The European Journal of International Law Vol. 22 no. 4 © EJIL 2011; all rights reserved

Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture

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Abstract

A diverse set of national and international bodies is increasingly commenting upon other organizations' compliance with 'global administrative law' norms, creating a complex network of interaction and review. Although many forms of interaction can be identified and observed, horizontal review between international organizations appears to be relatively rare. This article examines one instance in which review did emerge: the Parliamentary Assembly of the Council of Europe's criticisms of the transparency and accountability of the World Health Organization (WHO) during the H1N1 pandemic. Two key questions arise from the case study. First, what structural or institutional features allowed inter-institutional review to take place? And, secondly, why would two institutions have such divergent views of an international organization's accountability and transparency? The analysis suggests that a key factor in allowing horizontal review to occur is diversity in institutional composition – in terms either of membership, distribution of power between members, or interests represented by members. In this case study, the Parliamentary Assembly represented the interests of states' legislative branches, whereas the WHO representatives reflect the interests of states' executive branches. Variations in baseline assumptions regarding the WHO's function in regulating infectious disease response and to whom it should be accountable may partially explain the substantive divergence of opinion.

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EJIL (2011), Vol. 22 No. 4, 1089–1113 doi: 10.1093/ejil/chr093

> There is truth in the claim that it was the WHO who panicked and declared a pandemic. The [UK] Government bought 23.9 million doses of vaccine from drug manufacturer GlaxoSmithKline and five million from rival company Baxter. They are still smiling. The question remains, how powerful were the tentacles of the Pharmas in the WHO. Who was calling the tune?
>
> UK representative to the Parliamentary Assembly of the Council of Europe, 12 January 2010[1]

> Member States must be neither intimidated nor driven into a situation of complacency by the recent suggestions in the media that the [World Health] Organization and national health ministries had overreacted to the pandemic. . . . irrespective of the perceived severity of the pandemic, further spread could be combated and individuals around the world protected. . . . continued and strong precautionary action concerning the possible spread of the pandemic to vulnerable countries [is necessary].
>
> UK representative to the World Health Organization, 18 January 2010[2]

1 Introduction

Richard Stewart has described the global regulatory space as a Jackson Pollock painting, 'a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors'.[3] The developing body of literature on global administrative law (GAL) bears witness to this complexity, documenting instances of international organizations reviewing themselves,[4] international tribunals and organizations reviewing national entities,[5] national entities reviewing foreign national decisions,[6] and national administrative agencies and courts reviewing actions of international organizations[7] – to name just a few variations. There is, however, a notable absence in the forms of review; although international organizations do review themselves and national actors, they rarely publicly review *each other*.

The goal of this article is to study this absence – the spot of white on an otherwise chaotic canvas – by examining one instance where horizontal review between international organizations did emerge. In June 2010, the Parliamentary Assembly of the

1 Flynn, '"No Apology" for "Unscientific Exaggeration"', 12 Jan. 2010, available at: http://paulflynnmp.typepad.com/my_weblog/2010/01/topical-questions-in-the-commons-today-again-proved-to-a-valuable-innovation-i-did-not-have-a-question-selected-for-health.html.

2 Summarized statement of Sir Liam Donaldson, Representative of United Kingdom of Great Britain and Northern Ireland, World Health Organization (hereinafter WHO), Executive Board, 126th Session: Summary Records, EB126/2010/REC/2 (2010), at 45.

3 Stewart, 'The Global Regulatory Challenge to U.S. Administrative Law', 37 *NYU J Int'l L & Pol* (2005) 695, at 703.

4 Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contem. Prob.* (2005) 15, at 34–35.

5 *Ibid.*, at 36–37.

6 See, e.g., Benedetti, 'The *Conseil d'Etat* and *Schengen*', in S. Cassese *et al.* (eds), *Global Administrative Law: Cases, Materials, Issues* (2008), at 208; *Kuwait Airways Corporation v. Iraqi Airways Company (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883; *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme*, 169 F Supp 2d 1181 (ND Cal 2001).

7 Kingsbury *et al.*, *supra* note 4, at 31–34.

Council of Europe passed a resolution criticizing the World Health Organization (WHO) for 'grave shortcomings' in the transparency of its decision-making processes and expressing concerns regarding potential corporate influence.[8] This article addresses two questions that arise from the Council of Europe's call for increased transparency and accountability. First, *how* did this criticism emerge? What structural or institutional features of this situation allowed this inter-institutional review to take place? And secondly, *why* did this criticism emerge? Why would two international organizations (IOs) have such a divergent view of IO accountability?

Sections 2 and 3 of this article review the relevant background for the case study, starting with the history of and potential for undue corporate influence within the WHO. I then review the current international legal framework for global disease regulation (the International Health Regulations (IHR)), its implementation during the 2009 H1N1 pandemic, and the subsequent criticism of the WHO's transparency, oversight, and accountability.

Section 4 examines the first question posed above: how did horizontal review between international organizations emerge? I outline the reasons why such review may be relatively rare and elaborate a number of circumstances under which horizontal criticism might occur. The analysis suggests that diversity in institutional composition – either in terms of membership, distribution of power between members, or interests represented by members – is a key element. The Parliamentary Assembly, the representatives of which are sitting European parliamentarians, represents sufficiently different interests from WHO, the representatives of which are drawn from states' executive branches.

Section 5 addresses the second question posed above – why would government representatives in the Council of Europe show more concern about WHO accountability than their WHO counterparts? I suggest several practical and normative factors that may make the executive branch less concerned about potential corporate capture in international organizations. Section 6 concludes with some reflections on the challenges of developing GAL principles to combat international corporate capture.

2 Background

A *WHO and Corporate Capture*

Recent literature has suggested that international institutions may be relatively immune to infiltration by special interest groups and corporate capture.[9] Indeed, the initial vision of the WHO was that of a specialized agency, directed and staffed by health experts, operating outside the 'high politics' of the United Nations.[10] An examination of the history of the WHO, however, throws doubt on both these claims. From the outset the Organization's activities and mandate have been significantly influenced by broad geopolitical

[8] Parliamentary Assembly of the Council of Europe (hereinafter Parliamentary Assembly), Res 1729 (2010), 26th sitting (24 June 2010).

[9] Keohane, Macedo, and Moravcsik, 'Democracy-Enhancing Multilateralism', 63 *Int'l Org* (2009) 1, at 6–7.

[10] J. Farley, *Brock Chisholm, the World Health Organization and the Cold War* (2008), at 5.

disputes[11] and subject to numerous indirect mechanisms of control and influence that have allowed powerful states and corporations to pursue non-health-related interests.

There are three main governing organs within the WHO: the World Health Assembly (WHA), the Executive Board, and the Secretariat. The WHA is the highest decision-making body. Each WHO member state has one vote and may send a delegation of health experts who should 'preferably [represent] the national health administration of the Member'.[12] The WHA elects 34 member states to sit on the Executive Board. The individuals sent by states to sit on the Board are supposed to serve in their individual capacity as health experts rather than as state representatives.[13] The Secretariat is composed of the Director-General and WHO staff.[14] The WHO also has a number of partnerships and *ad hoc* working bodies that supplement its formal operational structures. The organization, for example, makes extensive use of Expert Advisory Committees – groups of external experts appointed by the Director-General who are available for specialized consultation. In addition, over the last decade the WHO has made a conscious organizational effort to focus on 'open and constructive relations with the private sector', joining several global public–private partnerships and actively soliciting private sector cooperation, funding, and personnel.[15]

Despite the fact that the WHO is formally controlled by and accountable to a diverse body of states, wealthy countries can disproportionately impact policy direction. The 'Geneva group', for example, is a political block of 13 states whose combined contributions account for over half the WHO budget, giving them 'a strong voice in setting limits to certain WHO programmes'.[16] States can also substantially impact the organization's priorities by offering project-specific financing. In the late 1950s, for example, the US contributed about US$150 million to a global malaria eradication effort, propelling the WHO's ultimately ill-advised prioritization of malaria eradication over malaria control. Although the US framed its donation as humanitarian aid, Cold War political calculations were a key motivator.[17] Targeted financing has become increasingly prevalent, rising from 18 per cent of the WHO's total budget in 1970 to 72 per cent in 2006.[18] Such earmarked funding continues to have a significant – and at times crippling – impact on the allocation of institutional resources.[19]

Powerful governments use this influence to advance not only national political interests but also corporate agendas. In 1999, for example, the US government issued a critique of proposed WHO dietary guidelines. Apparently developed at the behest of a coalition of 'Big Food Industries', the US report mirrored arguments traditionally used

[11] See J. Siddiqi, *World Health and World Politics: the World Health Organization and the UN System* (1995), at 53–177.

[12] WHO Constitution, Art. 11.

[13] K. Lee, *The World Health Organization* (2009), at 26.

[14] WHO, *WHO – its people and offices*, available at: www.who.int/about/structure/en/.

[15] Lee, *supra* note 13, at 115–122.

[16] Siddiqi, *supra* note 11, at 84.

[17] US State Department International Development Advisory Board, Summary Minutes, 13 Apr. 1956, quoted in Siddiqi, *supra* note 11, at 143. See generally *ibid.*, at 141–145.

[18] Lee, *supra* note 13, at 40.

[19] *Ibid.*, at 41.

by industry when lobbying against WHO and suggested extensive industry-friendly revisions.[20] WHO subsequently revised the guidelines and presented them to the WHA in a considerably weakened version. As described by one official:

> It was not that easy to deal with such a powerful industry. Tensions were very strong and you cannot expect that WHO with a dozen persons in Geneva will challenge the food industry whose financial resources far exceed WHO's budget. . . . During discussions on the Global Strategy on Diet, US representatives at WHO Executive Committee never made a mystery of the fact that they would not let WHO go beyond a sanitary education focused strategy. Dr. Lee [WHO Director-General] had to abide by that.[21]

In exchange for relenting on the health diet guidelines, the Director-General apparently secured US support for a global AIDS initiative.[22]

Corporations have also engaged in more direct tactics. A WHO report released in 2000 revealed substantial infiltration and manipulation by the tobacco industry which had an active and deliberate plan to engage with and disrupt WHO research and recommendations.[23] The investigation found corporate documents detailing industry efforts to 'contain, neutralize, [and] reorient' the WHO's tobacco control activities by 'staging events to divert attention from the public health issues raised by tobacco use, attempting to reduce budgets of the scientific and policy activities carried out by the WHO, pitting other UN agencies against the WHO, seeking to convince developing countries that the WHO's tobacco control programme was a 'First World' agenda carried out at the expense of the developing world, distorting the results of important scientific studies on tobacco, and discrediting the WHO as an institution.'[24] Companies also placed paid tobacco consultants in positions at the WHO to pursue industry goals.[25] The WHO has since passed staff conflict of interest regulations,[26] but the policy's loose language has meant that loopholes – and criticisms – remain.[27]

The scientific community has also repeatedly criticized the WHO generally, and WHO Expert Advisory Committees in particular, for having unacceptably close ties to industry groups, arriving at biased outcomes, and inadequately supporting their findings with scientific evidence.[28] In 1999, for example, the WHO adopted revised

[20] *Ibid.*, at 119.

[21] As quoted in Benkimoun, 'How Lee Jong-wook changed WHO', 367 *Lancet* (2006) 1806.

[22] *Ibid.*; Lee, *supra* note 13, at 119.

[23] WHO, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization*, Report of the Committee of Experts on Tobacco Industry Documents (July 2000).

[24] *Ibid.*, at 1.

[25] *Ibid.*

[26] WHO, 'Staff Regulations and Staff Rules', R. 1.7.

[27] Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJ* (2006) 1490, at 1553, citing an interview with Derek Yach in New Haven, Conn., 25 Oct. 2004.

[28] Maisch, 'Conflict of Interest & Bias in Health Advisory Committees: A Case Study of the WHO's Electromagnetic Fields (EMF) Task Group', 25 *J Australian College Nutrition & Environmental Medicine* (2006) 15; Bradbury, 'Storm over WHO–ISH Hypertension Guidelines', 353 *Lancet* (1999) 563; Laing *et al.*, '25 Years of the WHO Essential Medicines Lists: Progress and Challenges', 361 *Lancet* (2003) 1723; McCarthy, 'Critics Slam Draft WHO Report on Homoeopathy', 366 *Lancet* (2005) 705; Musgrove, 'Judging Health Systems: Reflections on WHO's Methods', 361 *Lancet* (2003) 1817; Horton, 'WHO: the

hypertension treatment guidelines after acknowledging concerns regarding the original experts' financial ties to the pharmaceutical industry.[29] Similarly, in 2001 a former employee accused the WHO of censoring criticism of the pharmaceutical industry and coming to findings that were 'much too favourable to the pharmaceutical industry'.[30] Several procedural provisions also significantly limit transparency. Expert Committee meetings are private and 'cannot become public except by the express decision of the committee with the full agreement of the Director-General'.[31] Moreover, although Committees are required to provide summary reports of their meetings, records have not been consistently created or provided, and public summaries are 'often incomplete or opaque'.[32] In 2003 the WHO addressed some of these concerns by requiring experts to disclose all possible conflicts of interest with 'commercial entities'.[33] Criticism, however, has continued.[34] Most recently, concerns have been raised regarding the transparency and independence of the Expert Committees involved with influenza preparedness and the H1N1 response; these critiques will be detailed in Section 3.

B *The International Health Regulations and the H1N1 Pandemic*

The WHO's response during the H1N1 pandemic was governed by the International Health Regulations, an international agreement binding on all WHO members.[35] The Regulations coordinate national and international public health monitoring, reporting, and response. At the national level, individual member states are required to develop and implement national surveillance and response capacities to track and manage health risks. Each country must designate a National IHR Focal Point to help implement the IHR at the national level, inform national policy-makers of WHO recommendations, and serve as a continuous official communication channel.[36] There are also mandatory reporting requirements, the most significant of which is states' duty to notify the WHO within 24 hours of any events which may constitute a 'public health emergency of international concern' (PHEIC).

Casualties and Compromises of Renewal', 359 *Lancet* (2002) 1605; Shaneyfelt, Mayo-Smith, and Rothwangl, 'Are Guidelines Following Guidelines? The Methodological Quality of Clinical Practice Guidelines in the Peer-reviewed Medical Literature', 281 *J American Medical Assn* (1999) 1900; Grilli *et al.*, 'Practice Guidelines Developed by Specialty Societies: The Need for a Critical Appraisal', 355 *Lancet* (2000) 103; Baverstock, 'A Time to Ask What You Want of WHO', 327 *British Medical J* (2003) 111.

29 Lee, *supra* note 13, at 117. WHO, 'WHO–ISH Hypertension Guidelines', available at: www.who.int/cardiovascular_diseases/guidelines/hypertension/en/.

30 Quoted in Horton, 'WHO: The Casualties and Compromises of Renewal', 359 *Lancet* (2003) 1605.

31 WHO, 'Rules of Procedure for Expert Committees, Annex to Regulations for Expert Advisory Panels and Committees', R. 1.

32 Esty, *supra* note 27, at 1553.

33 WHO, 'Guidelines for WHO Guidelines', Global Programme on Evidence for Health Policy, EIP/GPE/EQC/2003.1 (2009).

34 McCarthy, *supra* note 28; Maisch, *supra* note 28.

35 International Health Regs, WHA 58.3 (2005), Art. 2 (hereinafter IHR).

36 *Ibid.*, Art. 4.

At the international level the WHO has a general duty to monitor global health risks and provide expert assistance.[37] Additional regulatory powers are triggered by an international health emergency. To declare an official PHEIC, the WHO Director-General must consult with the Emergency Committee – a specially convened Expert Advisory Committee – and the affected state party.[38] In consultation with the Emergency Committee the Director-General may issue recommendations including guidelines on medical treatment and border control measures.[39] National health authorities, however, retain ultimate discretion regarding their country's pandemic response.

The first deployment of the IHR occurred in the spring of 2009. In early April, both Mexico and the United States notified the WHO of H1N1 outbreaks.[40] The Director-General convened an Emergency Committee, and on 25 April publicly announced that the H1N1 outbreak constituted a PHEIC.[41] On 11 June 2009, the WHO announced that the H1N1 outbreak had reached phase 6 on the WHO's pandemic scale, a determination that officially signalled the existence of a global pandemic.[42]

From the outset the WHO took on a leadership role in the public health response. The organization disseminated a large amount of information through frequent press briefings[43] and actively facilitated and enhanced on-the-ground monitoring and response capabilities. It dispatched teams of experts to support national health authorities,[44] coordinated global prophylactic and vaccination treatments,[45] and maintained a 'close dialogue with influenza vaccine manufacturers' throughout.[46] The organization also elaborated specific recommendations for national health ministries and the general public, including guidelines regarding the recommended use of specific antivirals, vaccine availability, and vaccination priorities and strategies.[47]

These recommendations were not directly binding on member states and the *de facto* influence of the WHO pandemic declaration and subsequent recommendations on

[37] *Ibid.*, Art. 13.

[38] *Ibid.*, Arts 12, 48, 49.

[39] *Ibid.*, Arts 17, 18.

[40] Katz, 'Use of Revised International Health Regulations during Influenza A (H1N1) Epidemic, 2009', 15 *Emerging Infectious Diseases* (2009) 1165, at 1166.

[41] WHO, 'Swine Flu Illness in the United States and Mexico – Update 2', 26 Apr. 2009.

[42] WHO, Press Statement of WHO Director-General, 'World now at the start of 2009 influenza pandemic', 11 June 2009.

[43] See WHO, 'Situation updates – Pandemic (H1N1) 2009', available at: www.who.int/csr/disease/swineflu/updates/en/index.html. WHO, 'Influenza updates', 10 Sept. 2010.

[44] WHO, 'Influenza-like illness in the United States and Mexico', 24 Apr., 2009; Pan American Health Organization (hereinafter PAHO), 'Swine influenza in the Americas', 29 Apr. 2009.

[45] See, e.g., WHO, 'Emergency Operations Center Update on Influenza A(H1N1) May 6', 6 May 2009.

[46] WHO, *supra* note 42; WHO, 'Pandemic influenza vaccine manufacturing process and timeline', 6 Aug. 2009. See also Collin, de Radiguès, and WHO H1N1 Vaccine Task Force, 'Vaccine production capacity for seasonal and pandemic (H1N1) 2009 influenza', 27 June 2009.

[47] WHO, 'Recommended use of antivirals', 21 Aug. 2009 (outlining the recommended use of oseltamivir and zanamivir); WHO, 'WHO recommendations on pandemic (H1N1) 2009 vaccines', 13 July 2009; WHO, 'Safety of pandemic vaccines', 6 Aug. 2009; WHO, 'Pandemic influenza vaccine manufacturing process and timeline', 6 Aug. 2009; WHO, 'Pandemic influenza vaccines: current status', 24 Sept. 2009; WHO, 'Experts advise WHO on pandemic vaccine policies and strategies', 30 Oct. 2009; WHO, 'Safety of pandemic vaccines', 19 Nov. 2009.

national policy-makers' responses is disputed.[48] Nevertheless, there is evidence to suggest that WHO declarations and recommendations significantly influenced regional and national responses. In a survey of national European H1N1 responses, 17 out of 27 governments indicated that the WHO declaration of a phase 6 pandemic was the first or second most important influence on their decision to order vaccine,[49] and nearly two thirds ordered the H1N1 vaccines in connection with or shortly after the WHO declaration.[50] Moving outside the European context, it may be that less developed countries with poorly resourced national regulatory bodies were less able to rely on independent national assessments, and were therefore even more likely directly to implement WHO recommendations and standards. The communicative role of the WHO National Focal Points would have facilitated such direct adoption. Moreover, the release of large amounts of scientific evidence and expert advice may have also indirectly shaped government policy choices, influencing both national opinion and general public expectations. Finally, many European countries had pre-existing, legally-binding advanced purchase agreements with vaccine manufacturers that were automatically activated by the WHO's declaration of a phase 6 pandemic.[51] As a result, even though the Regulations did not require countries to follow WHO declarations or guidelines, many nations had effectively delegated the purchase decision to the WHO through the declaration of a pandemic, giving the WHO's actions a significant influence on regional and national policy decisions.[52]

3 Critiques of the WHO's IHR Implementation

There has been a significant amount of public criticism directed towards the WHO as a result of its role in managing the pandemic. These concerns seem to stem from

[48] Cohen and Carter, 'WHO and the Pandemic Flu "Conspiracies"', 340 *British Medical J* (2010) 2912; Butler, 'Flu Experts Rebut Conflict Claims: Reports Throw Unsubstantiated Suspicion on Scientific Advice given to the World Health Organization', 465 *Nature* (2010) 672; Cohen and Carter, 'A Response to Nature's Coverage', 340 *British Medical J* (2010) 2912.

[49] Health Protection Agency, 'Assessment Report on EU-wide Pandemic Vaccine Strategies', 25 Aug 2010, at 42. This makes the WHO declaration the second most important 'trigger' overall, behind only 'Scientific assessments'. Because these countries did not indicate the source of the scientific assessments they relied on, however, this category may also include WHO's scientific assessments.

[50] *Ibid.*, at 44.

[51] 22 of 30 European respondents had advanced purchase agreements with vaccine manufacturers. Of these agreements, 11 were directly activated by the WHO pandemic declaration: *ibid.*, at 41.

[52] Although no formal H1N1-related trade complaints arose, World Trade Organization (WTO) compliance mechanisms could theoretically indirectly enforce WHO recommendations. WHO assessments are already taken into consideration with regard to a number of trade-related health issues, including trade disputes over food safety standards. The organization has also provided expert advice to the WTO and given expert testimony before WTO dispute settlement panels: WHO and WTO, 'WTO Agreements & Public Health: A Joint Study by the WHO and the WTO Secretariat' (2002), at 143; WTO Panel Report, *Thailand – Restrictions on Importation of an Internal Taxes on Cigarettes*, DS10/R – 37S/200, 7 Nov. 1990, at 14–17; WTO Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, 31 Mar. 1998, at 154. If a WTO complaint arose over a response to a global health emergency, it is likely that adjudicators would at a minimum consider the relevant WHO recommendations: see Condon and Sinha, 'The Effectiveness of Pandemic Preparations: Legal Lessons from the 2009 Influenza Epidemic', 22 *Florida J Int'l L* (2010) 1, at 23–29.

the realization that, despite the large national and international response mobilized to protect populations against H1N1, the actual health impacts of the virus proved to be relatively minimal. Although definitive death tolls have yet to be calculated, it is generally agreed that the H1N1 virus was a less dangerous pathogen than regular seasonal flu.[53] The public expenditure to combat H1N1, however, greatly outstripped budgets allocated to the seasonal flu in many countries.[54] The low impact on public health and high cost to the public purse, combined with criticisms regarding the WHO's transparency and conflict of interest protections, fuelled what many have termed 'conspiracy theories': conjectures that individuals with ties to the pharmaceutical industry were able to manipulate WHO declarations, triggering global public panic and massive government expenditures.[55] All allegations of undue influence have been strongly denied by both the WHO and pharmaceutical companies,[56] and the theories of corporate manipulation are viewed sceptically by most independent observers.[57] The criticisms directed towards the WHO's governance structure, transparency, and the adequacy of its conflict of interest provisions, however, have not been similarly dismissed.[58] Individuals within national governments, the scientific community, and even the WHO itself have expressed concern over these more procedural elements, leading to several institutional reviews of the WHO's H1N1 response.[59]

The Parliamentary Assembly of the Council of Europe emerged early on as the primary institutional critic of the WHO. In January 2010 a Parliamentary Assembly Rapporteur began a high profile public inquiry into the WHO's H1N1 response which culminated in a highly critical report that was released in June of the same year.[60]

[53] The Centre for Disease Control and Prevention (CDC) reports that the seasonal flu deaths in the US ranged between 3,000 and 48,000 between 1976–1977 and 1998–1999; a previous study estimated an average of 25,420 influenza-associated deaths per year. The CDC's estimated death range for 2009–2010 H1N1 deaths in the US was between 9,000 and 18,000 people: CDC, 'Estimating Seasonal Influenza-Associated Deaths in the United States: CDC Study Confirms Variability of Flu', available at: www.cdc.gov/flu/about/disease/us_flu-related_deaths.htm; CDC, 'CDC Estimates of 2009 H1N1 Influenza Cases, Hospitalizations and Deaths in the United States, April 2009 – March 13, 2010', available at: www.cdc.gov/h1n1flu/estimates/April_March_13.htm.

[54] The UK, e.g., spent about £1.1 billion (US$1.7 billion) on pharmaceuticals: Hine, 'The 2009 Influenza Pandemic: An Independent Review of the UK Response to the 2009 Influenza Pandemic', (July 2010), at 155. A JP Morgan study estimated that pharmaceutical companies made about US$7 to US$$10 billion in profits from vaccines alone: Godlee, 'Conflicts of Interest and Pandemic Flu', Editorial, 340 *British Medical J* (2010) 2947.

[55] Cohen and Carter, 'WHO and the pandemic flu "conspiracies"', *supra* note 48; Godlee, *supra* note 54; Borland, 'Swine flu advisers' ties to drug firms: Five WHO experts linked with vaccine producers', *Daily Mail* (13 Aug. 2010).

[56] Alphonso, 'World Health Organization fires back at critics of H1N1 response', *Globe and Mail,* 8 June 2010; 'GlaxoSmithKline UK responds', 340 *British Medical J* (2010) 3464.

[57] Butler, *supra* note 48; Evans, 'The Swine Flu Scam?', Editorial, 32 *J Public Health* (2010) 296.

[58] See, e.g., Cohen and Carter, 'A Response', *supra* note 48; Evans, *supra* note 57.

[59] Two reviews directly examined the WHO's H1N1 response: the Parliamentary Assembly's review, summarized below, and the WHO's own 'external' review: WHO, 'How will the global response to the pandemic H1N1 be reviewed?', 12 April 2010.

[60] Parliamentary Assembly, 'The handling of the H1N1 pandemic: more transparency needed', Report, Social Health and Family Affairs Committee, 24 June 2010, at 7.

The report cited a lack of transparency surrounding the WHO's decision to maintain the pandemic at a level 6 alert despite evidence that the pathogen was relatively non-lethal.[61] It also examined an apparently unreported, undocumented change in the WHO's pandemic definition just prior to the phase 6 declaration which made a pathogen's virulence irrelevant.[62] Finally, the report expressed significant concern regarding possible undue commercial influence, the sufficiency of existing conflict of interest provisions, and the WHO's refusal to release the names or the declared conflicts of interest for Emergency Committee members.[63] The Director-General had stated that Emergency Committee anonymity was maintained to protect the experts from political or commercial pressure.[64] The Rapporteur, however, was unsatisfied with this explanation, responding that he was 'very concerned by this attitude and remains convinced that it is entirely justified to require full transparency with regard to the profiles of experts whose recommendations have far-reaching consequences for the public health sector'.[65]

After considering the report the Parliamentary Assembly adopted a strongly-worded resolution citing 'grave shortcomings . . . regarding the transparency of decision-making processes relating to the pandemic which have generated concerns about the possible influence of the pharmaceutical industry'.[66] The resolution 'calls on public health authorities at international, European and national level – and notably WHO – to address in a transparent manner the criticisms and disquiet raised in the course of the H1N1 pandemic'.[67] The Assembly's conclusions were buttressed by a June 2010 *British Medical Journal* investigation revealing that experts involved in championing and developing the first WHO pandemic preparedness guideline belonged to an industry-funded scientific group.[68] In addition, experts who had drafted the WHO's most recent policy guidelines on the use of vaccines and antivirals during influenza pandemics had financial and research ties with pharmaceutical companies.[69] These relationships were not published with the guidelines, a violation of the WHO's conflict of interest directives.[70] The WHO subsequently agreed that '[t]he publication of summaries of relevant interests following meetings is inconsistent and needs to be made routine' and that 'safeguards surrounding engagement with industry need to be tightened'.[71]

[61] *Ibid.*, at 8, 9.

[62] *Ibid.*, at 10.

[63] The names and declared conflicts of interest were publicly released in Aug. 2010, after the pandemic was officially declared over: WHO, 'List of Members of, and Advisor to, the International Health Regulations (2005) Emergency Committee concerning Influenza Pandemic (H1N1) 2009', 10 Aug. 2010; updated 1 Oct. 2010.

[64] WHO, 'The international response to the influenza pandemic: WHO responds to the critics', 10 June 2010.

[65] Parliamentary Assembly, 'The handling of the H1N1 pandemic', *supra* note 60 at 11.

[66] Res 1729 (2010), *supra* note 8.

[67] *Ibid.*

[68] Cohen and Carter, 'WHO and the pandemic flu "conspiracies"', *supra* note 48.

[69] *Ibid.*

[70] *Ibid.*

[71] WHO, *supra* note 64.

Under considerable public pressure and media attention drawn in large part by the ongoing Parliamentary Assembly inquiry, the WHO announced its own independent review of the H1N1 response. The findings, released in May 2011, reinforce the Assembly's conclusions on the issues of transparency, accountability, and conflicts of interest. The Review Committee noted that the WHO's '[r]eluctance to acknowledge its part in allowing misunderstanding of the intended definition [of a pandemic] fuelled suspicion of the Organization'.[72] It also criticized the decision to keep the identities of the Emergency Committee members confidential, stating that 'this practice was not well-suited to a Committee whose service would extend over many months'.[73] Finally, the review found there was a '[l]ack of a sufficiently robust, systematic and open set of procedures for disclosing, recognizing and managing conflicts of interest among expert advisers'.[74] The Committee recommended increasing transparency in the appointment process of experts, including prior disclosure of identities and conflicts of interest, an opportunity for public comment, probationary appointments, and clear standards regarding what conflicts of interest would disqualify candidates. The Report was submitted to the World Health Authority, which requested the Director-General to report on the implementation of the Committee's recommendations in 2012.[75]

4 *How* Did this Criticism Emerge: the Institutional Features of Horizontal IO Review

There are several features that make the Council of Europe's response exceptional. First, although Kingsbury and Casini raise inter-institutional processes between international organizations as a theoretical mechanism for the evolution of GAL, in practice it appears to be relatively rare.[76] Authors have described numerous instances of international organizations being criticized by internal review mechanisms[77] and national courts and tribunals.[78] International organizations, however, seem less likely to

[72] Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009, A64/10 (5 May 2011), at 16.

[73] *Ibid.*

[74] *Ibid.*, at 16.

[75] WHA, 'Implementation on the International Health Regulations (2005)', 64th Session, A64/VR/9, 20 May 2011.

[76] Kingsbury and Casini, 'Global Administrative Law Dimensions of International Organizations Law', 6 *Int'l Orgs L Rev* (2009) 319, at 337.

[77] The World Bank's internal Inspection Panel, e.g., has criticized the organization for failing adequately to consult with affected communities; Ciri, 'The World Bank Inspection Panel: The *Indian Mumbai Urban Transport Project* Case', in Cassese *et al.* (eds), *supra* note 6, at 129. The WTO Appellate Body has ruled, over member states' objections, that it has the discretion to consider non-state actors' briefs: *ibid.*, at 496; Howse, 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy', 9 *Eur LJ* (2003) 496. Several international intergovernmental networks have also moved towards increased transparency and participation through internal reform: Kingsbury *et al.*, *supra* note 4, at 35.

[78] See, e.g., *R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58, at 39; *Abousfian Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, at 51

review each other. International and regional courts, for example, have refused to exert jurisdiction over various international organizations, and both the International Court of Justice and the European Court of Justice have declined to directly review Security Council resolutions.[79] One of the few identified instances of inter-institutional review is the *Bustani* case, in which the Administrative Tribunal of the International Labour Organization found that the Organization for the Prohibition of Chemical Weapons had unlawfully dismissed its director-general.[80] In reviewing another international agency, the Administrative Tribunal has gone where other judicial organs have refused explicitly to tread.[81]

It is also notable that the European Council is a political body controlled by powerful European states. A review of existing GAL literature suggests that courts and other adjudicative bodies are the primary institutional mechanisms advancing procedural protections and fairness in international organizations.[82] The most detailed examination of politically driven GAL evolution identifies states' divergent political interests as a highly relevant factor in increasing procedural fairness, but focuses solely on how divergent goals interact *within* institutions;[83] it presents no examination of political operations between institutions. Looking beyond the GAL literature, it is possible to

(stating *obiter* that the SC res at issue was 'untenable under the principles of international human rights', but ultimately relying on a narrowed interpretation of the government's international obligations); *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664; Van Varenbergh, 'Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime', IILJ Working Paper 2005/11, at 17–21 (describing national and regional courts' review of anti-doping regulatory decisions); *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F 3d 390 (DC Cir.), cert. denied, 124 S Ct 278 (2003) (finding that the Ethiopia/Eritrea Claims Commission is an inadequate forum because individuals must rely on the 'good will of Eritrea' to remit any awards).

79 See, e.g., *Waite and Kennedy v. Germany* [1999] ECHR 13, 116 ILR 121 (although the Court relied on the availability of 'reasonable alternative means' to protect individual rights, opening the door for review in subsequent cases); *Behrami and Behrami v. France*, 22 BHRC 477, 45 EHRR (2007) SE10. On the reluctance of human rights adjudicative bodies to review international organizations see Reinisch, 'Securing the Accountability of International Organizations', 7 *Global Governance* (2001) 131; Watson, 'Constitutionalism, Judicial Review, and the World Court', 34 *Harvard Int'l LJ* (1993) 1; Joined Cases C–402/05 P and C–415/05 P, *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities* [2008] ECR I–6531.

80 *Bustani v. Org. for the Prohibition of Chemical Weapons*, Judgment No. 2232, ILO Administrative Tribunal, 16 July 2003.

81 Klabbers, 'The Bustani Case before the ILOAT: Constitutionalism in Disguise?', 53 *Int'l & Comp LQ* (2004) 455.

82 This may be because much GAL literature emanates from legal academics who are predisposed to examine judicial or quasi-judicial decisions. Some scholars have explicitly limited their GAL inquiry to only 'legal' pronouncements. See, e.g., Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', 14 *Global Governance* (2008) 39, at 44. Nevertheless, it is striking that, in a review of many of the articles listed within the 'International Organizations' and 'General Works' portions of the GAL Project bibliography (compiled by the NYU GAL Project, available at: http://iilj.org/gal/bibliography/GALBib-IIIIntOrgs.asp) the vast majority do not discuss the impact of external international political bodies on the development of GAL norms. All concrete examples of state-based institutions reviewing other state-based organizations for compliance with GAL involve adjudicative bodies such as courts or tribunals.

find some examples of horizontal political IO review. Critical commentary, for example, has emerged from the Committee on Economic, Social and Cultural Rights, which has raised UN agencies' failure to pay heed to the Committee and incorporate human rights considerations into their work.[84] The UN General Assembly has also passed resolutions criticizing the inequitable representation on the Security Council and the Economic and Social Council.[85] Such examples, however, appear to be the exception rather than the norm.

The paucity of inter-institutional review and predominance of adjudicative bodies as the main reviewing actors is not surprising. The difficulty of engaging in this type of horizontal review was explicitly noted by the Parliamentary Assembly representatives, who, prior to passing the resolution criticizing the WHO, spoke of the 'brave' character of the criticism and stated that 'it [is] hard to criticise other international organisations'.[86] Several specific factors may account for this perceived difficulty.

First, potential review organizations may be concerned with appropriate jurisdiction and mutual respect for another institution's rules and procedures. The international arena has traditionally been guided by relatively vague but pervasive principles of comity and deference to the decisions of foreign actors. While international organizations frequently criticize individual states, such statements are often based on prior consent, with States Parties delegating a measure of oversight authority to institutions such as the WTO or UN human rights bodies. The same cannot be said of two international organizations with potentially disparate national membership. Moreover, while national institutions may in some sense be seen as subservient to the demands of international organizations, the reverse is also true. States are the original source of delegated power, suggesting that national organizations actually hold a strong structural claim on reinterpretation and critique of international organizations' use of authority. There is, however, no established hierarchy between most international organizations, and distinct international organizations have no such structural arguments to bolster inter-institutional review. Of course, a formal institutional hierarchy is not a prerequisite for horizontal review. Just as one country may criticize the practices of another, one political IO can legitimately criticize another, provided that it is in some way acting according to the wishes of its national membership. Nevertheless, such actions run against the baseline commitment to restraint in international relations. While

[83] Benvenisti, 'Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?', 68 *L and Contemp Probs* (2005) 319.

[84] UN Committee on Economic Social and Cultural Rights, 'General Comment 2: International technical assistance measures', E/1990/23 (1990).

[85] See, e.g., UN GA, Question of equitable representation on the Security Council and the Economic and Social Council, A/RES/1991(XVIII)[A-B], A/PV.1285, 17 Dec. 1963; UN GA, Question of equitable representation on and increase in the membership of the Security Council, Resolution 47/62, 11 Dec. 1992.

[86] Translated summary of the remarks of Agramunt Font de Mora (Spain). Parliamentary Assembly, Report of the Third Part of the 2010 Ordinary Session, 26th sitting, AA10CR26, AS (2010) CR 26, 24 June 2010.

horizontal review may be legally permissible, it will often transgress norms of international behaviour, giving rise to questions regarding organizational legitimacy and propriety.

The difficulty of horizontal review is compounded by the lack of universally applicable GAL standards. The GAL content of different international procedures and decision-making processes varies significantly, a divergence of practice that reflects, at base, political preferences. There is no universal standard of transparency or accountability against which all international organizations can be measured. A reviewer must therefore not only judge another's compliance with a set of rules, but also determine what rules should and should not apply. If such review borders on inappropriate, as suggested above, and can be politically costly to an organization, as I will argue below, the murkiness regarding the applicable norms makes inter-institutional criticism particularly difficult to justify.

Two further elements, political in nature, may impede inter-institutional review. First, international organizations are relatively weak institutions, heavily dependent on essentially voluntary funding and support provided by states. Criticism of another international organization's actions will frequently negatively implicate the interests of one or more powerful states. Under such circumstances direct, or even indirect, criticism can be institutionally costly. Secondly, there are the inherent structural obstacles to horizontal IO review. States are, in theory, the ultimate decision-makers within most international organizations. If enough states are concerned about the procedural fairness, accountability, or responsiveness of a given international organization, these concerns will conceivably be addressed within that organization. If, on the other hand, power-wielding states are of the opinion that the existing procedures are adequate, it is unlikely that another international organization controlled by those same powerful states will publicly voice criticism.

The lack of universally accepted GAL standards, the institutional weakness of IOs, and states' monopoly of control over multiple institutions all converge to make inter-institutional criticism an exceptional event. Based on this analysis of the factors that impede such review, however, we can also extrapolate circumstances that would allow space for international criticism. In particular, criticism may emerge where two international organizations have distinctive memberships, or divergent distribution of power between the same set of members. Such organizations would not encounter the structural and political impediments outlined above.

There are a number of situations that could give rise to power or membership differentials. The relationship between the UN General Assembly, a body with wide and egalitarian membership, and the Security Council, a body with highly restrictive membership, is one such example. One could also look to regional bodies representing weaker states that have distinct membership, and therefore a different power centre, from global organizations. Even organizations with comparable memberships may differ as a result of divergent vote allocation procedures. International financial organizations, for example, have broad member bases but distribute votes along monetary lines, introducing power distribution differentials when compared to UN bodies that allocate one vote per country. In such cases, politically weak states that were not

able to make their voices heard or achieve favourable substantive outcomes in the primary forum may have more success voicing dissent in an organization where they and other like-minded states have greater control.

The case study at hand, however, cannot be adequately explained by variations in the distribution of state power. European states are relatively powerful international actors, and the Council of Europe is composed of 47 European states. The motion criticizing the WHO that came before the Council of Europe passed with near universal support.[87] It would be surprising if such a large block of European states was not able to push forward an agenda for increased transparency and procedural protections within the WHO itself.

Representatives' discussions within the WHO and the Parliamentary Assembly confirm that this is not an instance of an unhappy minority of states voicing repressed criticism in a more accessible forum. The Parliamentary Assembly Rapporteur who investigated and reported on the WHO's handling of the H1N1 pandemic was British representative Paul Flynn. Flynn authored the final report that questioned the WHO's transparency and independence, introduced the draft resolution and recommendation that were subsequently adopted by the Parliamentary Assembly, and has done a large amount of high profile advocacy on the issue. Despite the fact that a British representative was the primary moving force within the Council of Europe, however, the British response within the WHO was restrained and even defensive. In the January 2010 meeting of the World Health Assembly Executive Board, the British Executive Board representative defended the Organization against the criticisms being raised by Flynn's ongoing investigation, stating that 'Member States must be neither intimidated nor driven into a situation of complacency by the recent suggestions in the media that the Organization and national health ministries had overreacted to the pandemic'.[88] Just six days before, Flynn had asserted that '[t]here is truth that . . . [WHO] panicked and declared a pandemic', asking 'how powerful were the tentacles of the Pharmas in the WHO'.[89] As indicated by these contrasting quotations, the British response within the Parliamentary Assembly ran directly counter to the British response within WHO.

The highly divergent responses of the British representatives in the two forums and the general lack of European criticism within the WHO itself suggest that there is a significant degree of policy determination independence between Parliamentary Assembly representatives and the delegates who represent governments at the WHO. This in turn suggests a different structural mechanism operating to allow for inter-institutional review. Rather than two organizations controlled by different groups of states engaging in horizontal review, this example shows review arising between two international organizations with similar membership, but whose members represent different branches of government within these same states.

[87] *Ibid.*

[88] Summarized statement of Sir Liam Donaldson, WHO, *supra* note 2, at 45.

[89] Flynn, *supra* note 1.

The Parliamentary Assembly of the Council of Europe is an international legislature, and as such is a uniquely structured international institution. In contrast to the composition of most other international organizations, Parliamentary Assembly delegates must be sitting Members of Parliament in their home countries and 'the balance of political parties within each national delegation must ensure a fair representation of the political parties or groups in their national parliaments'.[90] The number of representatives is apportioned according to population rather than the more usual 'one vote per country' system.[91] Moreover, unlike in many international organizations where state representatives are appointed directly by the executive branch, a variety of appointment methods is used to select Parliamentary Assembly representatives. In the UK, for example, the country's 16 Members, and the 16 alternates, must be approved by both Houses.[92] The current Members are drawn from three of the UK's political parties.[93] Finally, the Assembly completely controls its own agenda, both within Committees and within the broader plenary sessions.

As a result of this independence, the statements emanating from the Parliamentary Assembly more accurately reflect the varied views of the legislative branches of governments, rather than the executive branches that usually control foreign affairs. The UK representative to the WHO was Sir Liam Donaldson, the UK's Chief Medical Officer – the highest medical adviser to the executive branch and a central government figure in the UK's H1N1 response.[94] Paul Flynn, on the other hand, was a parliamentarian who from the outset was highly active in criticizing the UK government domestically regarding its H1N1 spending.[95] In introducing his resolution criticizing the WHO before the Parliamentary Assembly, Flynn even went so far as to call into question the impartiality of his own government's upcoming investigation:

> National governments are also holding their own investigations – my country will announce its investigation next week – but we know what is likely to happen. Nations will defend their

[90] Council of Europe, 'Assembly structure: Parliamentary representation', available at: http://assembly.coe.int/Main.asp?link=/AboutUs/APCE_structures.htm.

[91] *Ibid.*

[92] United Kingdom, 'Membership of the UK Delegation', available at: www.parliament.uk/mps-lords-and-offices/offices/delegations/coe2/membership/.

[93] As of 10 Nov. 2010 there were Members of the Parliamentary Assembly that belong to all three of the UK's political parties – Labour, Liberal Democrat, and Conservative. The party distribution reflects the composition of the House of Commons: *ibid.*

[94] United Kingdom Department of Health, 'The role of the Chief Medical Officer (CMO)', (2010), available at: www.dh.gov.uk/en/Aboutus/MinistersandDepartmentLeaders/ChiefMedicalOfficer/AboutTheChiefMedicalOfficerCMO/DH_4103960.

[95] In Jan. 2010, Flynn asked the Health Secretary in the House of Commons, 'Was the threat of 65,000 British swine flu deaths an unscientific exaggeration that has cost the country dearly, not only financially but in terms of stress and distorted NHS priorities?' The Health Secretary replied, 'We had to take every possible step to keep the country safe through what was declared a world health pandemic, not by this Government but by the World Health Organisation. We saw the events in Mexico in the spring, followed by the exceptional spike in flu cases in this country in the summer. There were understandably high levels of public concern, and I make no apology for making all the necessary preparations to keep the public safe through that. We have come through the pandemic because of the strength of the plans and preparations that this Government put in place': HC Debs, 12 Jan. 2010, vol. 503, col. 556.

> own conduct. I am sure Egypt will say that it did not suffer from swine flu because it killed all the pigs in the country. I am sure that Britain will say that it did not have many cases because it spent £1 billion, and that Poland will say that it spent very little and had none.
> So nation states will defend themselves, as will the WHO and the pharmaceutical companies, but who will speak for the 800 million people who suffered badly as a result of this decision? And, given that we have cried wolf four times, who will suffer in the future if a very nasty disease comes along but no one believes the WHO because they no longer trust it? The United Kingdom is the second biggest payer to the WHO and we greatly admire its work in eliminating smallpox, and now polio, from the world. We need a World Heath Organization in which we can have absolute confidence, but without transparency, that is not possible.[96]

The same intra-governmental criticism that exists between the legislative and executive branches is occurring on an international scale, allowing for review between international organizations.

An organization that allows legislative members to form an effective transnational network is a relatively unusual institution. In an international arena increasingly governed by global networks, legislators have generally 'lagged behind' their ministerial, judicial, and regulatory counterparts in the formation of transnational groups.[97] Anne-Marie Slaughter has suggested several explanations for the lack of international parliamentary cooperation. Parliamentarians generally focus on issues relevant to their local constituencies, which are primarily domestically oriented. The wide range of governance concerns also makes it difficult to identify common issues and logical counterparts in foreign constituencies and impedes the specialized expertise that binds other networks. Finally, legislators' high turnover means there is little incentive to invest in fostering long-term relationships with equally transient foreign counterparts.[98]

Although the Parliamentary Assembly is undoubtedly confronted with a number of these difficulties, the existence of a well-established permanent network structurally supported by all branches of government probably helps to overcome coordination barriers. Assignment to the Parliamentary Assembly forms part of a legislator's official duties, and there is some budgetary and time allowance for in-person meetings and debates. Permanent committees provide continuity, as the committee can continue work on an issue even if individual legislators are voted out of national office. The ability to join different committees also may allow parliamentarians to select the issue areas that are most pertinent to them, facilitating the identification of relevant counterparts. On an international stage where formal power is delegated to governments' executive branches, and international institutions are designed in a manner that often aggregates and replicates this power asymmetry both domestically and internationally,[99] an organization speaking with a transnational legislative voice should have a distinct and critical perspective.

[96] Remarks of Paul Flynn, Parliamentary Assembly, *supra* note 86.

[97] A.-M. Slaughter, *A New World Order* (2005), at 104.

[98] *Ibid.*, at 105–106.

[99] Moravcsik, 'Why the European Union Strengthens the State: Domestic Politics and International Cooperation', Centre for European Studies Working Paper Series (1994), at 52.

In addition to these structural elements, the Council of Europe's need to compete for public legitimacy and relevance may also have increased the likelihood of horizontal review. As characterized in its own publications, the Council is plagued by a 'lack of recognition and an undeservedly low profile', and is 'constantly having to make a special effort to avoid being confused with the European Union or eclipsed by it'.[100] The Council of Europe's budget of €205 million is dwarfed by the €1.3 billion given annually to the European Parliament (the Parliamentary body of the European Union).[101] Finally, the Parliamentary Assembly's potential to wield real power was seriously undercut by a 1951 decision to keep it a consultative, rather than a constituent, assembly. As one of the Assembly's Presidents hopefully remarked in 1963, it is a body with '[h]ardly any powers, but real moral authority'.[102]

Given this background, an organizational need to demonstrate relevance and utility may be another factor that pushed this particular institution beyond normal political bounds. In casting for an independent parliamentary role, a direct review of the WHO has set the Parliamentary Assembly apart. National legislatures are primarily focused on their national executives, and the European Parliament has mostly targeted the activities of the European Commission. The need to find a niche, and the absence of a direct legislative body for international organizations such as the WHO, makes direct review an attractive choice.

This organizational impulse towards impact and legitimacy was reflected in the universally congratulatory debate that preceded the adoption of the WHO Resolution. One UK Member in particular took time to stress how welcome a timely, relevant report was, saying that the investigation

> demonstrated, for the first time in a long time, that the Council of Europe can come up with a real response to a public concern. If it had not been for us, that would have gone relatively unnoticed and that would have been a tragedy.[103]

Flynn also viewed the Council's contribution as uniquely important:

> My great thanks to the team that created this report . . . The team realised that this was not like any other report; it was much more important. They were speaking for the people of Europe – not for private interests, not for privilege or wealth, but for the interests and health of the 800 [*sic*] people who we represent. . . . How often is it that we hear voices in here from all parts of the political spectrum and from every corner of Europe singing a Hallelujah Chorus in harmony, saying the same thing? Our message is a powerful, thunderous and intelligent one of anger against a foolish act by the World Health Organization. We are the first body in the world to look at this problem and to denounce what happened. This is not going to go away.[104]

Most international organizations that could potentially engage in horizontal IO review would have little to gain and much to lose by criticizing their peers. The Council

[100] A. Royer, *The Council of Europe* (2010), at 19.

[101] *Ibid.*

[102] Pierre Pflimlin, President of the Parliamentary Assembly, 6 May 1963, cited in Royer, *supra* note 100,. at 12.

[103] Remarks of Mike Hancock, Parliamentary Assembly, *supra* note 86.

[104] Remarks of Paul Flynn, *ibid.*

of Europe, on the other hand, seemed to view this form of review as critical to its continued relevance.

This point is also reinforced by comparing the Parliamentary Assembly's review and the European Parliament's H1N1 report. The European Parliament, one of two elements of the legislative branch of the European Union (EU), describes itself as an institution that is 'firmly established as a co-legislator, has budgetary powers and exercises democratic controls over all the European institutions'.[105] As mentioned, it also enjoys significantly greater funding than the Parliamentary Assembly. Like the Parliamentary Assembly, the European Parliament has also produced a highly critical review of the H1N1 response.[106] Although the EU Parliament's report and adopted resolution mention the WHO, its ultimate recommendations and focus remain on its primary jurisdiction of review – the European Commission and pan-European regulators.[107] The European Parliament has a targeted role as a power check within the very active EU, and is a relatively stable and powerful organization. Vocal public assertions of its relevance would be less advantageous to the relatively well-situated institution, making it less likely to engage in riskier forms of review.[108]

In addition to adding a unique perspective among global actors, international legislatures may also be a relatively effective forum for inter-institutional review. Criticism that arises from weaker states acting in more favourable forums will often increase public awareness of these states' concerns, perhaps increasing public pressure on the target institution. If, however, these states had been able effectively to voice concerns or change outcomes in the primary forum, they would have done so. External criticism emanating from bodies controlled by weaker states is less likely to influence the position of the more powerful states that blocked change in the first instance.

The criticism that emerges from international legislatures may be more effective. Because legislators are not represented within most international organizations, their objections may not have yet been addressed, perhaps giving them additional leverage as compared to opinions that presumably have already been heard, and dismissed, in discussions within the primary forum. Moreover, although legislative bodies may be

[105] European Parliament, 'Parliament's powers and procedures', available at: www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&language=EN.

[106] Rapporteur Michèle Rivasi, 'Report on evaluation of the management of H1N1 influenza in 2009–2010 in the EU', Environment, Public Health and Food Safety Committee, European Parliament, A7-0035/2011, 2 Feb. 2011.

[107] *Ibid.*; European Parliament, 'Resolution on evaluation of the management of H1N1 influenza in 2009–2010 in the EU', 2010/2153(INI), 8 Mar. 2011.

[108] Although the scope of this article does not allow for development of this point, it may be that this combination of independence from political decision-makers and cost-benefit risk analysis can also be applied to the judicial arm of horizontal international review. Theoretically, the more international adjudicators are independent from the executives that appointed them, the more likely they will be to review not only their own IO, but other international actors as well. The composition of the ILO arbitration panel that directly reviewed the conduct of the Organisation for the Prohibition of Chemical Weapons in the *Bustani* case, composed of employer and employee representatives, is an example: see *Bustani*, *supra* note 108. Other factors seen in this political example may also be relevant to the legal setting: tribunals that feel the need to 'make their mark' by setting out strong jurisprudence and demonstrating their relevance, e.g., may be more likely to engage in potentially costly peer review.

echoing the criticisms of other outside actors such as non-governmental organizations (NGOs), their governmental status may give their opinions more weight. As they are comprised of elected members of parliament and official government representatives, international legislative bodies do not suffer from the same legitimacy problems as NGOs, which may be dismissed as unaccountable special interest groups. Finally, individual delegates are also able to coordinate advocacy in their national legislatures, pressuring their own executives domestically.

Indeed, the Council of Europe's inquiry, report, and resolution seem to have had significant traction. From the outset the WHO quickly and publicly responded to the concerns being raised by the Council's investigation, and simultaneously announced that it would be engaging in its own independent review.[109] The WHO also participated in the Council of Europe's inquiry, attending the public hearings and providing written responses to questions. Finally, the WHO's own report confirmed many of the issues identified by the Parliamentary Assembly and its recommendations to enhance transparency, accountability, and independence have been accepted by the WHA.[110] Particularly given the WHO's reluctance to take responsibility for many of the issues raised by the Council of Europe during the H1N1 pandemic, a reluctance criticized by the WHO's independent review,[111] it seems unlikely that such change would have occurred without the Parliamentary Assembly's action.

5 *Why* did this Criticism Emerge: Divergent Conceptions of the Meaning of 'Accountability'

Although structural differences between international organizations may open a space for review, these institutional aspects shed little light on why the substantive positions of legislative and executive branches would be divergent. Why do the existing accountability mechanisms built into the IHR not satisfy governments' legislators? Or conversely, why would governments' executive branches not be as vocal about potential corporate capture of WHO decisions? There are both political and normative explanations that may account for this difference.

Looking first to the political reality of the situation, it is clear that most executive branches have little to gain by criticizing the WHO's actions in this context. First, there is the possibility that at least some governments or regulatory agencies are subject to significant pressure from the pharmaceutical industry. An executive that is to some extent 'captured' by private industry is less likely to express concern about industry

[109] WHO, Transcript of virtual press conference with Dr Keiji Fukuda, Special Adviser to the Director-General on Pandemic Influenza, 14 Jan. 2010. Records also show that the WHO's Executive Board authorized a review of the handling of the H1N1 pandemic at the request of several board members on 18 Jan. 2010. It is not clear from the summary provided which members requested the review, or what specific aspects of the H1N1 response the members were concerned about: Statement of the Director-General, WHO, *supra* note 2, at 42, 45.

[110] Report of the Review Committee, *supra* note 72.

[111] *Ibid.*, at 119.

capture at the international level. Even a relatively influence-free executive, however, would still find it politically difficult to criticize the WHO. While much criticism was driven by genuine concerns regarding the WHO's legitimacy and the efficacy of future pandemic warnings, the more immediate public anger revolved around the allegedly inappropriate allocation of enormous amounts of public money. Ultimately, however, the decision to buy vaccines was a national policy choice by the executive branch. It would be very difficult for the British government, for example, to raise questions about the WHO's independence without also raising questions about their own decision-making process. Indeed, the WHO's British representative was a leading figure in the national UK pandemic response and himself the subject of intense domestic criticism. Under the circumstances, it is unlikely that those directing national H1N1 responses would publicly criticize a similar H1N1 response at the global level.

Significant practical difficulties would also arise if states rigorously insulated the WHO from corporate actors. While significant concerns have been expressed regarding potential conflicts of interests in ventures such as public–private partnerships,[112] it is not likely that the WHO will decrease its reliance on the private sector. The mandates of the WHO and pharmaceutical companies do overlap, and the involvement of the private sector is often crucial to achieving public health goals. Moreover, the scientific community with the necessary expertise to advise on these subjects is very limited. Because of the nature of scientific work, many of the relevant experts will have at some time worked for or advised pharmaceutical companies. It is neither realistic nor desirable to insist that the WHO develop a pandemic response without consulting pharmaceutical manufacturers. The most that can be asked is for thorough safeguards and adequate governance structures to ensure that final outcomes reflect public health priorities.

In addition to the feasibility barriers, underlying financial considerations may also impact on states' eagerness to tackle corporate capture. One of the main motivations for private industry partnerships was to expand available resources and assist the WHO in fulfilling core functions.[113] If resources currently supplied by the private sector are eliminated, states will face more pressure to shoulder the financial burden. Since states are unlikely to provide significantly increased funding, they too will be likely to be cautious about insisting too strongly on distancing the WHO from private industry. The need to keep industry 'on side' may also lead to a reluctance openly to question the advice of experts with industry ties.

There are additional normative factors that may explain the divergence between executive and legislative branches. Indeed, it is likely that executive branches are concerned about organizational accountability, but simply have a different conception

[112] Buse and Waxman, 'Public–Private Health Partnerships: a Strategy for WHO', 79 *Bull WHO* (2001) 748; Buse and Walt, 'Global Public–Private Health Partnerships: Part II – What are the Issues for Global Governance?', 78 *Bull WHO* (2001) 699; Richter, '"We the Peoples" or "We the Corporations"? Critical Reflections on UN-Business "Partnerships"' (2003), available at: www.gifa.org/files/wearethepeople.pdf.

[113] Buse and Walt, 'Global Public–Private Partnerships: Part I – A New Development in Health?', 78 *Bull WHO* (2000) 549, at 553.

of what accountability means. The Parliamentary Assembly seems to view the WHO as an entity charged with effective and independent global health solutions, and thus accountable to the global population's – or at least the European population's – health needs. Traditionally, however, governments' efforts to regulate international disease have not been so singularly focused on health outcomes. To understand the multi-faceted governmental interest in this area, it is necessary to take a small detour into the history of international infectious disease regulation.

For well over a century countries have been entering into formal agreements regarding international disease regulation. Historically, however, the motivating force propelling international cooperation has not been the pursuit of global or national health agendas, but a desire to minimize unnecessary restrictions on international trade. The first international sanitary conference was convened in 1851 to deal with the 'fragmented, non-harmonized patchwork of national quarantine regulations that imposed delays and costs on trade and commerce'.[114] Over the next century numerous agreements were signed in an effort to systematize and limit various national measures that impeded trade.[115] When the International Sanitary Regulations (later renamed 'International Health Regulations') entered into force in 1951, they consolidated the existing international rules, and introduced the WHO as the administrator.[116]

The 'classical regime' of international infectious disease control that was consolidated into the 1951 Regulations was never very effective. As described by David Fidler, the period from 1951 to 1981 was a time marked by the 'marginalization and stagnation' of the IHR',[117] an era that only 'proved not to be the regime's nadir because the subsequent 20 years witnessed its death'.[118] Crippled by the original IHR's limited scope and a complete reliance on state consent and information, the WHO was relatively powerless in the field of international disease transmission. Indeed, after the creation of the World Trade Organization (WTO) in 1995, that organization became 'the central horizontal regime for international law on infectious diseases'.[119]

Beginning in the 1990s, however, Western countries started to view international infectious disease control through a national security lens.[120] Within the WHO, the revision of the then-obsolete IHR began in 1997 but stalled until 2003, when the global outbreak of Severe Acute Respiratory Syndrome killed nearly 800 people and cost the Canadian economy an estimated US$3 billion.[121] The review process was

[114] Fidler, 'From International Sanitary Conventions to Global Health Security', 4 *Chinese J Int'l L* (2005) 328, at 329.

[115] *Ibid.*, at 329–330.

[116] *Ibid.*, at 333.

[117] *Ibid.*

[118] *Ibid.*, at 338.

[119] Fidler, 'Emerging Trends in International Law Concerning Global Infectious Disease Control', 9 *Emerging Infectious Diseases* (2003) 285, at 286.

[120] Fidler, 'Constitutional Outlines of Public Health's "New World Order"', 77 *Temple L Rev* (2004) 247; S.E. Davies, *Global Politics of Health* (2010), at 136–142.

[121] WHO, 'Summary of probable SARS cases with onset of illness from 1 November 2002 to 31 July 2003', 21 Apr. 2004; Davies, *supra* note 120, at 140.

prioritized, and in 2005 the significantly-revised International Health Regulations were adopted by the WHA.

Despite the WHO's overall mandate to pursue global health, the institution's regulatory authority over international infectious disease essentially placed it at the head of a traditional trade regulation regime. The continued relevance of international trade is reflected in the revised IHR's purpose which includes avoiding 'unnecessary interference with international traffic and trade',[122] as well as the WHO's joint press conference with the WTO during the H1N1 pandemic to denounce unnecessary import restrictions.[123] Unlike the general public and the Parliamentary Assembly, states' concerns encompass not only health, but also international trade.

This discrepancy regarding the exact goals of disease regulation may partially account for the divergence in opinion regarding what kinds of accountability measures are important, and to whom accountability is owed. As pointed out by Grant and Keohane, most multilateral institutions criticized for a lack of accountability are, in fact, highly accountable to states, which closely supervise and constrain their actions.[124] A review of the IHR provisions provides support for the proposition that executive branches are concerned with accountability but simply have a different vision of what this means and how it should be achieved. Coming on the heels of the WHO's essentially unregulated – but generally welcomed – response to the SARS crisis, states' renewed interest in the IHR reflected, at least in part, a desire to increase their control over a global institution with expanded powers. As a result, the Regulations have numerous provisions designed to ensure that the WHO remains accountable to states, and that emergency actions are subject to state oversight. Not only do the accountability measures accrue primarily to states, many of the specific rights afforded appear tailored to address states' trade-related concerns. For example, significant participation[125] and confidentiality rights[126] accrue to states that are affected by potential and ongoing pandemics. These are precisely the states that would be most impacted on by trade and travel restrictions.

[122] IHR, *supra* note 35, Art. 2.

[123] WHO, 'Transcript of virtual press conference with Gregory Hartl, WHO Spokesperson for Epidemic and Pandemic Diseases, and Dr. Peter Ben Embarek, WHO Food Safety Scientist', 3 May 2009, available at: www.who.int/mediacentre/swineflu_presstranscript_2009_05_03.pdf.

[124] Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *Am Pol Sci Rev* (2005) 29.

[125] If the WHO receives information about a potential global health risk from a third party, it must request verification from the State Party concerned and offer to collaborate in assessing the risk of adverse international health and trade effects: IHR, *supra* note 35, Arts 9(1), 10(1). Once the Director-General determines that a PHEIC is occurring, he or she must first consult with the affected State Party before going to the Emergency Committee, and the final decision must take into consideration the information provided by the State Party: Art. 12(4). The affected State Party also has the right to nominate at least one member to the Emergency Committee and has the right to present its views to the Emergency Committee prior to their issuing recommendations: Arts 48(2), 29(4).

[126] While there are proactive disclosure obligations, these relate primarily to obligations to exchange information between states and the WHO. Relatively tight control is retained over what the WHO can independently release to the general public: IHR, *supra* note 35, Arts 6, 7, 11(1), 10(4).

The relative importance of the trade aspects of international disease regulation may be increased by the fact that most powerful states do not strictly *need* WHO policies to mirror optimal public health practice. Wealthy countries already have functional national regulators to ensure their populations' best health interests. States' concrete policy recommendations in response to the WHO transparency and accountability criticisms reflect this reality. The European Union, for example, recommended insulating Europe's decision-making structures from WHO assessments and recommendations.[127] Similarly, the UK investigation recommended that all future pharmaceutical contracts should not depend on external triggers for their actuation.[128] Affluent countries can simply shore up parallel regional or national processes rather than reform potentially problematic global institutions. For these states, the WHO's function in issuing recommendations is subsidiary to already-existing national regimes.[129] It is therefore not a direct concern that the WHO may not be optimally transparent or accountable in the substance of its regulatory functions. Indeed, for any executive branches that are significantly influenced by the pharmaceutical industry, it could actually be preferable that accountability mechanisms remain lax in this area. Particularly for wealthy states, the WHO may be an acceptably functional organization if it is accountable to its members, serves as an 'early warning' disease alert system, continues to be responsive to states' desires to minimize impacts on international trade, and navigates a financially acceptable balance between public and private interests.

These political, practical, and normative considerations probably combined to work against governments' executive branches speaking publicly on the issue of transparency and corporate capture. In contrast, the global public and the scientific community have quite different expectations and constraints. Their overarching demand is for the WHO to be responsive to global public health interests. For this community, the IHR has nothing to do with international trade, and the fact that strong national systems can filter corporate capture out of WHO recommendations is irrelevant. Responding to populist concerns regarding the possible misallocation of public funds, legislatures in various countries bound together to question an international organization and the control exercised by their own executive governments. The GAL norms incorporated into the IHR text are insufficient to ensure that the WHO is pursuing the public good, rather than the pharmaceutical good, in its elaboration of policy recommendations. These groups and individuals therefore called for a new, and differently-oriented, set of GAL norms to be incorporated into the WHO governance structure.

[127] Rivasi, *supra* note 106.

[128] Hine, *supra* note 54.

[129] It might be thought that developing countries would be much more reliant on the WHO's substantive recommendations and therefore would be more concerned about possible regulatory capture. However, WHA debates show that developing countries' criticisms were squarely focused on access to drugs and equitable vaccine distribution mechanisms. If there is no system to distribute vaccines to countries that cannot afford to purchase them, the discussion over the adequacy of the regulatory recommendation and approval procedure appears moot.

6 Conclusion

This novel path for the emergence of GAL review, emanating from political rather than judicial mechanisms, holds some potentially interesting insights into the ability of global administrative law to address corporate capture. Corporations and other financially-motivated special interest groups can have a significant impact on international policy development. States' executive branches, however, may have relatively little incentive to police international organizations for this type of influence. Most powerful governments already have functioning domestic regulatory agencies charged with protecting public health and safety. As long as international organizations are accountable to states, serving the government's immediate needs, and strong domestic structures are in place to provide for independent decisions on national public policy goals, states are likely to be relatively content with international organizations' performances.

Adjudicative review bodies such as courts and tribunals may also have difficulty implementing GAL procedures that will address corporate capture. Judicial processes are well placed to increase participation rights and examine the impact of decisions on the rights of particular individuals. It is easier for courts to broaden participation in a given process than it is to exclude a potentially powerful interest from contributing to the discussion. If the executive branches of controlling states decide that, for whatever reason, insulating a particular process from corporate capture is not a priority, judicial or quasi-judicial bodies are unlikely to have a strong response.

Given the inherent limitations in the responses of the executive and judicial branches, the criticisms levelled by the Council of Europe seem both procedurally and substantively unique. As an international political body that is relatively independent from the executive branches of government, the Parliamentary Assembly is well placed to question underlying substantive assumptions about what international institutions are for and to whom they should be accountable. On a domestic level, legislative bodies are uniquely placed to question whether the executive and its delegated decision-makers are acting in the public interest as broadly defined.[130] The existence of independent political forums for the expression of communal public interest concerns, therefore, represents a unique and valuable contribution to the already diverse global stage of reviewing bodies.

[130] In the US, e.g., safeguards against regulatory capture of Federal Advisory Committees were introduced due to Congressional concern over redundancy and special interest capture: S. Smith, *Federal Advisory Committees: A Primer*, Cong. Res. Serv., RL30260, 20 Mar. 2007; Karty, 'Closure and Capture in Federal Advisory Committees', 4 *Bus & Pol* (2002) 213.