confirmed such a trend, noting that global economic growth fell to an annualised rate of around -3.2 % in 2020, with a recovery of 5.9 % expected in 2021, and 4.9 % in 2022.[64]

The impact of the health crisis on the global economy emphasises the important role the WHO plays in effectively coordinating government policies during an emergency. When a pandemic has to be managed by international or-

59 See D. Paweł and R. Wisła, *The Socioeconomic Impact of COVID-19 on Eastern European Countries*, Routledge Studies in the European Economy, Abingdon, Oxon, New York, 2022. The authors analyse the directions and dynamics of the spread and its socioeconomic consequences, and provide a comparative analysis of fiscal and monetary packages employed by Europe, with an emphasis on Eastern European countries.
60 See A. Tauseef, H. Haroon, B. Mukhtiar, and H. Jin, *Coronavirus Disease 2019 (COVID-19) Pandemic and Economic Impact*, (2020) 36 Pakistan Journal of Medical Science, p. 1.
61 See W. McKibbin, F. Roshen, *The Global Macroeconomic Impacts of COVID-19: Seven Scenarios*, (2021) 20(2) Asian Economic Papers, pp. 1-30. According to the authors, economic costs could be significantly avoided with greater investment in public health systems in all economies, particularly in economies where health care systems are less developed and population density is high.
62 The World Bank, World Development Report 2022, *Finance for an Equitable Recovery*, *supra note* 53.
63 OECD Interim Economic Assessment: Coronavirus: The World Economy at Risk, Organization for Economic Cooperation and Development. March 2, 2020, https://www.oecd.org/economic-outlook/march-2020/.
64 World Economic Outlook Update, International Monetary Fund, October, 2021, p. 6, https://www.imf.org/en/Publications/WEO/Issues/2021/10/12/world-economic-outlook-october-2021.

ganisations, this does not only threaten the health system, but other sectors of the economy as well. Nonetheless, some major weaknesses of the WHO emerged in order to manage an emergency effectively. One of the main problems of the WHO is the loss of control over the regular budget.[65] This has led to a progressive privatisation of this organisation. Although the Member States adopt the programme's budget, it is only partly financed in a predictable manner (20%) while around 80% of the budget is in the hands of voluntary (public and private) contributors, including philanthropic entities such as the Bill & Melinda Gates Foundation and industrialised countries that make donations for specific purposes often chosen by them unilaterally.[66]

Perhaps the most urgent reform of the WHO that should be addressed by the States Parties is to ask how and by whom this agency is financed. In this regard, the public and multilateral character of the institution should be recovered. These characteristics are a prerequisite for effectively placing the WHO at the service of global public health. Increasing the regular public budget will allow this organisation to address the priorities set by all States Parties without having to constantly follow the priorities of an agenda set by donors.[67]

Pandemic is a global phenomenon whose control requires an international task sharing and effective global coordination.[68] Currently, the WHO is responsible for coordinating the administrative policies of governments. Indeed, as we have argued, both the Constitution and the IHR assign the WHO a mandate to prevent and respond to international emergencies in the form of disease outbreaks and pandemics.[69] Nevertheless, the health crisis showed up all the weaknesses of both the WHO and the States Parties in managing administrati-

65 On the budget see WHO, *How WHO is Funded*, https://www.who.int/about/funding.
66 See G. Velásquez, *Germán. Vaccines, Medicines and COVID-19: How can WHO be given a Stronger Voice?* Springer Briefs in Public Health, Cham, Switzerland, 2022, p. 97.
67 *Ibid*, p. 98.
68 See R.C.R. Taylor, *The global governance of pandemics*, 43(6) (2021) Sociology of Health & Illness, pp. 1540-1553.
69 See G.L. Burci and J. Hasselgård-Rowe, *Through the Rule of Law Looking Glass*, *supra note* 47, pp. 307-334.

ve powers in a shared way with participation of all institutional actors. Hence, I believe that it is necessary to rethink the administrative power of the WHO.

5. Conclusion

In the light of the analysis of the legal and economic framework, we would be inclined to think that the main weaknesses are due only to the limited administrative powers conferred on the WHO by international law. However, if we turn our attention to understanding why international norms like the Constitution and the IHR have devised such limitations, we can see that concerns about the intensity of powers are, in the main, unfounded.

I believe that such concerns are unfounded because the WHO should no longer act through intrusive and invasive powers over civil rights and liberties, but by sharing their powers with the subjects of the proceedings. As I argued in this article, sharing powers here means more precisely negotiating administrative measures with the various actors involved in the procedure. Not by imposing conditions in an authoritarian and unilateral manner, but by cooperating and reaching a decision that satisfies the interests of all parties to the proceedings.

Importantly, the international norms have designated the WHO as an organisation that exercises administrative powers in a non-authoritarian manner in order to achieve the highest possible level of health for all people, without undermining other legally protected interests. To do so, I suggest it needs sharing powers with States Parties rather than more intrusive powers over States Parties.[70] In this regard, from the point of view of the impact of health crisis on the global economy, coordinated and shared emergency management by the WHO and States Parties is crucial in emergencies. GDP losses, public debt accumulation, market and corporate failures, and loss of jobs and savings can at

70 See D. Vese, *Managing the Pandemic: The Italian Strategy for Fighting Covid-19 and the Challenge of Sharing Administrative Powers*, European Journal of Risk Regulation, 2020, p. 5, doi:10.1017/err.2020.82.

least be mitigated by effective governance by the WHO and other institutional actors.

Sharing powers – and more precisely administrative powers[71] – means here that the WHO implements measures and strategies for managing the emergency in agreement with the States Parties, by allowing the participation in the proceeding of governments, national health authorities, and other non-state actors involved in the decision-making process.

I claim that one of the WHO's main weaknesses in managing emergencies, namely the slow or ineffective determination of the PHEIC, is due to a lack of or ineffective sharing of powers in the administrative proceedings. This means that the decision-making process whereby the authority chooses a measure and more generally an administrative strategy for managing an emergency should be exercised with the participation of all actors involved in the administrative proceedings. [72]

I mean that the WHO should not impose public power through measures that negatively affect the subjective sphere and disproportionately restrict civil rights and freedoms. Rather, the WHO should share its power through measures that are the result of negotiated procedures.

In other words, administrative measures taken by the WHO should be the result of negotiation among different actors. Those actors must be placed in such a position as to act on an equal footing with the administrative author-

71 According to L.O. GOSTIN and L.F. Wiley, *Public Health Law: Power, Duty, Restraint*, *supra note* 4, p. 5, a theory of public health law can be defined as «*the state's legal powers and duties to assure the conditions for people to be healthy, and limits on the state's power to constrain individual rights*». Limiting the powers of the state to restrict people's legally protected interests is a great challenge for public health law.

72 The theory of the participation of institutional actors and persons in the administrative procedure – of which my argument on the "sharing of administrative powers" is a development, is argued by some prominent scholarships in the doctrine of Italian administrative law. In this regard, we refer to F. BENVENUTI, *Il nuovo cittadino: Tra libertà garantita e libertà attiva* [*The New Citizen: Between Guaranteed Freedom and Active Freedom*], Marsilio, Venezia, 1994; G. PASTORI, *La procedura amministrativa* [*The Administrative Procedure*], Neri Pozza, Vicenza, 1964. L.R. PERFETTI (ed.), *Le riforme della l. 7 agosto 1990, n. 241 tra garanzia della legalità ed amministrazione di risultato* [*The reforms of Law No 241 of 7 August 1990 between guarantee of legality and result-oriented administration*], Padova: Cedam, Padova, 2008).

ity. To do so, such authority must *share* rather than *impose* its powers in an authoritarian and intrusive way.

The Global Outbreak Alert and Response Network (GOARN), a global partnership of public health institutions, UN agencies, International and national NGOs, academic institutions and consortiums, and other organisations to monitor and respond to pandemics, is a paradigmatic case of power sharing by WHO with the main actors in charge of managing a global health crisis.[73] Although it does not fund it directly, WHO provides much of the staff and assistance to the GOARN. Therefore, we welcome those proposals to expand and strengthen this shared crisis management network.

Of course, in the context of a health emergency, sharing administrative powers plays a crucial role both in managing emergencies effectively and in avoiding undermining people's rights. Sharing administrative powers implies that actors in an emergency response need to share policies and strategies to achieve effective public health outcomes while minimising restrictions to individual rights. This meaning complies with the definition of public health law.

I might wonder whether more intrusive powers would have allowed the WHO to achieve better outcomes in terms of China's cooperation in adopting an effective strategy to frame and respond to the pandemic.

Nevertheless, as we have seen, administrative powers were poorly shared during the pandemic, as China failed to provide adequate and timely information, data and documents needed to make the decision-making process effective in managing the emergency.

Thus, it can be reasonably argued that even with more powers, WHO still needs participatory and shared administrative proceedings. The need for sharing powers rather than authoritative ones poses a challenge to the future

73 See GOARN, https://extranet.who.int/goarn/. See also the Fourth meeting of the GOARN partners, https://apps.who.int/iris/bitstream/handle/10665/354406/9789240046955-eng.pdf?sequence=1.

role of the WHO as we move towards the "era of pandemics".[74] Arguably, the challenge of sharing powers can help the WHO, States Parties and all actors involved in emergencies to avoid interfering with persons' rights and avoid serious economic spillovers.

74 See the Editorial *A Pandemic Era*, (2021) 5(1) The Lancet Planetary Health, doi.org/10.1016/S2542-5196(20)30305-3.