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# (Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility

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## Abstract:

International Health Regulations (IHR) of the World Health Organization (WHO) are fundamental to ensure an adequate response of the international community to health emergencies such as the spread of the virus Ebola in 2014. This notwithstanding, WHO's Member States appear reluctant to comply with the IHR and in particular they violate the ban on unnecessary trade and travel restrictions. After having presented the lack of compliance with the IHR, the present article analyses the means at the disposal of the WHO for sanctioning the behaviour of its Member States, both from the perspective of WHO's internal rules and from the perspective of the law of international responsibility, evaluating if countermeasures might represent a viable solution. The conclusions will offer a broad reflection on the codification process of the rules on the responsibility of international organisations concluded by the International Law Commission in 2011.

**Keywords:** world health organization, international health regulations, countermeasures, draft articles on the responsibility of international organizations, unnecessary containment measures

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## 1 The pathological lack of compliance with the 2005 International Health Regulations

Ensuring compliance with their own rules is a crucial task for international organisations.<sup>1</sup> In the case of the World Health Organization (WHO), the lack of compliance with the 2005 International Health Regulations (IHR)<sup>2</sup> has become a rather pathological situation.<sup>3</sup> Such a pathology is already well known and it is rooted in WHO's Member States' attitude toward the respect of IHR and even the Organisation's own recommendations during epidemic outbreaks. In fact, practice reveals that Member States' quite often violate both the IHR and WHO's recommendations, thus posing a threat to a communitarian management of health crises and calling the WHO to react.

The Organisation, however, does not currently appear able to sanction the behaviour of its members who violate these norms and, consequently, it does not seem fit to halt this practice. This is clear from WHO's own assessment of its ability to react to IHR violations during an epidemic outbreak. The Ebola Interim Assessment Panel, established by the Executive Board of the WHO to assess the response of the international community to the spread of the Ebola virus,<sup>4</sup> clearly outlined this problem in its final report published in July 2015.<sup>5</sup> In the report, the Panel urged the WHO to establish and implement a mechanism that allows for the sanctioning of Member States, which directly or indirectly violate the IHR and/or the Organisation's own recommendations.<sup>6</sup> Certainly, this is not the first warning that WHO has received. The assessment of Member States' response to the 2009 bird flu epidemic (the H1N1 virus), in fact, brought similar issues to light.<sup>7</sup> It is with no surprise that this problem has become a central one in the WHO Director General's speeches, which demonstrates that the Organisation's management has no intention of hiding the problem.<sup>8</sup>

So, what are the IHR violations that make WHO accept the blame? The Director General's speech referred to above could help identify at least two categories of violations. The first can be summarised as a general problem of compliance with the IHR. As the Director General admitted: «[e]ight years after the IHR entered into force, fewer than a third of WHO Member States meet the minimum requirements for core capacities to implement the IHR».<sup>9</sup>

The second category – that will be the object of this article – groups together a series of violations of the IHR and of WHO recommendations and refers to cases where WHO Member States adopt containment measures

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that are stricter than those requested by WHO. These measures are frequently seen as severely limiting communication with States that have been hit by epidemics. In some cases, these measures can amount to a severe limitation of individuals' freedom of movement and of trade relationships.

As this article will show, IHR violations belonging to the second category are serious for two reasons. Firstly, because they severely reduce the effectiveness of a coordinated international response during an epidemic outbreak and, secondly, because they attack WHO's credibility. In fact, the rules that are frequently violated were designed and implemented by an authority – the WHO – that should be able to coordinate and to guarantee effective action during an epidemic outbreak. They are also rules that the Organisation's Member States have agreed to adopt and to abide by.

Against this background, it would be natural to wonder what tools WHO has at its disposal to urge on its Member States to respect IHR or to sanction their violations. In particular, it might be of interest to scrutinize if general international law can offer a remedy to the lack of compliance; namely, if the WHO could adopt countermeasures to this end.

Countermeasures can be seen as an evolution of the concept of retaliation. They are tools that States use to induce other States to cease violating a commitment made under international law.<sup>10</sup> Countermeasures are a powerful tool as they can lead to certain international rules being suspended between parties. They are literally "self-help" measures that States can ultimately turn to should violation of an international law obligation threaten their interests.<sup>11</sup>

The adoption of countermeasures by international organisations «is not categorically ruled out»,<sup>12</sup> although it seems obvious that they represent a limited and extreme scenario. It is no coincidence that the International Law Commission's (ILC) Special Rapporteur Giorgio Gaja, who we just quoted earlier, maintains that «[t]he question of countermeasures was the most difficult for the Commission»<sup>13</sup> during the drafting of the Draft Articles on Responsibility of International Organisations (DARIO).

The hurdles that the ILC had to cope with concern the nature of international organisations and their relationships with their Member States. With the first profile, it is important to recall that resorting countermeasures is a typical prerogative of States' exercise of sovereign powers. It could be held, in fact, that States resort to countermeasures as they are primary subjects of international law. But, can the same be said of international organisations? This line of research was explored several years ago<sup>14</sup> and led us to believe that international organisations can, in principle, adopt countermeasures in the relationship with other international organisations, or with non-member States.<sup>15</sup> However, it is still unclear and obscure whether, to what extent and under what conditions an international organisation can resort to countermeasures in the relationship with its Member States.

Relationships of this kind are particularly important for the purpose of this article as WHO's membership is (almost) universal. For this reason, this investigation will focus on the relationships between the Organisation and its Member States. Obviously, situations where WHO has had to "react" to other international organisations cannot be excluded, but, as we will explain later, the most obvious problem lies in the relationship between the WHO and its members.

The research hypothesis is that, at least on paper, resorting to countermeasures could be a useful tool to help WHO reduce IHR violations, but it is not plausible. Such a hypothesis will lead to a general reflection on the attitude of the WHO toward the lack of compliance with the IHR in the management of international health crises. An attitude that seems to be accommodated by the current state of the art of the law on international organisations.

To develop this idea, this article is then divided into two parts. The first will present WHO's problems of compliance with the IHR in the wider context of the Organisation's role in the management of health crises; this part will be closed by explaining that the lack of compliance is due to a lack of a sanctioning mechanism, which deprive the WHO of any possible deterrent to a widespread State's practice of violating the IHR. Moving from the conclusion of the first part, the second one will explore an alternative route: the law regulating the adoption of countermeasures by international organisations against their Member States as codified by the ILC, with a view of analysing the legal constraints and the political hurdles surrounding the resort to countermeasures by the WHO for sanctioning the violation of the IHR. This second part will also scrutinize if WHO's Member States could resort to countermeasures in their *inter se* relationships. In the final paragraph of the article the analysis performed in the two parts will help formulating some general reflections that go beyond the specific case.

## 2 The role of the World Health Organization and of the 2005 International Health Regulations in the management of health crises

Violations that threaten the effectiveness and credibility of WHO's actions can be traced back to certain States' negative attitudes towards the content of the 2005 IHR. Therefore, it is necessary to outline the norm features that these States violate, which will help to explain the gravity of their violations. It is equally useful to understand the IHR in the context they have been adopted.

The treaty that established WHO is defined as the Organisation's "Constitution".<sup>16</sup> Labels usually say little of the nature or content of an international treaty; however, as concerns the WHO, the choice of the term does not seem coincidental. In fact, on paper, the Organisation's powers described in its Constitution are broad and penetrating enough to impact Member States' behaviour significantly and to affect the international community's overall ability to avoid epidemics from spreading and help improve health standards.<sup>17</sup>

The powers referred to above are listed in Art. 2 of the Constitution which is a very long and complex norm that lists around twenty functions for WHO to implement.<sup>18</sup> They range from the definition of technical standards (Letter D) to the coordination of the international community's efforts regarding health care (Letter A). Such a wide range of functions contributed to strengthening WHO's public dimension,<sup>19</sup> which has increasingly supported the technical one and continues to make the Organisation stand out.<sup>20</sup> In fact, it looks like WHO wants to be recognised as the leading international organisation for health rights,<sup>21</sup> appointed by a universal and vocational mandate.<sup>22</sup>

The public implications of WHO's mandate are particularly obvious when we consider its copious production of norms – or para-norms – i. e. its ability to design and impose standards of conduct in health matters on Member States.<sup>23</sup> WHO's competence for drafting regulations binding upon its member states originates from Art. 21 and 22 of its Constitution. The former gives the Organisation the powers to impose regulations on certain subjects.<sup>24</sup> The latter closely defines the conditions under which such norms come into force and impact on the organisation's Member States obligations and, lastly, the moment in which they take legal effect.

This last point is interesting and characterises WHO's issue of norms. In fact, Art. 22 states that regulations adopted by the Organisation come into force unless Member States oppose it before a certain date. This is the procedure that Member States use to express their consent, albeit implicitly, to adhere to and abide by the norms that the Organisation has decided to adopt.<sup>25</sup> The IHR were adopted in 2005 following this procedure.

This is the reason why there is uncertainty on their legal nature, as on one side they can be classified as WHO's binding acts, but on the other side they also possess characteristics that are typical of international treaties.<sup>26</sup> It is reasonable to maintain that they are unilateral acts of the WHO because they were formally adopted through a World Health Assembly (WHA) Resolution<sup>27</sup> grounded in Art. 21 and 22 of the Constitution. Viewed from this standpoint, it is difficult to exclude the IHR from the category of the "rules of the organisations", which includes «the constituent instruments, relevant decisions and resolutions, and established practice of the Organisation». <sup>28</sup> On the other hand, there are some factors that might lead to consider the IHR under a different lens. In fact, it is to be noted that States' consent, albeit even tacit, is necessary to the entry into force of the Regulations.<sup>29</sup> Moreover, the IHR are registered with the UN's Secretary General under Art. 102 of the UN Charter<sup>30</sup> and, thus, are open to the ratification to WHO Non-Member States.<sup>31</sup> Lastly, they allow Member States to formulate reservations.<sup>32</sup> To sum up, the IHR share features with common international treaties, appearing, therefore, as a set of obligations agreed between Member States.<sup>33</sup>

We can reasonably conclude that the IHR are an act of a *sui generis* nature,<sup>34</sup> being, at the same time, rules of the organisation and obligations arising from a treaty concluded by WHO Member States. It is probably impossible to draw a clear-cut line to choose the "right" nature of this peculiar act and as we will see later, this conclusion has an impact on the application of the rules on countermeasures.

The 2005 version of the Regulations is the second one. The first dates back to 1951, when WHO adopted the International Sanitary Regulations which later became the International Health Regulations in 1969 after its first overhaul. The model that the first version was inspired by is very different from the current one as it determined specific categories of "illnesses" and only regulated Member States' conduct in those cases. The following version of the IHR, i. e. the current one, was approved in 2005 and does not specify the type of illness, referring only to an «illness or medical condition, irrespective of origin or source that presents or could present significant harm to humans». <sup>35</sup> This means that the current version of IHR appears to be a flexible tool that could be applied in future epidemics, even though they are still unknown today.<sup>36</sup>

Innovations in the new version of the IHR do not only concern their field of application.<sup>37</sup> The 2005 Regulations create a sophisticated system for handling health crises imposing a number of obligations upon Member States. In particular, the latter are obliged to set up national focal points<sup>38</sup>; they also have to monitor and report events to WHO that could lead to the spreading of an epidemic<sup>39</sup> as well as share information.<sup>40</sup> More in general, States are requested to «develop, strengthen and maintain, as soon as possible but no later than five

years from the entry into force of these Regulations for that State Party, the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern».<sup>41</sup>

As we mentioned earlier, these obligations have been designed to make WHO's coordination role increasingly effective, especially during particularly serious situations.<sup>42</sup> In fact, the WHO was assigned the power to examine information it receives from Member States<sup>43</sup> and to assess if conditions are met to declare the existence of a «public health emergency of international concern».<sup>44</sup> Should this be the case, and after having established an *emergency committee*, the WHO has the power to adopt temporary recommendations aimed at containing the health crisis.<sup>45</sup> Such recommendations are not binding, but they are of fundamental importance as they represent the tool that WHO uses to suggest the best measures for States to adopt.<sup>46</sup> It is no coincidence that Art. 43 of the IHR gives WHO the power to make States justify their lack of respect of these recommendations. As we will see in the following paragraph, the concrete application of Art. 43 is at the centre of the Organisation's problems.

### 3 The ban on imposing unnecessary containment measures

The purpose and scope of the IHR (2005) are rather ambitious:

«to prevent, protect against, control and provide 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»<sup>47</sup>

The article mentioned above clearly shows the rationale of the IHR. When there is the risk of an epidemic creating international level consequences, Member States have to respect the standards of conduct that are outlined in the Regulations and set out by the WHO avoiding excessive measures. The last point is crucial as it describes more than others the nature of the IHR. In fact, the IHR appear not just as "minimal" safeguards, but as limits for States to operate within.<sup>48</sup> To put it plainly, it is up to the WHO to set standards that balance the adoption of measures to contain health emergencies with the need to safeguard the economic and trade ties, and more in general the travel arrangements, with the Countries affected by an epidemic.<sup>49</sup>

This appears clearly when reading another IHR norm, the already mentioned Art. 43.<sup>50</sup> This complex article basically authorises Member States to adopt additional epidemic containment measures beyond those covered in WHO's own regulations and recommendations, by adopting a formula that is very similar to the "equivalent protection" developed in international human rights law. As long as States' measures are of equal or better effectiveness compared to the Organisation's standards, they can be considered IHR compatible.<sup>51</sup> However, these States are not free to adopt any measure they consider suitable to contain an epidemic. In fact, Art. 43 imposes a ban on States adopting measures that indiscreetly limit the movement of people and trade flows.<sup>52</sup>

The relationship between the WHO and its Member States in the implementation of additional measures is similar to that characterizing the reception of international rules in domestic legal orders. In fact, the IHR allow States to choose which health measures to adopt during an epidemic, especially if they are more effective. The same regulations, however, pose a sort of "counter limit"<sup>53</sup> on this freedom by maintaining that such measures do not exaggeratedly affect the movement of people or goods.

The imposition of such a limit seems to be inspired by a threefold rationale. Firstly, it tends to protect those States that have been hit by the epidemic. Secondly, it operates as an incentive for States to respect their obligations to report epidemic outbreaks. Lastly, it seems to emphasise WHO's central role in defining universally accepted standards.

WHO is particularly interested by the first rationale and in fact it is invariably on the Organisation's agenda at public meetings. States hit by epidemics need many different types of aid, not only those immediately connected to containing the illness, but also – and more general – aid that helps to maintain the Country's very existence. It should not be forgotten that in the vast majority of cases – or at least in documented cases to date – serious international health crises have hit developing Countries, which are already wanting from certain points of view, in particular when they are in a post-conflict phase. It is useful to recall that the United Nations General Assembly decided to establish a task force to cope with the spread of the virus Ebola because it was concerned «about the potential reversal of the gains made by the affected countries in peacebuilding, political stability and the reconstruction of socioeconomic infrastructure in recent years».<sup>54</sup> Once in place, embargoes against such States would only lead to aggravating the population's living standards, which have already been compromised by the spreading of the disease. Additionally, excessive restrictions can negatively impact the movement of "health staff", who the States – and the WHO itself – have sent to try to physically contain the epidemic.<sup>55</sup>

Secondly, as mentioned earlier, the ban on imposing excessive measures beyond those recommended by WHO represents an incentive for States to respect the obligation contained in the IHR to report epidemic events.

In fact, it is obvious that if they believed there was a risk of enduring restrictive measures that would impact trade, States would have very little incentive to report any outbreak which could potentially develop into a health crisis.<sup>56</sup> This would inevitably undermine the capacity of the international community as a whole to react.

The third aspect to consider concerns WHO's role. Obviously, setting universal and compulsory standards helps awarding the organisation a central role in coordinating States' action in order to avoid unilateral deviations.<sup>57</sup> The centrality of such a role is reinforced as derogation to such standards are permitted only on exceptional and motivated basis.

In this regard, it must be stressed that the IHR give WHO a key role in handling health crises and this represents a real change compared to the 1969 regulations. In fact, the new role of the WHO seems to characterise the current version.<sup>58</sup> The new international health security regime created by the 2005 version of the IHR is based on prevention and centralization of the reaction. As held by some Authors, this system builds upon the creation of a network where States are more and more interconnected through a central hub that was promptly identified in the WHO.<sup>59</sup> Indeed, WHO was given the specific task to coordinate and articulate the international community's response to serious international health crises, like epidemic outbreaks; as an Author pointed out, «WHO was created to be an orchestrator».<sup>60</sup>

WHO's central role is even clearer when we consider the specific ban on imposing excessive measures or controls. The Organisation is responsible to evaluate such measures on the basis of the scientific motivations that the adopting States must produce under the previously mentioned Art. 43. Basically, the "counter limit" that the ban on excessive measures represents can be bypassed when the interested State demonstrates that its actions are unavoidable. And it is up to the WHO to determine if a measure was unavoidable or not. Such a competence is transferred to WHO by its Member States though the acceptance of the IHR and the non-exercise of the right to contracting out from the regulations, explicitly set out in Art. 59.<sup>61</sup>

In other words, halting States from imposing excessive or disproportionate limitations on the movement of people or goods is in line with WHO's updated role. In fact, WHO, as per its Constitution, is an international organisation equipped to coordinate States' conduct when a health crisis is declared, thus avoiding a situation where States react chaotically and independently.<sup>62</sup>

## 4 The violations of the ban in practice

Such an ambitious objective is not always carried through into the practical procedure of imposing excessive containment measures. But before moving on to analyse the unilateral actions undertaken by the States, it could be interesting to cite the position that the Swiss government maintained during the negotiations of the IHR in 2005. The extract under discussion is so explanatory that it is worth quoting in its entirety:

«in accordance with the WHO constitution [...] the State's sovereignty to choose a higher level of protection for its population than the internationally agreed minimal standard should be respected by the IHR»<sup>63</sup>

It confirms a widespread belief among States: the adoption of the IHR must not impact on their freedom to adopt containment measures. In other words, WHO Member States consider the regulations the same way they consider the minimum protection standards: they can easily be ignored, in favour of stricter containment measures.<sup>64</sup>

And in practice, this tendency is even clearer.

During the H1N1 virus infection in 2009, it was unsure how the virus was spread,<sup>65</sup> but some States supported the theory that pork meat was responsible, especially if it had been minced in the US or Mexico, where it was said that the infection have originated.<sup>66</sup> Even though there was no scientific proof to support this theory and WHO had categorically excluded it,<sup>67</sup> along with the World Trade Organisation (WTO), the Food and Agricultural Organisation and the World Organisation for Animal Health,<sup>68</sup> many States imposed bans on pork meat imports from States where the flu had originally started.<sup>69</sup>

The adoption and the enforcement of such restrictive measures were discussed within the WTO. In that context emerged that the Chinese government imposed a ban on pork meat imports from the US, Mexico and Canada on the presumption that: «China was the world's biggest producer of pork and that pork was the most consumed meat product in the country».<sup>70</sup> The Philippines government adopted precautionary restrictions against the same States, although they removed them a few weeks later. Similar measures were also adopted by the Indonesian government. In this last case, it was not only against the three "original" states, but also against France, Spain, New Zealand and Israel. The reasons presented by Indonesia were even clearer as they were linked to the necessity to «protect its territory and industries from the virus».<sup>71</sup> It is also interesting to

consider the ban imposed by Ghana, which justified its actions by also referring to the necessity to respond to its people's concern.<sup>72</sup> Apart from those already mentioned, an additional twenty countries, fourteen of them were WTO Members, also imposed commercial restrictions on Mexico.

Alongside the measures to impose strict restrictions on the import of pork meat, some Countries severely limited freedom of movement of citizens from States that had been hit by the epidemic.<sup>73</sup> The case of the forty Mexican citizens put in quarantine by the Chinese government is exemplary and well known. The latter government worried that the Mexicans would spread the virus in China and so once again the IHR were violated.<sup>74</sup> The Chinese government justified such action as necessary «to put the virus under control and safeguard people's health and hygienic safety».<sup>75</sup> It is interesting to note that in the official statement that announced and justified the quarantine the IHR were not even mentioned.

States' responses to the spreading Ebola virus in 2014 were not that different from the spreading of the H1N1 virus. In fact, Canada and Australia adopted measures restricting freedom of movement of citizens from States affected by the Ebola virus epidemic, including the suspension of granting visas.<sup>76</sup> These last measures even induced the United Nations Security Council (UNSC) to request Member States to refrain from such conduct.<sup>77</sup>

Although quarantine – and more in general individual containment measures – represent anything but a long-established States' practice in reaction to the spread of infectious diseases,<sup>78</sup> and to a certain extent they are still permissible,<sup>79</sup> it must be noted that they represent a violation of human rights of the persons whose freedom of movement is restricted. Derogations from the respect of human rights are permitted under the ICCPR and regional human rights treaties, but they must be justified by strict necessity.<sup>80</sup> In the vast majority of the above-mentioned cases, however, WHO has repeatedly recommended not to adopt quarantine measures as they were superfluous, hence not necessary. This happened during both the H1N1 swine flus crisis<sup>81</sup> and the Ebola epidemic.<sup>82</sup>

The adoption and enforcement of containment measures and quarantine despite WHO recommendations to the contrary clearly show States' tendency to violate Art. 2 and Art. 43 of the IHR. The formal justifications that the concerned States put forward in relation to their conducts loosely hide the “real” reasons why they constantly disregard the obligation contained in the IHR: little trust in each other and in WHO recommended measures. They also reveal a revival of protectionist arguments, especially concerning the need to give effective answers to the population.<sup>83</sup>

Going back to the rationale of the ban on excessive measures it appears quite clearly that the widespread practice of adopting and enforcing containment and quarantine measures contradicts all the three reasons that pushed toward the inclusion of such a provision. The seriousness of such measures, in fact, is understandable once we better appreciate, and recall, that they are violations of Art. 2 and Art. 43 of the IHR, which are specifically designed, as we saw in paragraph 3 of this article, to safeguard the countries hit by an epidemic, to induce States to report the spread of new diseases and, finally, to reinforce the WHO's coordinating role in managing health crises. More in general, they are rules aimed at avoiding chaotic and unilateral reactions.

## 5 The (Non) existence of a statutory sanctioning mechanism in WHO's rules

Surprisingly however, the seriousness of these violations does not correspond to an equally severe sanctioning mechanism within WHO, the Organisation that should be coordinating the international response. Actually, such a mechanism does not even exist.

It should firstly be pointed out that international organisations have little means to enforce their rules or recommendations; in fact, they can impose sanctions on Member States by basically suspending their rights to take part in the organisation's activities.

As far as the WHO is concerned, Art. 7 of its Constitution provides for the adoption of sanctions when the Organisation's Member States do not honour their financial obligations. The same article also allows WHO to adopt sanctions «in other exceptional circumstances». This expression was at the centre of an intense debate about whether or not Art. 7 was adequate to allow the Organisation to sanction its Member States for violating general international law rules. In this regard, practice exists, as the WHA discussed the possibility of sanctioning Portugal for having supported *apartheid* politics in Angola. It had to be decided if Art. 7 of WHO's Constitution could be considered a valid, legal foundation for WHO to sanction its own Member States for serious human rights violations. At outset of the debate, the WHA grounded in Art. 7 the exclusion of Portugal from the regional activity of the WHO in Africa.<sup>84</sup> Therefore, as of now, it seems that serious human rights violations represent the only exception to adopting sanctions on Member States for violating financial obligations.

Moving on to the specifics of the IHR (2005), we should refer back to Art. 56, para. 5, which reads: «in the event of a dispute between WHO and one or more States Parties concerning the interpretation or application of

these Regulations, the matter shall be submitted to the Health Assembly». It seems that this norm could pave the way towards a mechanism, albeit rather primitive, of settling disputes,<sup>85</sup> which would make resorting to countermeasures both redundant and illegitimate. This same norm's clauses leading up to the fifth, state that in the case of disputes between WHO's Member States, they can refer the question to the Organisation's Director General or put it forward for arbitration.<sup>86</sup> We will come back to this possibility later, in paragraph 9.

We should, however, add some comments, here. The formula included in Art. 56, para. 5 of the IHR may even have been designed for this purpose. However, there is no practice that confirms its suitability for addressing disputes arising from the adoption of excessive measures. So, it is not clear how adequate the mechanism is to actually induce a State to end its illicit behaviour. On the other hand, States could – but they are not obliged to – report to the Director General the existence of a dispute about how the IHR are applied, so we should remember that they are under no obligation and could, in fact, proceed quite differently.

This is the end of the overview of possible sanctioning tools available to WHO.

It is clear that neither Art. 7 of the WHO Constitution nor Art. 56 of the IHR allow the Organisation to effectively act against the violations of health regulations that we have mentioned so far. The inexistence of a sanctioning mechanism available to WHO in order to keep states' activities in check is a reality. Nevertheless, it does not look like the Organisation is planning to propose statutory changes to rectify the situation. Further proof of this is in the absence of a "sanctioning problem" in the Organisation's governance's reform plans.<sup>87</sup>

WHO's action seems to be inspired by a different rationale, based on the politics of creating incentives for States to respect the IHR and the Organisation's recommendations; a method that Alvarez described as "managerial" and inspired by a "carrot & stick" policy.<sup>88</sup> This is not necessarily negative. If WHO was able to get Countries to respect the IHR without having to resort to sanctions or countermeasures, it would be carrying out its duties. In fact, respecting the Organisation's rules is not necessarily connected to the threat of a sanction or, as in the case of this paper, a countermeasure. As Hart put it, respect for international law obligations does not necessarily depend on a "gunman situation", but on the persuasion that they are socially necessary and acceptable.<sup>89</sup> Indeed, the force deriving from social "blame and shame" should be sufficient to induce respect for international standards imposed by international organizations.<sup>90</sup>

However, this approach is not satisfactory nowadays, or, at least, it does not seem to yield results.<sup>91</sup> The percentage of WHO Member States that have adjusted their own standards to IHR is still too low<sup>92</sup> and, as we saw earlier, imposing excessively restrictive measures on countries hit by epidemics in violation of Art. 43 is continuous.

It is no coincidence that under the previously mentioned resolution 2177, the UNSC turned to Chapter VII of the UN Charter to remind states to observe the IHR when managing the *Ebola* crisis.<sup>93</sup> Although the rapprochement between the maintenance of peace and security and the management of health crises has been generally welcomed,<sup>94</sup> the practice of the UNSC in this regard is inevitably a symptom of the weakness of the strategies that WHO put in place to induce compliance with the IHR.<sup>95</sup>

At this point of the analysis the absence of a statutory sanctioning mechanism has been confirmed and, at the same time, it is also demonstrated that such an absence is part of the endemic problem of compliance with the IHR.

It is therefore useful to understand if general international law allows WHO to end the IHR violations. In the next paragraph, it will be questioned if the Organisation could (or intends to) resort to using countermeasure.

## 6 Exploring an alternative route: the adoption of countermeasures by international organisations

As we mentioned in the introduction, it cannot be excluded the adoption of countermeasures by international organisations. Caution is normally necessary when addressing this issue, but it is especially important when the relationships between international organisations and their Member States are at stake.<sup>96</sup>

In fact, there do not seem to be compelling reasons to limit international organisations from resorting to countermeasures in cases that fall outside the relationship with their Member States. As international organisations increasingly enter international agreements with third parties, both with States or other international organisations, they have a real interest in stopping violations that could be committed against them. It seems just reasonable to admit that they can adopt any suitable measures to halt the violation of an obligation arising from such relationships.<sup>97</sup>

In this regard, we cannot exclude either that international organisations can adopt countermeasures against third parties for violating *erga omnes* obligations. A clear example were sanctions that the EU adopted as part of its Common Security and Defence Policy regarding states involved in terrorist activities or those that committed serious violations of international law.<sup>98</sup>

As we said earlier, the relationship between international organisations and their Member States seems more complex and this is, in fact, what this paper has set out to investigate. This relationship is at the centre of a historic debate that is fraught with deep divisions and undoubtedly difficult to appease. In an attempt to sum up the different doctrinal positions, some scholars believe that the relationships between international organisations and their Member States are to be exclusively regulated by each organisation's internal rules. Therefore, it is impossible for countermeasures to be implemented in international organisations' internal relationships as they are not covered under the domain of international law.<sup>99</sup>

Other scholars, however, argue that international organisations and their Member States are autonomous in their *inter se* relationships, which are governed by international law.<sup>100</sup> Countermeasures would naturally then be applicable to international relations that can exist between these two international law subjects.<sup>101</sup> In this regard, the adoption of countermeasures by international organisations in the relations between them and their Member States proves that the formers are autonomous in respect of the latter.<sup>102</sup>

In addition to these theoretical problems, it must be observed that, in practice, international organisations usually have few tools at their disposal that can classify as "countermeasures". One of this could be the suspension of a faulting State's right to vote. However, the effectiveness of this measure can be reasonably doubted. Such concern is witnessed by the recent United States' Government decision to suspend its UNESCO funding because Palestine was accepted as a Member. In fact, even now, the Congress of the United States has still not authorised UNESCO funding to start again despite its voting rights being suspended.<sup>103</sup> On the other side, Member States have more effective tools to induce international organizations to comply with their political will.<sup>104</sup> As an example, they persuade their organisations to adhere to international obligations by adopting countermeasures against them: for example, suspending funding.<sup>105</sup>

The ILC has maintained a laic position on the issue of countermeasures, confirming that the rules concerning international organisations' responsibility – and thus the rules on countermeasures – can also be applied to international organisations and Member States where these relationships are governed by international law. In fact, Art. 10, paragraph 2 of the DARIO claims that an internationally wrongful act could result from the violation «of an international obligation that may arise for an international organisation towards its members under the rules of the organisation». Indeed, the Commentary to Art. 10 states that this provision «does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organisation has to be regarded as an obligation under international law, the principles expressed in the present article apply. Breaches of obligations under the rules of the organisation are not as such breaches of obligations under international law».<sup>106</sup>

The DARIO, therefore, could be a good point to start in understanding the state of art in international law regarding international organisations and countermeasures. Analysis must begin then with Art. 22, which dictates the conditions for an international organisation to react with countermeasures against States and other international organisations that are its Members or third parties. During discussions about this norm, debates have long analysed the possibility that international organisations adopt countermeasures against their own Members (whether they are States or other organisations) and vice versa. The ILC's efforts led to draw up two specular norms: Art. 22 and Art. 52, which respectively discipline the case of an international organisation taking countermeasures against its own Member States or when an international organisation has countermeasures placed against it.

Art. 22 is what interests us here and it is a complex norm that disciplines three situations: the international organisation's adoption of countermeasures against 1) third parties; 2) its own Members for violations of general international law; 3) its own Members when they violate the rules of the organisation. In the first situation (1), Art. 22 subordinates the countermeasures' legality to the procedural and substantial conditions that can be found in the specific part of the DARIO (4<sup>th</sup> part, Chapter II); they are closely aligned to those in the Articles on the Responsibility of States for Internationally Wrongful Act (ARSIWA). In the second scenario (2), adopting countermeasures is subordinate not only to the conditions cited above but also to the circumstances that they are «not inconsistent with the rules of the organisation» and that there are not any internal remedies geared to ceasing the illegal actions. In the last scenario (3), Art. 22 ban an international organisation to react with countermeasures unless the rules of the organisation allow it.<sup>107</sup>

So, basically, the severity of the conditions for adopting a countermeasure is considered directly proportional to the relationship between the international organisation and the subject that has had countermeasures imposed on it. To put it simple, the more the organisation is tied with the "targeted" subject, the more the conditions for adopting countermeasures are demanding.

This conclusion should not surprise: Art. 22 of the DARIO was designed to carefully consider the «special ties existing between an international organisation and its members».<sup>108</sup> As one Author put it, the DARIO seem to let the regulation of countermeasures to the rules of the organisations.<sup>109</sup> So, the default rule depends on the *leges speciales* of each organisation. At the very end, the ILC's approach to countermeasures seems to



accommodate the criticism based on the unacceptability of the very idea that a State can adopt countermeasures against an international organisation that it is a Member of and vice versa.

The most extreme scenario – the third one, mentioned before – demonstrates this, by allowing the recourse to countermeasures for violations of the rules of the organisation only if the same rules so provide. Therefore, it is of a paramount importance to ascertain which obligation is violated, as from this evaluation depends the choice of the regime that governs the adoption of countermeasures.

However, such a determination is not an easy one.

## 7 Can WHO adopt countermeasures against its own Member States if they violate the 2005 International Health Regulations?

It is now possible to apply the results of the analysis performed in the previous paragraph to the special case of the WHO. It is crucial to look closely at this Organisation in order to understand which regime – among those mentioned in Art. 22 – governs the adoption of countermeasures.

First of all, it is necessary to point out – as we did earlier<sup>110</sup> – that its nearly universal membership makes any reasoning about adopting countermeasures against non-member States or international organisations of no practical use. However, WHO could certainly adopt measures aimed at stopping violations of international law committed by other international organisations, although this paper cannot analyse all the conditions that these measures would be subordinated to. It rouses our interest, though, to reason about WHO's qualification as injured party and how it would demonstrate this in order to resort to countermeasures. Such a qualification could derive from the violation of any norm deriving from the various partnership agreements that WHO has with international organisations. WHO, however, could also consider itself injured if *erga omnes* obligations were violated, including health protection.<sup>111</sup> In this case, nothing would appear to stop WHO from approaching a State or international organisation in order to make them respect their obligations on the matter,<sup>112</sup> which in fact has already happened in other international organisations.<sup>113</sup>

As far as the relationships between WHO and its Member States are concerned, Art. 22 of the DARIO requires a closer inspection at the rules of the organisation in order to find out if there is a ban on reacting with countermeasures and/or if WHO is explicitly allowed to react with countermeasures against its Member States.

An analysis of the WHO Constitution shows no norm banning the adoption of countermeasures or a norm explicitly giving WHO this authority. As we already saw, Art. 7 only considers the possibility for the organisation to sanction the States that do not respect their financial obligations and, in certain cases, where they are responsible for serious violations of fundamental rights. It is necessary then to investigate the existence of norms – different from the sanctioning mechanism established in Art. 7 – that entitle the WHO to react against its own Member States.

There is an interesting provision to this end in the Constitution of the Organisation that allows for the WHO Assembly to adopt «any other appropriate action to further the objective of the Organisation» (Art. 18, Letter M). This disposition apparently gives WHO sufficiently wide-ranging powers which would allow it to adopt countermeasures, although the practice demonstrates that such powers have been used through time for other reasons.

In fact, looking at the WHA's practice we notice that it has extended the organisation's competences, frequently forcing Member States' to approval. It is interesting to mention, in this regard, the outcome of a research project on the delegation of power to international organisations, which indicates that the WHO is a clear example of the predominance of the technical components – particularly within the Secretariat – that has often pushed the political organs to expand the competence of the organisation.<sup>114</sup> This tendency, however, does not seem to prove much as it can be justified by the implicit powers that any international organisations can resort to.<sup>115</sup>

A more specific and interesting practice is linked to the management of the 2003 SARS (Severe Acute Respiratory Syndrome) epidemic, which spread up two years before the conclusion of the IHR revision process. In that period, the 1969 version of the IHR was still in force. SARS had not been included in that formulation of the IHR, which, it is worth recalling, was applicable only to a certain, and specified, number of diseases. The regulations, therefore, were not applicable and, in theory, WHO was not competent to act as a coordinator of the international response to the disease. This notwithstanding, WHO recommended not travelling to States that had been hit by the flu, which were – among the others – Hong Kong and the Chinese province of Guangdong. The WHO issued such a recommendation even though it had not reached any prior agreement with these Countries; it grounded its action on the necessity to cope with the rapid evolution of the epidemic<sup>116</sup> that was expanding to a growing number of areas.<sup>117</sup> This recommendation was the first of this kind in WHO's history and it represented a courageous attitude of the Organisation towards the prerogatives of States' sovereignty.

Such an attitude can be credited with creating a partnership between the organisation and the States' governments involved in the epidemic. The Chinese were the most involved and the network aimed at facilitating the flow of information and therefore contain the epidemic as much as possible.

This practice is certainly interesting and proof that WHO enjoys a certain margin of discretion in its actions and it could be autonomous in the adoption of measures and recommendations against its Member States that are not included in the rules of the organisation, but useful to reach its own objectives. However, the actions that the WHO performed against the will of its Member States does not qualify as countermeasures or sanctions, as it has not been recognised as being in violation of any of the Organisation's obligations owed to its Member States and because the acts are frequently not binding.

Moving to the regime created by the 2005 IHR, the WHO seems to be edging towards adopting measures as a reaction to Member States violating the IHR. In fact, some Authors maintain that Art. 43 that obliges countries to not adopt unnecessary, restrictive measures allows WHO to "name and shame" Member States that do not follow the dictates of the norm.<sup>118</sup> So basically, paragraph 3 of Art. 43 obliges WHO to publish the necessary information<sup>119</sup> concerning the measures that the concerned States adopt. Paragraph 4 gives WHO the power to ask for those measures<sup>120</sup> to cease, but the norm does not go further and this reflects the organisation's approach that has never adopted measures against the numerous states that have violated Art. 43.

In conclusion, the rules of the WHO – enclosed in both the Constitution and the IHR – seem to be silent on the issue of countermeasure: neither they explicitly allow, nor they ban the adoption of countermeasures on the part of the Organisation. If we tried to apply Art. 22 of the project to WHO, we would then determine that WHO cannot adopt countermeasures against its own Member States for violation of the rules of the organisation. It could, though, abstractly adopt countermeasures against Member States if they violated general international law rules.

It is crucial, then, to understand if violating the Art. 43 IHR would qualify as violations of the rules of the organisation or not because, as we saw earlier, the applicable regime on the adoption of countermeasures is radically different. In this regard, we already anticipated in paragraph two of this article that the nature of the IHR – including earlier versions – is unusual, but that it is impossible to deny that the IHR fall under the category of the rules of the organisations. Consequently, as Art. 22 DARIO dictates, the WHO may adopt countermeasures for sanctioning violations of the IHR by its Member States only insofar as the rules of the organisation so provide.

However, this is not the case.

## 8 Can WHO member states adopt countermeasures against each other?

The above conclusion suggests we should move the investigation from the rules concerning international organisations' responsibility to those concerning States' responsibility. In concrete terms, the combination of the rigidity of Art. 22 and the WHO internal rules, that make it difficult for it to adopt countermeasures, seem to lead towards another option: the adoption of countermeasures by WHO's Member States following IHR violations. In other words, as WHO lacks suitable regulations for determining resort to countermeasures, could it be for its Member States to react to a violation of the IHR?

One may wonder whether WHO's Member States are allowed to resort to countermeasures in their *inter se* relationships to react to violations of the IHR as foreseen in the ARSIWA.<sup>121</sup> Such a hypothesis seems to be justified by the IHR's dual nature as both rules of the organisation and treaty obligations.<sup>122</sup> It is reasonable to maintain, in fact, that they do not only create States' obligations towards the WHO, but also – and maybe especially – obligations that limit Member States in their reciprocal relationships.<sup>123</sup>

The theoretical background of this question can be traced back in the well-known debate on self-contained regimes, namely regimes that contains special rules on responsibility excluding the application of general international law.<sup>124</sup> Recourse to countermeasures between Member States of an international organisation, in fact, implies that there are no available means to resolve the dispute in the law of that international organisation or that the means are not effective. As seen above, Art. 56, para. 5 of the IHR establishes a rather primitive resolution mechanisms for disputes between the WHO and its Member States. However, no similar mechanisms is established in the relationships between WHO's Member States. As anticipated in paragraph five of this article, paragraphs from 1 to 4 of Art. 56, in fact, simply suggest the involvement of the WHO Director General, but do not envisage any mandatory dispute resolution mechanisms.<sup>125</sup> All the more, Art. 56, par. 4 indicates that:

«Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.»

It appears clearly that there are neither the WHO Constitution, nor the IHR can be labelled as self-contained regimes, as no dispute resolutions mechanisms are foreseen.

However, Art. 56, par. 4 of the IHR suggests that this might not be the only regime to consider. Indeed, States affected by restrictive trade measures adopted and enforced in violation of Art. 43 of the IHR brought the issue before the WTO, which hosted a debate on the matter, as we already saw in paragraph four of this article.

The debate, therefore, shifts from the WHO rules to the Dispute Settlement Understanding (DSU) of the WTO, which, in Art. 23, establishes a sort of primacy of the WTO dispute resolution mechanism.<sup>126</sup> Resort to countermeasure would therefore be limited if not prohibited by the dispute resolution mechanism established in the “WTO regime”.<sup>127</sup> Some Authors, however, maintain that a fall-back to general international law would be permissible in cases where the WTO dispute resolution mechanism proves to be ineffective, as an *ultima ratio*.<sup>128</sup>

Looking at the practice, in a joint statement by Trade Ministers of United States, Mexico and Canada issued on the 7 of May 2009 appears a clear intention to adopt retaliation measures:

«[...] we urge our trading partners to remove these restrictions on our products immediately. We will continue to follow this situation closely, and will take any steps to prevent the enforcement of unjustified measures against our exports, as appropriate»<sup>129</sup> (emphasis added)

Countermeasures were not adopted, but during the debate hosted by the WTO, States that had implemented restrictive measures were called to provide justification for their actions. As a consequence, China justified<sup>130</sup> the ban on importing pork meat on the basis of Art. 5.7 of the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)* that allows States to «provisionally adopt sanitary or phytosanitary measures».<sup>131</sup>

It is interesting to note that the States that lamented trade restrictions or bans characterized them as violations of international law rules other than the IHR, in particular rules related to trade agreements. At the same time, even the justification adduced by the States responsible of the violations were not based on the IHR or on the WHO's recommended standards. In other words, this seems to prove that States does not consider the WHO as a system capable of solving disputes among them. They disregard the fact that such restrictions amount to violations of the IHR or, at least, to disagreement on the interpretation of them that could be addressed in the terms of Art. 56 of the IHR. It appears, therefore, that States do not consider this mechanism as an option and would prefer, as the joint statement issued by United States, Mexico and Canada demonstrates, to engage the States that imposed restrictive measures on the field of other regimes or, in *ultima ratio*, resorting to general international law.

This hypothesis should not be underestimated and it might be considered as a solution for ensuring compliance with the IHR. However, it runs the risk of threatening the impact of WHO's actions as it would damage the delicate balance between what distinguishes the relationship between international organisations and its Member States and what acts as a guarantee of autonomy for the former compared to the latter. In other words, the “institutional veil” of the WHO will inevitably end up being pierced.<sup>132</sup>

Another reason for adopting a cautious attitude regarding this hypothesis is the following: it would imply an acceptance of the WHO inability to ensure that its own regulations are respected, even when they are confirmed by recommendations. States would over-ride the organisation, either because it is inadequate – in this case because of its sanctioning system – or probably because there is a lack of trust.<sup>133</sup> Indeed, when China was called to justify the trade restrictions it stated that it: «was aware of the concerns on the issue and was actively seeking additional information for a more objective assessment of the risk».<sup>134</sup> The fact that a Member States of the WHO seeks for *additional information for a more objective assessment of the risk* after four international organisations – the WHO among them – explicitly affirmed that there was no such a risk, appears as a blunt evidence of mistrust in the international organisation that should be recognized as the orchestrator of the international response to epidemics.

## 9 Conclusions

Most of the doubts that have emerged in this article have received a negative response. It has been confirmed that there is a problem caused by persistent violations of the IHR and WHO's subsequent inability to find a remedy. It also came to light that the current state of evolution in the law of international responsibility admits that international organisations can resort to countermeasures against their own Members in only really exceptional cases.

Art. 22 of DARIO certainly appears to be a rigid norm because it greatly limits an international organisation's chances of resorting to countermeasures. The cautions that limit the adoption of countermeasures on the part

of the international organisations when their Member States violate the rules of the organisation appear to be designed for sophisticated organisations with their own systems of sanctioning and dispute settlement.

It could be argued that this caution represents progressive development and not codification of international law on this point.<sup>135</sup> If this were the case, a more elastic regulation might be useful to better address the peculiarity of those international organisations that do not have sanctioning powers, like WHO, but might need to resort to countermeasures to induce States to comply with the standards they contribute to set.

But WHO seems to oppose this interpretation. In a comment sent to the ILC during its 61<sup>st</sup> session, the WHO highlighted that the adoption of countermeasures should have been read in the light of the “privileged” position enjoyed by an international organisation’s Member States.<sup>136</sup> Indeed, as we saw earlier<sup>137</sup> there is a clear lack of effectiveness of the measures that an international organisation could adopt against its Member States compared to those that the latter could adopt against the former.

The ineffectiveness of such measures pairs with the risk that their adoption would likely bring the international organisations to violate their own mandates. It is again the WHO, in the comments sent to the ILC, to stress that: «[t]he suspension by the organisation concerned of its activities [...] would negatively affect the interests of the beneficiaries of those activities» and therefore contradict the spirit of the rules of the organisation.<sup>138</sup> It is quite telling that such a comment derives from the WHO. Among the wide panorama of international organisations, it is one of the fewest that elaborate standards the respect of which is demanded to Member States. Against this, one would have probably expected another attitude of the WHO towards the formulation of the DARIO’s rules on countermeasures.

As this is not happened, it is reasonable to conclude that the evolution of international law regarding the adoption of countermeasures by international organisations perfectly reflects the political will of the same international organisations and of their Member States; in other words, it seems to reflect *practice* and *opinion juris*. The codification efforts of the ILC on the responsibility of international organisations has led to the elaboration of strict and demanding conditions for the adoption of countermeasures, which are objectively difficult to satisfy. WHO’s attitude seems to confirm that the direction the ILC took corresponds to the state of the art. The relationship between international organisations and their Member States is disciplined by the rules of the organisations and resort to countermeasure makes no exception.

The lack of compliance with the 2005 IHR, therefore, can only be tackled and solved by WHO’s Member State through an expansion of the Organisation’s powers or competence leading to the establishment of a sanctioning mechanism.<sup>139</sup> It seems obvious, however, that States look reluctant about the idea of giving WHO new and greater powers, maybe even institutionalising resorting to countermeasures. On the other side, WHO does not seem to push too much for a similar reform. This is evident by the absence of this issue in the organisation’s *governance* reform proposal – as we mentioned earlier.<sup>140</sup>

There seems to be a sort of implicit “non-aggression pact” in force between the WHO and its Member States. The terms of this “pact” are emblematically summarized in a speech delivered by the then Director General Halfdan Mahler in 1983. This speech was made during the phase described previously<sup>141</sup> where WHO was under pressure from its own technical board, which had persuaded the WHA to extend its authority, albeit excessively:

«[i]f we allow ourselves to be lured astray into fields beyond our constitutional competences I am afraid we will find ourselves in those very minefields that we have trying to avoid in the interest first and foremost of the deprived peoples living in the Third World. None of us would want to blow up our Organisation, nor would we want to lose the tremendous prestige we have gained as an Organisation of 160 Member States, able to cooperate with one another for the health of people everywhere without distinction of race, religion, political beliefs, social or economic development – indeed, what our very Constitution demands of us»<sup>142</sup>

Normally such reasoning is justified by referring to international organisations that have limited mandates or powers to act. In such cases, Member States can control the organisations’ conduct through the rules of the organisations that normally discipline its powers very carefully.<sup>143</sup> The level of detail that characterizes the conferral of powers to this kind of organisations leaves little space for discussing an extension of the organisations’ powers. Although this model simply reflects an extreme interpretation of functionalism, it is influenced by a clear political choice of Member States not to leave to international organisations room for increasing their powers.<sup>144</sup>

However, as we explained in the introduction,<sup>145</sup> WHO is not an organisation with limited powers. In fact, it has the competence to adopt rules and standard that its Member States are bound to respect; moreover, as seen above, it sometimes acted with a high degree of autonomy, in particular in the period that preceded the negotiation of the 2005 IHR.<sup>146</sup> Indeed, the mandatory character of the IHR, both the actual version and the earlier ones, reflects an “anti-contractualist” attitude of the WHO towards its Member States.<sup>147</sup> Potentially, then, WHO would need to be tenacious when following its own mandate, which might include creating dialogue

with its Member States. In this last case, WHO should be able to make the States respect certain standards of conduct, regardless of their desire to do so or not.

But this does not happen and this inertia is helped by reading and analysing the rules on countermeasures in the DARIO. It is also helped by the behaviour of Member States, which label the violations of the IHR as violations of rules of general international law, or treaties other than those concluded within WHO, and seem tempted to activate dispute resolution mechanisms elsewhere or, in *ultima ratio*, to resort to countermeasures in their *inter se* relationship.<sup>148</sup>

In a recent piece, Jan Klabbers concludes that the law of international organisations is fundamentally conservative. It is more geared to protecting the organisations than efficiently regulating their activities and helping solve their problems.<sup>149</sup> This reflection was developed by looking at the relationships between the organisations and third parties, but the case made in this article shows how it can also be applied to relationships between the organisations and their Member States.

Whereas this might help to avoid the “great escape” of States from international organisations, it is hardly useful for giving the latter enough means to pursue their mandates.

## Acknowledgements

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## Notes

<sup>1</sup>Henry G. Schermers, Niels M. Blokker, *International Institutional Law. Unity within Diversity* 5<sup>th</sup> ed. (Leiden-Boston: Martinus Nijhoff Publishers, 2011), 873, para. 1390.

<sup>2</sup>*International Health Regulations* (Geneva, 23 May 2005), in 2509 UNTS at p. 79 ff. (hereinafter, *IHR*).

<sup>3</sup>The term “pathologic” is freely adapted from Michael N. Barnett, Marta Finnemore, “The Politics, Power and Pathologies of International Organizations”, *International Organization* 53, no. 4 (Autumn 1999): 699 ff.

<sup>4</sup>WHO, Resolution n. EBSS3.R1 of 25 January 2015, para. 52.

<sup>5</sup>WHO, *Report of the Ebola Interim Assessment Panel*, 7 July 2015, available at [www.who.int/csr/resources/publications/ebola/ebola-interim-assessment/en/](http://www.who.int/csr/resources/publications/ebola/ebola-interim-assessment/en/).

<sup>6</sup>*Ibid.*, p. 12, para. 19: «[...] the Panel requests that the full IHR Review Committee for Ebola examine options for sanctions for inappropriate and unjustified actions under the Regulations».

<sup>7</sup>WHO, *Implementation of the International Health Regulations (2005). Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, doc. A64/10 of 5 May 2011, p. 13, para. 24.

<sup>8</sup>WHO Director-General addresses the Review Committee of the International Health Regulations focused on the Ebola response. *Opening remarks at the Review Committee on the role of the International Health Regulations in the Ebola outbreak and response*, Geneva, 24 August 2015, available at [www.who.int/dg/speeches/2015/review-committee-ih-ebola/en/](http://www.who.int/dg/speeches/2015/review-committee-ih-ebola/en/).

<sup>9</sup>*Ibid.*

<sup>10</sup>Mary E. O’Connell, *The Power and Purpose of International Law. Insights from Theory and Practice of Enforcement* (Oxford: Oxford University Press, 2008) 233.

<sup>11</sup>The definition of countermeasures is coined in the famous arbitral award in the *Naulilaa* case 1928, between Portugal and Germany: « La représaille est un acte de propre justice (Selbsthilfehandlung) de l’État lésé, acte répondant – après sommation restée infructueuse – à un acte contraire au droit des gens de l’État offensé. Elle a pour effet de suspendre momentanément, dans les rapports des deux États, l’observation de telle ou telle règle du droit des gens ». See *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (Portugal c Allemagne)*, 31 July 1928, *RIAA*, vol. II, p. 1011 ff., at p. 1026.

<sup>12</sup>Giorgio Gaja, *Fourth report on responsibility of international organisations*, UN Doc. A/CN.4/564 and Add. 1–2, p. 109, para. 22.

<sup>13</sup>*Yearbook of the International Law Commission*, 2008, vol. I, p. 55, para. 63.

<sup>14</sup>Maria Laura Picchio Forlati, *La sanzione nel diritto internazionale* (Padua: CEDAM, 1974); in particular, see Chapters VII and VIII, from p. 303 to p. 408.

<sup>15</sup>See Lorenzo Gradoni, *Making Sense of «Solanging» in International Law. The Kadi Case before the EC Court of First Instance*, in *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference. Proceedings of the Eighth Joint Conference on Contemporary Issues of International Law*, ed. Willem J.M. van Genugten et al (The Hague: TMC Asser Press, 2009), 139 ff.

<sup>16</sup>WHO *Constitution* (New York, 22 July 1946), in 14 UNTS, p. 185 ff.

<sup>17</sup>See José E. Alvarez, *The Impact of International Organizations on International Law* (Leiden-Boston: Martinus Nijhoff Publisher, 2016), 196–197.

<sup>18</sup>WHO *Constitution*, Art. 2: «In order to achieve its objective, the functions of the Organisation shall be: (a) to act as the directing and co-ordinating authority on international health work; (b) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organisations as may be deemed appropriate; (c) to assist Governments, upon request, in strengthening health services; (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments; (e) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups, such as the peoples of trust territories; (f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services; (g) to stimulate and advance work to eradicate epidemic, endemic and other diseases; (h) to promote, in co-operation with other specialized agencies where necessary, the prevention of accidental injuries; (i) to promote, in co-operation with other specialized agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene; (j) to promote co-operation among

scientific and professional groups which contribute to the advancement of health; (k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organisation and are consistent with its objective; (l) to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing total environment; (m) to foster activities in the field of mental health, especially those affecting the harmony of human relations; (n) to promote and conduct research in the field of health; (o) to promote improved standards of teaching and training in the health, medical and related professions; (p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security; (q) to provide information, counsel and assistance in the field of health; (r) to assist in developing an informed public opinion among all peoples on matters of health; (s) to establish and revise as necessary international nomenclatures of diseases, of causes of death and of public health practices; (t) to standardize diagnostic procedures as necessary; (u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products; (v) generally to take all necessary action to attain the objective of the Organisation».

<sup>19</sup>See David P. Fidler, “Caught Between Paradise and Power: Public Health, Pathogenic Threats, and the Axis of Illness”, *McGeorge Law Review* (2005): 64–67.

<sup>20</sup>Tine Hanrieder, “WHO orchestrates? Coping with competitors in global health”, in *International Organizations as Orchestrators*, ed. Kenneth W. Abbott et al (Cambridge: Cambridge University Press, 2015), 191 ff., 196–197.

<sup>21</sup>WHO Constitution, Preamble: «The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition». See Fidler, “Caught Between Paradise and Power: Public Health, Pathogenic Threats, and the Axis of Illness”, 71, who describes with the expression «holistic strategy» the role of the WHO in the promotion of the right to health.

<sup>22</sup>Nadja Meisterhans, “The World Health Organization in Crisis – Lessons to be Learned Beyond the Ebola Outbreak”, in *The Chinese Journal of Global Governance* 2, no. 1 (2016): 25.

<sup>23</sup>See accordingly Alberto Oddenino, “Profili internazionali ed europei del diritto alla salute”, in *Salute e sanità*, ed. Rosario Ferrara (Milan: Giuffrè, 2010), 129. The idea that the WHO can be regarded as an international organisation capable of imposing standard even before the entry into force of the 2005 IHR is shared by Felice Morgenstern, *Legal Problems of International Organisations* (Cambridge: Cambridge University Press, 1969), 91 ff and Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), 58–59.

<sup>24</sup>WHO Constitution, art. 21: «The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce».

<sup>25</sup>WHO Constitution, art. 22: «Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice».

<sup>26</sup>See Laurence Boisson de Chazournes, “Le pouvoir réglementaire de l’Organisation mondiale de la santé à l’aune de la santé mondiale: réflexions sur la portée et la nature du Règlement sanitaire international de 2005”, in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 1157 ff. On the *sui generis* nature of the IHR see also Schermers, Blokker, *International Institutional Law*, 795, para. 1265; Roberto Virzo, “The Proliferation of International Acts of International Organisations. A Proposal for Their Classification”, in (Leiden-Boston: Martinus Nijhoff Publishers, 2015), 311–313. On this issue see *infra* para. 7.

<sup>27</sup>WHO, Resolution n. WHA58.3, *Revision of the International Health Regulations*, of 23 of May 2015. The first paragraph of the resolution mention expressly: «[The World Health Assembly] ADOPTS the revised International Health Regulations attached to this resolution, to be referred to as the “International Health Regulations (2005)”».

<sup>28</sup>Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (Vienna, 21 May 1986), not yet in force, text available in *Official Records of the United Nations Conference on the Law of Treaties between States and International Organisations or between International Organisations*, vol. II (United Nations publication, Sales No. E.94.V.5), art. 2, j).

<sup>29</sup>IHR, art. 59.

<sup>30</sup>*Ibid.*, art. 66.

<sup>31</sup>*Ibid.*, art. 64.

<sup>32</sup>*Ibid.*, art. 62.

<sup>33</sup>See accordingly Virzo, “The Proliferation of International Acts of International Organisations. A Proposal for their Classification”, 312.

<sup>34</sup>On this issue, literature is almost unanimous; see *inter alia* Boisson des Chazournes, “Le pouvoir réglementaire de l’Organisation mondiale de la santé à l’aune de la santé mondiale: réflexions sur la portée et la nature du Règlement sanitaire international de 2005”, 1165–1168; Michèle Poulain, “Le règlement sanitaire de l’OMS”, in *Droit des organisations internationales*, ed. Evelyn Lagrange, Jean-Marc Sorel (Paris: LGDJ, 2013), 761; Virzo, “The Proliferation of International Acts of International Organisations. A Proposal for their Classification”, 312.

<sup>35</sup>IHR, art. 1.1.

<sup>36</sup>See accordingly Gian Luca Burci, “Institutional Adaptation without Reform: WHO and the Challenges to Globalization”, in *International Organisations Law Review* 2, no. 2 (2005): 437–443.

<sup>37</sup>David P. Fidler, “Revision of the World Health Organization’s International Health Regulations”, in *ASIL Insights* of 16 April 2004, available at [www.asil.org/insights/volume/8/issue/8/revision-world-health-organizations-international-health-regulations](http://www.asil.org/insights/volume/8/issue/8/revision-world-health-organizations-international-health-regulations).

<sup>38</sup>IHR, art. 4.

<sup>39</sup>*Ibid.*, art. 5 and 6.

<sup>40</sup>*Ibid.*, art. 7.

<sup>41</sup>*Ibid.*, art. 13.

<sup>42</sup>See Pia Acconci, *Tutela della salute e diritto internazionale*, (Padua: CEDAM, 2011), 170–171.

<sup>43</sup>IHR, art. 10.

<sup>44</sup>*Ibid.*, art. 12. As of now, the WHO has declared has declare four *Public Health Emergencies of International Concern* (PHEIC): in 2009, due to the spread of the virus H1N1, the “swine flu”; in 2014 twice, for poliomyelitis and for tackling the spread of virus Ebola; lastly, in 2016, for Zika. All the information related to the past and future declaration of PHEIC can be found on the website of the WHO at [www.who.int](http://www.who.int).

<sup>45</sup>IHRIHR, art. 15.

<sup>46</sup>Gian Luca Burci, Claude H. Vignes, *World Health Organisation* (The Hague: Kluwer Law International, 2004), 44, para. 56.

<sup>47</sup>IHR, art. 2.

<sup>48</sup>See again David P. Fidler, “Revision of the World Health Organization’s International Health Regulations”.

<sup>49</sup>David P. Fidler, Lawrence O. Gostin, "The New International Health Regulations: An Historic Development for International Law and Public Health", in *The Journal of Law, Medicine and Ethics* 34, no. 1 (Spring, 2006): 86. More in general, the purpose of the WHO is to elaborate rules and standards that do not affect commercial relations between States and do not infringe the freedom of movement of their citizens: see Edoardo Greppi, "Organizzazione mondiale della sanità (O.M.S.)", in *Novissimo Digesto Italiano* (1984), 19.

<sup>50</sup>IHR, art. 43.

<sup>51</sup>*Ibid.*, art. 43, para. 1: «These regulations shall not preclude State parties from implementing health measures in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which: (a) achieve the same or greater level of health protection than WHO recommendations».

<sup>52</sup>*Ibid.*: «Such measures shall not be 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».

<sup>53</sup>The expression "counter-limits" is mainly used in the relationship between different legal orders or in the dialogue between international and national courts on the protection of human rights. For an overview see Giuseppe Martinico, "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts", in *European Journal of International Law* 23, no. 2 (2012): 401 ff., at 419.

<sup>54</sup>United Nations General Assembly Resolution 69/1, UN Doc. A/RES/69/1 of 23 September 2014.

<sup>55</sup>«Flight cancellations and other travel restrictions continue to isolate affected countries resulting in detrimental economic consequences, and hinder relief and response efforts risking further international spread of the disease»: WHO, *Statement on the 2nd meeting of the IHR Emergency Committee regarding the 2014 Ebola outbreak in West Africa*, 22 September 2014, available at [www.who.int/mediacentre/news/statements/2014/ebola-2nd-ihc-meeting/en/](http://www.who.int/mediacentre/news/statements/2014/ebola-2nd-ihc-meeting/en/). See also a United Nations press release issued on the 25 August 2014: *Flight restrictions hamper ability to battle Ebola, UN cautions*, available at [www.un.org/apps/news/story.asp?NewsID=48555#.WYCiioiLR9A](http://www.un.org/apps/news/story.asp?NewsID=48555#.WYCiioiLR9A).

<sup>56</sup>See accordingly Jennifer Shkabatur, "A Global Panopticon – The Changing Role of International Organisations in the Information Age", in *Michigan Journal of International Law* 33, no. 2 (2011): 171.

<sup>57</sup>Again Acconci, *Tutela della salute e diritto internazionale*, 171.

<sup>58</sup>See accordingly Poulain, "Le règlement sanitaire de l'OMS", 757.

<sup>59</sup>Sarah E. Davies et al, *Disease Diplomacy. International Norms and Global Health Security* (Baltimore: John Hopkins University Press, 2015), 40–41.

<sup>60</sup>Hanrieder, "WHO orchestrates? Coping with competitors in global health", 191.

<sup>61</sup>See again Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, 60.

<sup>62</sup>See accordingly Adam Kamradt-Scott, "Who, Global Health Security & International Law", in *Legal Perspective on Security Institutions*, ed. Hitoshi Nasu, Kim Rubenstein (Cambridge: Cambridge University Press, 2015), 244.

<sup>63</sup>The comment provided by the Swiss Government is available at [www.who.int/ihr/revisionprocess/swissIHR.pdf](http://www.who.int/ihr/revisionprocess/swissIHR.pdf).

<sup>64</sup>Sarah E. Davies et al., *Disease Diplomacy. International Norms and Global Health Security*, 128. According to these Authors, States are more and more convinced that imposing excessive measures is convenient to them, even if it causes a violation of Art. 43 of the IHR. Such an attitude seems to prove that States do not trust the capacity of the WHO to manage health crises. On this specific issue, we will come back later in this paragraph.

<sup>65</sup>Joint FAO/WHO/OIE Statement on influenza A(H1N1) and the safety of pork, 7 May 2009, available at [http://www.who.int/mediacentre/news/statements/2009/h1n1\\_20090430/en/](http://www.who.int/mediacentre/news/statements/2009/h1n1_20090430/en/).

<sup>66</sup>See broadly on this issue: Rebecca Katz, Julie Fischer, "The Revised International Health Regulations: A Framework for Global Pandemic Governance", in *Global Health Governance* 3, no. 2 (2010): 1–18.

<sup>67</sup>WHO, *Swine flu illness in the United States and Mexico – update 2*, 26 April 2009, available at [www.who.int/csr/don/2009\\_04\\_26/en/](http://www.who.int/csr/don/2009_04_26/en/).

<sup>68</sup>Joint FAO, OIE, WHO and WTO statement on A/H1N1 virus, 2 May 2009, available at [www.fao.org/news/story/it/item/19349/icode/](http://www.fao.org/news/story/it/item/19349/icode/).

<sup>69</sup>WHO, *Implementation of the International Health Regulations (2005). Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009*, para. 40.

<sup>70</sup>Such arguments were raised by the Chinese government in the WTO, in the context of a debate entirely devoted to discuss technical aspects of the reactions of States to the "swine flu". See WTO (Committee on Sanitary and Phytosanitary Measures), *Specific Trade Concerns. Note by the Secretariat. Addendum. Issues not considered in 2010*, G/SPS/GEN/204/Rev.11/Add.2 of 1 March 2011, p. 4, para. 13.

<sup>71</sup>*Ibid.*, para. 12.

<sup>72</sup>The declaration of the Ghanaese government is paradigmatic: «most of these countries did not have the capacity to do a proper risk analysis of the pandemic» (*ibid.*, p. 5, para. 20). It appears clearly that the restrictions were adopted because States were convinced of the fact that the spread of the virus could not have been prevented otherwise.

<sup>73</sup>See broadly on this Wendy E. Parmet, *Public Health & Social Control: Implications for Human Rights, The International Council on Human Rights Policy*, Project on Social Control and Human Rights Research Paper (Final Draft), available at [www.ichrp.org/files/papers/173/public\\_health\\_and\\_social\\_control\\_wendy\\_parmet.pdf](http://www.ichrp.org/files/papers/173/public_health_and_social_control_wendy_parmet.pdf).

<sup>74</sup>See Austin Ramzy, "China and Swine Flu: Are Mexicans Being Singled Out?", *Time*, 4 May 2009 available at: [content.time.com/time/world/article/0,8599,1895659,00.html](http://content.time.com/time/world/article/0,8599,1895659,00.html).

<sup>75</sup>Foreign Ministry Spokesperson Ma Zhaoxu's Remarks on Mexican Officials Accusing China of Discrimination for Placing Mexican Citizens under Quarantine, 4 May 2009, available at: [it.china-embassy.org/ita/fyrth/t560379.htm](http://it.china-embassy.org/ita/fyrth/t560379.htm).

<sup>76</sup>As concerns the peculiarity of the Canada case, see Michelle Hayman, "Fear Above Science: Canada's Ebola Related Visa Restrictions", published on the blog of the Faculty of Law of the University of Toronto and available on the website: [ihp.law.utoronto.ca](http://ihp.law.utoronto.ca).

<sup>77</sup>Security Council, resolution 1277 of 18 September 2014, para. 4: «The Security Council [...] Calls on Member States, including of the region, to lift general travel and border restrictions, imposed as a result of the Ebola outbreak, and that contribute to the further isolation of the affected countries and undermine their efforts to respond to the Ebola outbreak and also calls on airlines and shipping companies to maintain trade and transport links with the affected countries and the wider region».

<sup>78</sup>See on this Andreas Schloenhardt, "From Black Death to Bird Flu: Infectious Diseases and Immigration Restrictions in Asia", in *New England Journal of International and Comparative Law* 23, no. 1, (Spring 2006): 263 ff.

<sup>79</sup>Even the WHO does not exclude the permissibility of quarantine measures, see WHO, *Addressing ethical issues in pandemic influenza planning. Discussion Papers*, WHO/HSE/EPR/GIP/2008.2 and WHO/IER/ETH/2008.1, available at [www.who.int/csr/resources/publications/cds\\_flu\\_ethics\\_5web.pdf](http://www.who.int/csr/resources/publications/cds_flu_ethics_5web.pdf).

<sup>80</sup>UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4 of 28 September 1984, Art. 62.

<sup>81</sup>WHO, *Global Alert and Response, Travel*, 7 May 2009, available at [www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/travel/en/index.html](http://www.who.int/csr/disease/swineflu/frequently_asked_questions/travel/en/index.html).

<sup>82</sup>WHO, *Statement on travel and transport in relation to Ebola virus disease outbreak*, 18 August 2014, available at [www.who.int/mediacentre/news/statements/2014/ebola-travel-transport/en/](http://www.who.int/mediacentre/news/statements/2014/ebola-travel-transport/en/).

<sup>83</sup>Sarah E. Davies et al, *Disease Diplomacy. International Norms and Global Health Security*, 133–134. A stimulating insight on the reasons that push States to adopt restrictive measures can be found in William A. Kerr, “Political Precaution, Pandemics and Protectionism”, in *Estey Centre Journal of International Law and Trade Policy* 10, no. 1, (2009): 1–14, particularly at 9. Id., *Conflict, Chaos and Confusion. The Crisis in the International Trading System* (Cheltenham: Edward Elgar Publishing, 2010), Chapter 19.

<sup>84</sup>WHO, Resolution n. WHA 19.31 of 18 May 1966. See more extensively on this Picchio Forlati, *La sanzione nel diritto internazionale*, 295.

<sup>85</sup>Gian Luca Burci, Clemens Feinäugle, “The ILC’s Articles Seen from a WHO Perspective”, in *Responsibility of International Organisations. Essays in Honour of Sir Ian Brownlie*, ed. Maurizio Ragazzi (Leiden-Boston: Martinus Nijhoff Publishers, 2013), 187.

<sup>86</sup>IHR, art. 56, para. 2 and 3.

<sup>87</sup>WHO, *WHO reform: overview of reform implementation Report by the Director-General*, A68/4 of 8 May 2015.

<sup>88</sup>Alvarez, *The Impact of International Organizations on International Law*, 225.

<sup>89</sup>Herbert L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1961), 85–91, particularly p. 85: «it is clear that obligation is not to be found in the gunman situation». Recently this doctrinal position has been adversed by Frederick Schauer, *The Force of Law* (Boston: Harvard University Press, 2015).

<sup>90</sup>See accordingly Abram Chayes, Antonia H. Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Boston: Harvard University Press, 1995), 151 and 232–233; Oran Young, “The Effectiveness of International Institutions: Hard Cases and Critical Variables”, in *Governance without Governments: Order and Change in World Politics*, ed. James Rosenau, Ernst O. Czempel (Cambridge: Cambridge University Press, 1992), 176–177.

<sup>91</sup>See again Alvarez, *The Impact of International Organizations on International Law*, 225 and Shkabatur, “A Global Panopticon – The Changing Role of International Organizations in the Information Age”, 172.

<sup>92</sup>WHO, *Implementation of the International Health Regulations (2005)*, p. 129, para. 12: «Despite these positive features of the IHR, many States Parties lack core capacities to detect, assess and report potential health threats and are not on a path to complete their obligations for plans and infrastructure by the 2012 deadline specified in the IHR. Continuing on the current trajectory will not enable countries to develop these capacities and fully implement the IHR. Of the 194 States Parties, 128, or 66 %, responded to a recent WHO questionnaire on their progress. Only 58 % of the respondents reported having developed national plans to meet core capacity requirements, and as few as 10 % of reporting countries indicated that they had fully established the capacities envisaged by the IHR. Further, as documented by external studies and a WHO questionnaire, in some countries, NFPs lack the authority to communicate information related to public-health emergencies to WHO in a timely manner».

<sup>93</sup>Security Council, resolution n. 2177, preamble: «Recalling the International Health Regulations (2005), which are contributing to global public health security by providing a framework for the coordination of the management of events that may constitute a public health emergency of international concern, and aim to improve the capacity of all countries to detect, assess, notify and respond to public health threats and underscoring the importance of WHO Member States abiding by these commitments». See also para. 9 of the same resolution: «The Security Council [...] Urges Member States to implement relevant Temporary Recommendations issued under the International Health Regulations (2005) regarding the 2014 Ebola Outbreak in West Africa [...]». For an overview of the implications of this Resolution see Ludovica Poli, “La risoluzione n. 2177 (2014) del Consiglio di sicurezza delle Nazioni Unite e la qualificazione dell’epidemia di ebola come minaccia alla pace ed alla sicurezza internazionale”, in *Diritti umani e diritto internazionale* 9, no. 1 (2015): 238–245.

<sup>94</sup>Lawrence O. Gostin, Erica A. Friedman, “Ebola: a crisis in global health leadership”, in *The Lancet Global Health* 384, no. 9951 (2014): 1324, available at [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61791-8/fulltext?rss%3Dyes](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61791-8/fulltext?rss%3Dyes).

<sup>95</sup>See Louis Balmond, “Le Conseil de sécurité et la crise d’Ebola: entre gestion de la paix et pilotage de la gouvernance globale”, in *Questions of International Law*, Zoom In 10, (2014): 5–25. See also, and in particular, Gian Luca Burci, “Ebola, the Security Council and the securitization of public health”, *inibid.*: 27–39, whose reflection, at page 28, are interesting: «In its operative part, the resolution urges member states to implement the temporary recommendations referred to above, arguably with regard to both positive measures to implement as well as unnecessary overreactions. The general tone of those provisions and the fact that they were partly placed in the preambular part of the resolution suggests that their purpose is to extend political support and generate more commitment to a legal instrument whose crucial role for an effective and balanced response to the outbreak has not been matched by a high level of compliance».

<sup>96</sup>See Elisabeth Zoller, *Peacetime Unilateral Remedies. An Analysis of Countermeasures* (Leiden-Boston: Martinus Nijhoff Publishers, 1984), 104–106.

<sup>97</sup>On this issue, see more in general Frédéric Dopagne, *Les contre-mesures des organisations internationales* (Bruxelles: Bruylant, 2010); id., “Countermeasures by International Organizations: The Decentralised Society in the Heart of the Institutionalized Society”, in *Select Proceedings of the European Society of International Law*, ed. Hélène Ruiz-Fabri et al (Oxford: Hart Publishing, 2008), 204 ff. See also Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant, 1998) 396–409.

<sup>98</sup>See more extensively on this issue Esa Paasivirta, Allan Rosas, “Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks” and Paolo Palchetti, “Reactions of the European Union to Breaches of *Erga Omnes* obligations”, both in *The European Union as an Actor in International Relations*, ed. Enzo Cannizzaro (The Hague: Kluwer Law International, 2002), 207–218 and 219–230. On the recent sanction imposed by the European Union on Russia for the facts occurred in Crimea see Pasquale De Sena, Lorenzo Gradoni, “Crimea: le ragioni del torto (russo) e il torto delle ragioni (occidentali)”, in *Quaderni di SIDIBlog* 1 (2014): 5 ff., at 17.

<sup>99</sup>Christiane Ahlborn, “The Rules of International Organizations and the Law of International Responsibility”, in *International Organizations Law Review* 8, no. 2 (2011): 451. See also Zoller, *Peacetime Unilateral Remedies. An Analysis of Countermeasures*, 105. See also Yann Kerbrat, “Sanctions et contre-mesures: risques de confusion dans les Articles de la CDI sur la responsabilité des organisations internationales”, in *Revue Belge de Droit International* 46, no. 1 (2013): 103–110.

<sup>100</sup>Frédéric Dopagne, “Sanctions and countermeasures by international organizations. Diverging lessons from the idea of autonomy”, in *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order*, ed. Richard Collins, Nigel D. White (Abingdon: Routledge, 2011), 267 ff.

<sup>101</sup>Dopagne, “Countermeasures by International Organizations: The Decentralised Society in the Heart of the Institutionalized Society”, 206.

<sup>102</sup>Dopagne, “Sanctions and countermeasures by international organizations. Diverging lessons from the idea of autonomy”, 274.

<sup>103</sup>*The United States’ Reelection to the UNESCO Executive Board*, available at [2009–2017.state.gov/secretary/remarks/2015/11/249414.htm](http://2009–2017.state.gov/secretary/remarks/2015/11/249414.htm).

<sup>104</sup>See accordingly Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, 111–114.

<sup>105</sup>More in general see Thordi Ingadóttir, “Financing international institutions”, in *Research Handbook on the Law of International Organizations*, ed. Jan Klabbers, Åsa Wallendhal (Cheltenham: Edward Elgar Publishing, 2011), 108 ff.



<sup>106</sup>*Draft articles on the responsibility of international organisations, with commentaries (DARIO)*, in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, para. 88. On this issues see Paolo Palchetti, "Unità, pluralità o inutilità dei regimi di responsabilità internazionale applicabili alle organizzazioni?", in *Il futuro delle organizzazioni internazionali. Prospettive giuridiche. Atti del XIX Convegno della Società italiana di Diritto internazionale, Courmayeur, 16–18 giugno 2014*, ed. Michele Vellano (Naples: Editoriale Scientifica, 2015), 49–52.

<sup>107</sup>DARIO, art. 22: «1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organisation not in conformity with an international obligation towards a State or another international organisation is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organisation. 2. Subject to paragraph 3, an international organisation may not take countermeasures against a responsible member State or international organisation unless: (a) the conditions referred to in paragraph 1 are met; (b) the countermeasures are not inconsistent with the rules of the organisation; and (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organisation concerning cessation of the breach and reparation. 3. Countermeasures may not be taken by an international organisation against a member State or international organisation in response to a breach of an international obligation under the rules of the organisation unless such countermeasures are provided for by those rules».

<sup>108</sup>*Ibid.*, Commentary, para. 6.

<sup>109</sup>Simone Vezzani, "Countermeasures by Member States against International Organizations", in *Responsibility of International Organisations. Essays in Honour of Sir Ian Brownlie*, 373 ff.

<sup>110</sup>*Supra*, para. 1.

<sup>111</sup>As noted earlier (*supra*, para. 2), among the function of the WHO the right to health is of a paramount importance.

<sup>112</sup>See accordingly Art. 5 of the resolution «Obligations and rights erga omnes in international law» adopted in Krakow, in 2005, by the *Institut de droit international*, available on the website: [www.justitiaetpace.org](http://www.justitiaetpace.org).

<sup>113</sup>For an overview of this practice see Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, 401–402.

<sup>114</sup>See Andrew P. Cortell, Susan Peterson, "Dutiful agents, rogue actors or both? Staffing, voting rules and slack in the WHO and WTO", in *Delegation and agency in international organizations*, ed. Darren G. Hawkins et al (Cambridge: Cambridge University Press, 2006), 265–266. More in general, on the role of the technical bodies in interpreting the competences of international organisations see Ingo Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012), 77–78.

<sup>115</sup>For a broad discussion on the doctrine of implied powers see Manuel Rama-Montaldo, *International legal personality and implied powers of international organizations*, in *British Yearbook of International Law* 44 (1970): 111 ff.

<sup>116</sup>«As a measure of precaution WHO is now recommending that persons travelling to Hong Kong and Guangdong Province of China consider postponing all but essential travel. This temporary recommendation will be reassessed in the light of the evolution of the epidemic in the areas currently indicated, and other areas of the world could become subject to similar recommendations if the situation demands». WHO, *Travel advice – Hong Kong Special Administrative Region of China, and Guangdong Province, China*, 2 April 2003, available at [www.who.int/csr/sarsarchive/2003\\_04\\_02/en/](http://www.who.int/csr/sarsarchive/2003_04_02/en/).

<sup>117</sup>WHO, *WHO extends its SARS-related travel advice to Beijing and Shanxi Province in China and to Toronto, Canada*, 23 April 2003, available at [www.who.int/mediacentre/news/notes/2003/np7/en/](http://www.who.int/mediacentre/news/notes/2003/np7/en/).

<sup>118</sup>Kamradt-Scott, "Who, Global Health Security & International Law", 236.

<sup>119</sup>IHR, art. 43, para. 3: «A State Party implementing additional health measures referred to in paragraph 1 of this Article which significantly interfere with international traffic shall provide to WHO the public health rationale and relevant scientific information for it. WHO shall share this information with other States Parties and shall share information regarding the health measures implemented».

<sup>120</sup>*Ibid.*, para. 4: «After assessing information provided pursuant to paragraph 3 and 5 of this Article and other relevant information, WHO may request that the State Party concerned reconsider the application of the measures».

<sup>121</sup>See Draft Articles 49 and 52 and, in particular, the conditions set forth in Article 52. *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 128–136. It is not possible to expand here the discussion on Art. 52, reference can be made to Alessandra Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan: Giuffrè, 1997); more in general, on the codification on the rules on countermeasures see Carlo Focarelli, *Le contromisure nel diritto internazionale* (Milan: Giuffrè, 1994).

<sup>122</sup>See more in general on the dual nature of the rules of the organizations Lorenzo Gasbarri, "The Dual Legality of the Rules of International Organizations", in *International Organizations Law Review* 14, no. 1 (2017): 87–119.

<sup>123</sup>See *supra*, para. 2.

<sup>124</sup>See *ex multis* Lorenzo Gradoni, *Regime failure nel diritto internazionale* (Padua: CEDAM, 2009); Bruno Simma, Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", in *European Journal of International Law* 17, no. 3 (2006): 483–459. See also Gaetano Arangio-Ruiz, *Fourth report on State responsibility*, UN Doc. A/CN.4/444, p. 35–42, paras. 97–126.

<sup>125</sup>See accordingly David P. Fidler, "From International Sanitary Conventions to Global Health Security: The New International Health Regulations", in *Chinese Journal of International Law* 4, no. 2 (2005): 390.

<sup>126</sup>*Understanding on rules and procedures governing the settlement of disputes*, Annex to Agreement establishing the World Trade Organization, Annex to Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994), in 1867 UNTS, at p. 493, Art. 23.

<sup>127</sup>See accordingly Simma, Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", 520–521. See also Joost Pauwelin, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), 230.

<sup>128</sup>Simma, Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", 522. See also Arangio-Ruiz, *Fourth report on State responsibility*, 41, para. 116.

<sup>129</sup>*Statement by Trade Ministers of the United States, Canada and Mexico*, 7 May 2009, available at [geneva.usmission.gov/2009/05/07/pork-trade.html](http://geneva.usmission.gov/2009/05/07/pork-trade.html).

<sup>130</sup>WTO, (Committee on Sanitary and Phytosanitary Measures), *Specific Trade Concerns. Note by the Secretariat. Addendum. Issues not considered in 2010*, p. 5–6, para. 23.

<sup>131</sup>*Agreement on the Application of Sanitary and Phytosanitary Measures*, Annex to Agreement establishing the World Trade Organization, Art. 5.7.

<sup>132</sup>On this issue see Catherine Brölmann, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties* (Oxford: Hart Publishing, 2007).

<sup>133</sup>Philippe Manin, "La substitution de l'Etat à l'organisation", in *Les organisations internationales contemporaines. Société française pour le droit international, Colloque de Strasbourg* (Paris: Pedone, 1988), 162 ff.

<sup>134</sup>WTO, (Committee on Sanitary and Phytosanitary Measures), *Specific Trade Concerns. Note by the Secretariat. Addendum. Issues not considered in 2010*, p. 5–6, para. 23.

<sup>135</sup>See among the others Pietro Pustorino, *L'ammissione della Palestina all'UNESCO*, in *La Comunità Internazionale* 66, no. 4 (2011): 599–600.

<sup>136</sup>*Responsibility of International Organisations. Comments and Observations received from International Organisations*, UN Doc. A/CN.4/609 of 13 March 2009, p. 101, para. 2.

<sup>137</sup>See *supra*, para. 6.

<sup>138</sup>*Responsibility of International Organisations. Comments and Observations received from International Organisations*, p. 102, para. 4.

<sup>139</sup>See Andrew Guzman, "International Organisations and the Frankenstein Problem", in *European Journal of International Law* 24, no. 4 (2013): 999 ff., particularly at p. 1003: «IOs have simply not been given enough power to impose serious harm on states with any frequency».

<sup>140</sup>See *supra*, para. 5.

<sup>141</sup>*Ibid.*

<sup>142</sup>WHO, *Provisional verbatim record of the sixth plenary meeting*, A36/VR/6 of 5 May 1983, p. 6.

<sup>143</sup>See again Guzman, "International Organisations and the Frankenstein Problem", 1004: «[...] an IO with a more limited mission can do less damage when it strays. By creating many IOs, each with a narrow jurisdiction, rather than fewer institutions with broader authority, states can more effectively prescribe the issues that each organisation can and cannot address».

<sup>144</sup>Laurence Boisson de Chazournes, "Functionalism! Functionalism! Do I Look Like Functionalism?", in *European Journal of International Law* 26, 4 (2015): 951 ff., particularly, 954–955.

<sup>145</sup>See *supra*, para. 2.

<sup>146</sup>See *supra*, para. 6.

<sup>147</sup>Krzysztof Skubiszewski, "Enactment of Law by International Organisations", in *British Yearbook of International Law* 41 (1965–1966): 201 ff.

<sup>148</sup>See *supra*, para. 8.

<sup>149</sup>«The modern law of international organisations, under functionalism, goes a step further still and is sometimes an elaborate framework not for deferring substantive resolution but, rather, for dissolving substantive resolution». Jan Klabbers, "The EJIL Foreword: The Transformation of International Organisations Law", in *European Journal of International Law* 26, no. 1 (2015): 82. Klabbers borrows a quote from Koskenniemi: «Modern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on». Martti Koskenniemi, "The Politics of International Law", in *European Journal of International Law* 1, no. 1 (1996): 28.