

The empirical apprehension of the normative leadership of an international organization: The example of the World Health Organization

Catherine Régis, Gaëlle Foucault, Pierre Larouche, Jean-Louis Denis et Miriam Cohen

Volume 29, numéro 5, 2024

Droit international en droit interne : développements récents et perspectives comparées : actes de conférence

URI : <https://id.erudit.org/iderudit/1116028ar>

DOI : <https://doi.org/10.7202/1116028ar>

[Aller au sommaire du numéro](#)

Éditeur(s)

Centre de recherche en droit public Université de Montréal

ISSN

1480-1787 (numérique)

[Découvrir la revue](#)

Citer cet article

Régis, C., Foucault, G., Larouche, P., Denis, J.-L. & Cohen, M. (2024). The empirical apprehension of the normative leadership of an international organization: The example of the World Health Organization. *Lex Electronica*, 29(5), 129–146. <https://doi.org/10.7202/1116028ar>

Résumé de l'article

En plein essor, la recherche empirique en droit participe à la création de nouvelles connaissances et ouvre aux juristes d'autres voies pour étudier une question, un phénomène. Oser l'empirisme n'est pas chose aisée, mais les auteurs du présent article ont pris ce virage et proposent d'en exposer le récit. En construisant deux méthodes distinctes (pour deux projets), ils ont pu tester les possibilités qu'offre la recherche empirique pour appréhender l'enjeu du *leadership* normatif de l'Organisation mondiale de la santé (OMS). Destiné à aiguiller à partir d'une expérience celles et ceux qui voudraient s'aventurer dans l'empirisme, cet article met en lumière les défis rencontrés, mais surtout les atouts d'une telle recherche. La richesse des informations obtenues a en effet grandement bonifié la compréhension de la trajectoire des normes de l'OMS et de leurs impacts sur les États.

© Catherine Régis, Gaëlle Foucault, Pierre Larouche, Jean-Louis Denis et Miriam Cohen, 2024



Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter en ligne.

<https://apropos.erudit.org/fr/usagers/politique-dutilisation/>

Cet article est diffusé et préservé par Érudit.

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche.

<https://www.erudit.org/fr/>

The empirical apprehension of the normative leadership of an international organization: the example of the World Health Organization³³⁰

Catherine RÉGIS, Gaëlle FOUCAULT, Pierre LAROCHE,
Jean-Louis DENIS & Miriam COHEN
The empirical apprehension of the normative leadership of an international organization: the example of the World Health

Catherine Régis, Gaëlle Foucault, Pierre Larouche, Jean-Louis Denis & Miriam Cohen³³¹

330 This article has been double-blind peer-reviewed. This article was originally written in French under the title: « L'appréhension empirique du *leadership* normatif d'une organisation internationale : l'exemple de l'Organisation mondiale de la Santé »

331 Catherine Régis, Full Professor, Université de Montréal, Faculty of Law, Canada Research Chair: catherine.regis@umontreal.ca ; Gaëlle Foucault, PhD candidate, Université de Montréal, Faculty of Law, Canada: gaelle.foucault@umontreal.ca ; Pierre Larouche, Full Professor, Université de Montréal, Faculty of Law, Canada: pierre.larouche.1@umontreal.ca ; Jean-Louis Denis, Professor, University of Toronto, Canada, Ontario Research Chair: jean-louis.denis@umontreal.ca ; Miriam Cohen, Associate Professor, Université de Montréal, Faculty of Law, Canada Research Chair: miriam.cohen@umontreal.ca

ABSTRACT

Empirical research in law is thriving, contributing to the creation of new knowledge and providing jurists with innovative ways to study issues and phenomena. Embracing empiricism is no easy task, but the authors of this article have taken the plunge to shed light on such research. By developing two distinct methods (for two projects), they tested the empirical potential for understanding the normative leadership of the World Health Organization (WHO). Designed as a resource for those looking to explore empiricism, this article highlights both the challenges faced and the strengths of such research. The wealth of information gathered significantly enhanced the researchers' insights into the trajectory of WHO norms and their influence on States.

Keywords: World Health Organization – empirical study in law – normative leadership – international law – methodological construct

RÉSUMÉ

En plein essor, la recherche empirique en droit participe à la création de nouvelles connaissances et ouvre aux juristes d'autres voies pour étudier une question, un phénomène. Oser l'empirisme n'est pas chose aisée, mais les auteurs du présent article ont pris ce virage et proposent d'en exposer le récit. En construisant deux méthodes distinctes (pour deux projets), ils ont pu tester les possibilités qu'offre la recherche empirique pour appréhender l'enjeu du *leadership* normatif de l'Organisation mondiale de la santé (OMS). Destiné à aiguiller à partir d'une expérience celles et ceux qui voudraient s'aventurer dans l'empirisme, cet article met en lumière les défis rencontrés, mais surtout les atouts d'une telle recherche. La richesse des informations obtenues a en effet grandement bonifié la compréhension de la trajectoire des normes de l'OMS et de leurs impacts sur les États.

Mots clés : Organisation mondiale de la santé — étude empirique en droit – *leadership* normatif – droit international – construction méthodologique

INTRODUCTION

[1] Since 2019, the authors of this article have been conducting empirical research into the normative leadership of the World Health Organization (WHO).³³² Following the completion of a pilot project led by researchers Catherine Régis and Florian Kastler (Régis & Kastler, 2018), the research team wished to propose and develop a broader evaluation of WHO's normative leadership by increasing the number of countries studied and following a different, more complex and interdisciplinary methodology (see below). To better understand this research object and, ultimately, the methodological construct developed to analyze it, it is important to provide a few details about WHO and its normative capacity.

[2] WHO is the only international intergovernmental organization dedicated exclusively to health. It was created after the Second World War as an institution in the service of peace, as emphasized in the preamble to its *Constitution*: “the health of all peoples is fundamental to the attainment of peace and security.” In addition to its field of activity, it is also its structure that marks its uniqueness. WHO is indeed a decentralized organization, with six regional organizations created in accordance with Article 44 of its *Constitution*. Although it has a central base, whose three main bodies are the Executive Board, the World Health Assembly and the Secretariat, WHO's work is also carried out at regional and national levels by specific entities. WHO is set up as the “directing and co-ordinating authority on international health work” (Art. 2(a), and has numerous functions in the fields of assistance, research and the production of norms. WHO's normative capacity is particularly important in view of the extensive powers of the World Health Assembly in this area, under articles 19 to 23 of the *Constitution* (power to adopt conventions, regulations and recommendations), and the diversity and quantity of normative instruments adopted by the Secretariat (WHO, 2023, p. 1).

[3] While the issue of state compliance with international directives and obligations has long occupied internationalists (Kingsbury, 1998; Weldon & Hoffman, 2020), the emergence of international organizations endowed with normative powers in the twentieth century, such as WHO, has opened up discussions regarding the alignment of state behaviour with the international norms produced by these organizations. Thus, the issue of normative leadership by international organizations can now be included within the developments surrounding state compliance. Distinct from the concepts of political and scientific leadership, the expression “normative leadership”, seldom used in the literature, is intended to focus on the normative role that certain international organizations can claim and on their ability to influence the behaviour of their Member States through the norms they adopt (Askie et al., 2023, p. 618).

[4] Because of its proximity to the study of state compliance, the analysis of normative leadership reflects the same complexities. Specifically, as a composite process, state compliance expressly refers to the analysis of three elements: the implementation of international norms, the convergence of the result of this implementation with these

332 The research project and its methodological construct were the subject of a presentation at the “Droit international en droit interne | Développements récents et perspectives comparées” conference held in Montréal on September 1, 2023.

norms, and the causal link between the implementation and convergence of States.³³³ In view of these different elements, questioning state compliance in research is particularly ambitious (Chayes & Chayes, 1993, p. 176). What's more, the plurality of disciplines that can grasp compliance as an object of study (e.g., law, politics, sociology, economics) potentially mobilizes a methodological diversity that only complicates the task. Among the range of methodological options available, empirical research in law, the focus of this article, certainly offers a number of advantages.

[5] Empirical legal research is booming in the 21st century. It is now firmly established in the English-speaking world (Cane & Kritzer, 2010) and is also gaining ground in the French-speaking world (Gesualdi-Fecteau & Bernstein, 2022). The empirical methods put forward for legal research are inspired by and similar to those of other social sciences, whether more qualitative methods such as field observation or interviews, or more quantitative methods such as surveys or advanced statistical data analysis (regression, etc.) are involved. In this sense, empirical research makes it possible to approach the law from a different angle, that of empirical data (instead of the traditional sources of law), with the key possibility of a solid basis for greater critical distance. It also enables us to tackle head-on questions that often put off traditional legal research, such as the effectiveness and efficiency of the law.

[6] However, as the projects presented below demonstrate, the empirical methods of other social sciences cannot simply be transposed to law. They need to be adapted to fit the reality of the law and to take into account certain nuances and specificities, so as to enrich the research results. In this article, we seek to explain how the empirical method can answer a research question relating to the evaluation of the normative leadership of an international organization. Indeed, the scope and innovative nature of the methodology we have developed justify describing the various stages in its construction and implementation.

333 This triptych is proposed following the reading of numerous studies on state compliance and the divergences that have been observed, including: Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106-8 *Yale Journal of International Law* 2599, pp. 2599–2660; Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation", (2000) 32-3 *Case Western Reserve Journal of International Law* 387, pp. 387–440; Edith Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths", (1998) 32-5 *University of Richmond Law Review* 1555, pp. 1555–1590; Alexander Betts and Philip Orchard, "The Normative Institutionalization-Implementation Gap", (2014) *Oxford Scholarship Online*, pp. 1–26; Beth A. Simmons, "Compliance with International Agreements", (1998) 1 *Annual Review of Political Science* 75, pp. 75–93; Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, Harvard University Press, 1995 and Pieter van Dijk, "Normative Force and Effectiveness of International Norms", (1987) 30 *German Yearbook of International Law* 9, pp. 9-35.

[7] Moreover, after the first few months of research and the construction of the theoretical framework,³³⁴ a major event occurred: the COVID-19 pandemic. Given the object of study, WHO's normative leadership, and the importance of this organization in times of health crisis, the research team decided to build a specific "sub-project" on the behaviour of States during this period to test the empirical possibilities of apprehending WHO's normative leadership in the specific context of such a crisis.

[8] Two methodologies have thus been devised and tested. Both seek to understand the journey of WHO norms in the domestic law and policies of Member States, yet their construction has been thought through differently (I) and can claim to make a rich contribution to knowledge in the field, despite the challenges and limitations that must be raised (II). Lastly, through the presentation of these research projects, we hope to be able to equip those who would like to venture into empiricism and contribute to the wider issue of the development and deployment of empirical methodologies in law.

1. TWO METHODOLOGICAL CONSTRUCTS FOR THE EMPIRICAL STUDY OF WHO'S NORMATIVE LEADERSHIP

[9] Intended to empirically test the convergence of States with WHO guidelines and recommendations for managing the COVID-19 pandemic, the "COVID-19 project" is based on a method involving a meticulous system of calculation (1.1) distinct from the general project on normative leadership, and this, because of the objectives pursued (1.2).

1.1 THE COVID-19 PROJECT: AN EMPIRICAL METHOD BASED ON THE CONVERGENCE RATIO

[10] The COVID-19 pandemic put the spotlight on WHO, which was responsible for the production of a substantial body of norms, notably in light of the *International Health Regulations* (2005). Specifically aimed at preventing, controlling and protecting against "the international spread of disease" (Art. 2), this binding instrument, adopted by

334 The theoretical framework for understanding how international norms in general—and those of WHO in particular—are deployed and incorporated into domestic law and public policy was developed in three main stages. Firstly, a literature search was carried out, drawing on four bodies of work: 1) the law of international organizations; 2) international health law; 3) standardization; and 4) multi-level governance. Finalized in 2022, the literature search led to an initial collection of 5,751 documents (articles, books, book chapters), of which 112 were kept and 16 were added using the "snowballing" technique. Secondly, based on this corpus of texts, a mapping of the various factors influencing, positively or negatively, the integration of and compliance with international law by States was sketched out. Thirdly, in addition to the above factors, an inventory of the different theoretical approaches involved in the question of the landing of international norms in domestic law was also carried out in order to construct a "neutral" theoretical framework, i.e., one without theoretical bias guiding our research. The overlaps and oppositions of the different theoretical approaches were thus identified. As a result of these three phases, a theoretical framework was constructed to account for the factors explaining the landing of international standards in domestic law throughout the life cycle of these standards (creation / dissemination / compliance / implementation / feedback).

196 States, provides the WHO Director-General with an important position from which to manage a health crisis. The urgency with which States reacted could lead them to be guided by WHO's position to benefit from the latter's expertise. The COVID-19 pandemic thus offered an opportunity to consider the empirical evaluation of WHO's normative leadership over a defined period characterized by crisis time. On this point, a special tool was developed as part of the qualitative analysis: the convergence ratio. Based on the observation of data, this allowed us to concretely measure the convergence/divergence between state measures and WHO norms.

[11] It is important to note that the concept of "convergence" should not be confused with that of "compliance." Indeed, unlike expectations of compliance, convergence is not intended to qualify the existence of a causal link between convergent state behaviour and the international norm.³³⁵ Examining the convergence of Member States in relation to the norms adopted by an international organization implies observing only whether state attitudes are aligned (*converging*) or not (*diverging*) with the positions taken by the organization. There is therefore no question here of assessing whether state behaviour is a direct consequence of the norm, which is empirically very difficult, if not often impossible, to characterize based on available data.

[12] However, observing and identifying such alignment, and therefore convergence, does not necessarily mean that it is optimal or perfect. In fact, as we will emphasize below, the flexibility offered by the convergence "ratios" tool makes it possible to apprehend situations of "partial convergence."

[13] More concretely, the "convergence ratio" tool aims to organize the qualitative analysis of collected data by comparing the positions of several players and to observe and assess potential alignment. Used in the context of the COVID-19 pandemic and state behaviour with regard to WHO norms, it led to the implementation of a complex points allocation system designed to gauge alignment as well as the rate of alignment.

[14] Empirical analysis offers an opportunity to break out of the confines of theory to explain the convergence of States, by proposing a concrete, material apprehension. It can thus complement, validate or even reject certain phenomena predicted or constructed by theory. To better understand the benefits of empiricism (see II-A), it is important to present more concretely the methodological construct specifically thought out in the context of the COVID-19 pandemic and WHO recommendations. However, it should be noted from the outset that this methodology could be reproduced in other contexts (e.g., other crises and other international organizations).

[15] Before highlighting the system for awarding the points essential to the convergence assessment, it should be pointed out that, given the objectives of this project and the issues of feasibility, some guidelines for empirical analysis had to be taken into account during data collection. In this case, a choice was made with regard to the period studied (first wave of the pandemic – from December 31, 2019, to August 31, 2020), the number

³³⁵ As indicated in the introduction, convergence is seen as one of the building blocks of compliance.

of States targeted (five – Brazil, Canada, China, France and the United States³³⁶) and specific areas of pandemic management activity (in this case normative activities – border controls and mask-wearing) (see Régis et al., 2021).

[16] Data analysis and the observation of potential alignments were carried out in three stages.

[17] Firstly, it was in the form of a temporal superimposition of the positions of WHO and the States studied that major convergence trends could be observed. A chronology of WHO normative action by marker (frontier/mask) was produced, based on a systematic census of norms adopted by WHO in accordance with the collection guidelines specified above. Symmetrically, the same chronology was produced for each State, taking into account all their political and legal positions for the same two markers. Here, the analysis was not limited to domestic law but also included political positions, which are of key importance in times of crisis. Then, for each country, an overlay was carried out to observe the first trends in terms of similarities and differences between WHO and State positions on the same subject, namely borders or masks.

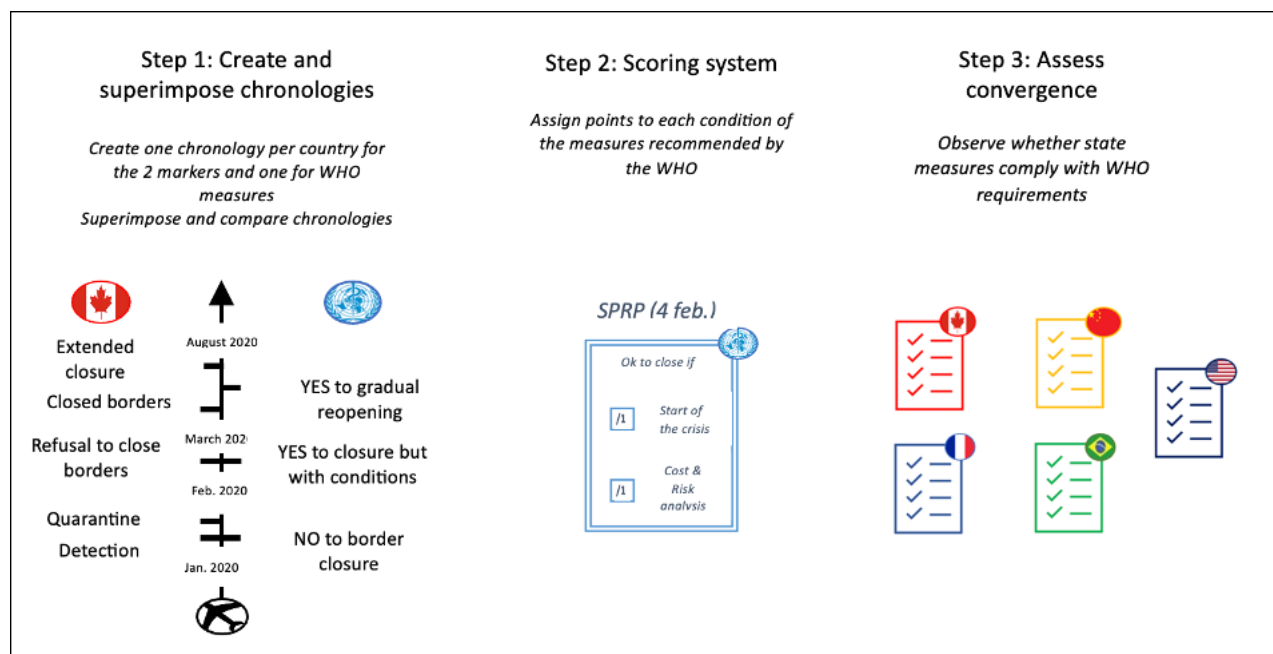
[18] Secondly, to bring more granularity and depth to the trends linked to convergence/divergence between States, a model for counting “convergence points” was established. Specifically, points were awarded for each WHO prescription or condition, and half points or even third points were given when conditions were of a composite nature. By way of illustration, on February 4, 2020, WHO was still against closing borders (1 point) but had admitted that, under certain conditions (two conditions³³⁷), travel restrictions could be envisaged (1 point).

[19] Thirdly, state positions were evaluated by taking into account whether or not each condition set by WHO had been met. Returning to the previous example, for a State to be 100% convergent, it could either have taken no measures affecting its national borders (1 point out of 1 point) or have taken such measures but complied with the two conditions set by WHO (0.5 points + 0.5 points out of 1 point). Assuming that only one of the conditions has been met, the State would receive only half a point and would therefore be considered not 100% convergent (or divergent), but 50% convergent.

336 These five jurisdictions were chosen because they are located in different regions and allow us to report on states that have been described in the media as presenting different levels of compliance with WHO norms: from less compliant (USA, Brazil) to more compliant (France, Canada). Moreover, China was an obvious choice given its central role in the pandemic and its frequent interactions with WHO.

337 These conditions were: the travel restriction had been taken at the start of the health crisis, and the restriction was based on a risk analysis. See: WHO, *Strategic preparedness and response plan*.

Covid-19 Project Methodology



[20] The previous methodology could be reproduced over a longer period but would have certain limitations (e.g., access to data, significant human requirements, feasibility). In the context of analyzing a crisis period, we considered these limitations to be acceptable. However, given the issues they raise, the methodology of this project on COVID-19 seems to us less appropriate for more comprehensive and complex analyses of the phenomenon of state compliance with WHO norms and of WHO's normative leadership (see II-A). Consequently, for the main project on WHO's normative leadership, another methodological framework, still based on empiricism, has been developed.

1.2 THE MAIN PROJECT: A DUAL AND COMPLEMENTARY EMPIRICAL METHODOLOGICAL FRAMEWORK

[21] In keeping with the objective of understanding States' compliance with WHO norms through the prism of the latter's normative leadership, the methodological construct of the main project necessarily proved different in view of its scope. Indeed, the assessment of normative leadership relates to both "implementation" and "convergence" on the part of States. Defined as the ability to influence, through its norms, the behaviour of those to whom they are addressed, WHO's normative leadership can have an impact on the process of implementation of these norms by States, and on convergence between State norms and those emanating from WHO.

[22] Determined to understand and evaluate this leadership, the main research project does not repeat some of the markers that were necessary in the COVID-19 project. Indeed, the research team sought to understand WHO's normative leadership as broadly as possible, so as to be able to paint a picture of it without being confined to any particular norm or context. However, certain restrictions had to be imposed for reasons

of feasibility of the empirical analysis, given the mass of data: WHO has existed since 1946, is made up of 194 Member States and has a particularly broad mandate in health.³³⁸

[23] More specifically, having established a relevant theoretical framework for the research, the methodology devised to observe and empirically evaluate WHO's normative leadership was structured around two complementary phases.

[24] The first phase was designed to observe both quantitatively and qualitatively WHO's normative leadership as expressed in the domestic law of Member States. To this end, a systematic study of references to WHO was carried out in the primary sources of law (laws, regulations, case law) of seven States (Canada, Costa Rica, France, Israel, New Zealand, Switzerland and the United States). Thanks to the pilot project and the COVID-19 project, the research team was aware of the large number of references to WHO that could potentially be found in domestic law. It was therefore essential to limit data collection to a limited number of countries. It was impossible to carry out such a systematic study in certain countries where public or private legal databases were not sufficiently accessible and reliable. As the databases used did not all go back that far in time, the year 1990 was chosen as the time marker.

[25] For reasons of feasibility, this type of empirical analysis had to be geographically and temporally restricted, but it was possible to avoid limiting it to a material approach. For this reason, no WHO norms or fields of activity were defined in advance. In fact, by using "World Health Organization or WHO" as the search equation in the legal databases (in the different working languages, depending on the country), WHO's entire normative activity could be captured. By way of illustration, both binding WHO instruments (e.g., *WHO Framework Convention on Tobacco Control*) and "softer" instruments (e.g., *Guidelines on the medical examinations of seafarers*), as well as simple declarations such as those on World Health Days, could be found.

[26] As explained below, given the limitations of this methodological construct (see II-B), the research team then had to follow various steps (exclusion criteria, sampling, etc.) to finalize the collection of documents to be analyzed. All the references collected were analyzed both quantitatively and qualitatively, using an analysis grid based on the theoretical framework specifically established for this research.

[27] The second phase was designed to complement the previous one, with the main role of filling in certain gaps identified by the theoretical framework. Indeed, this second stage of the research focused on information derived from the theoretical framework that could not be confirmed or invalidated by the observations of the first phase. For example, in light of the literature constituting the theoretical framework, it had been identified that the problem of access to international norms by States could be an obstacle to the monitoring of these norms. However, it was impossible to validate or

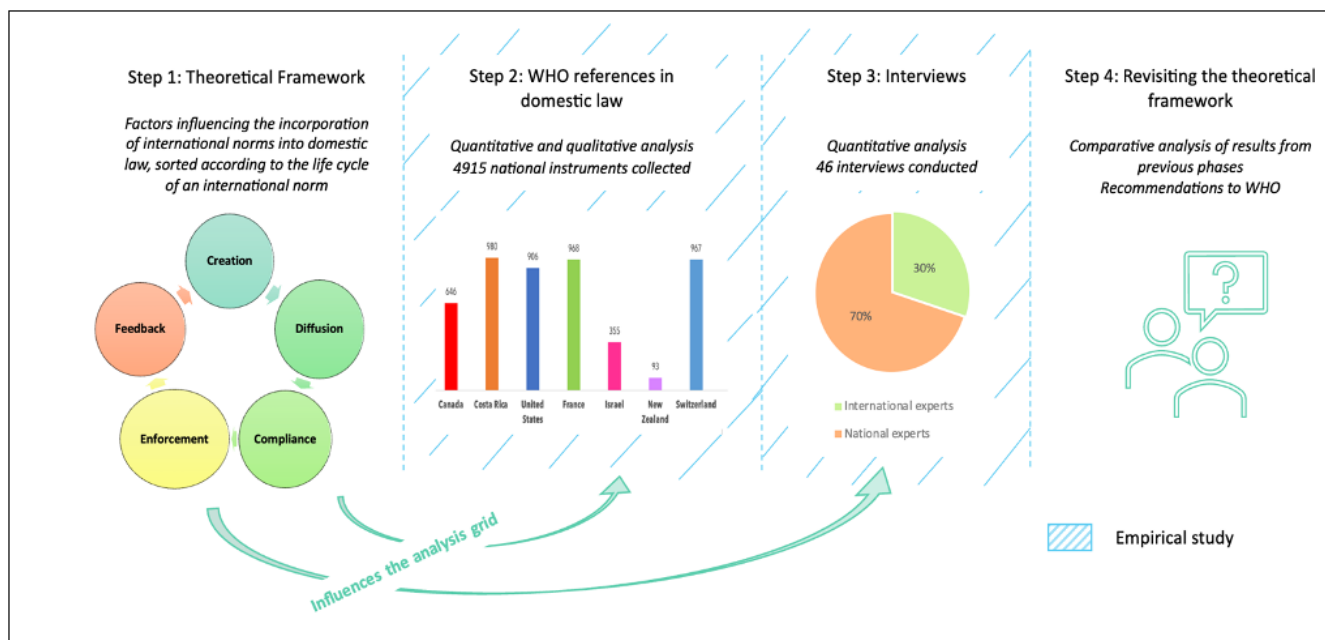
338 Health, at the heart of WHO's mandate, is defined particularly broadly in its founding document. According to the WHO Constitution, health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (Preamble). See, *WHO Constitution*, preamble.

invalidate this factor concerning WHO through research into domestic law (first empirical phase). A second phase of empirical research was therefore necessary.

[28] In this instance, the empiricism of this new phase broke out of the rut of traditional legal research. Through interviews with a variety of people identified as relevant to the study (46 in all), the assessment of WHO's normative leadership was deepened. Although some experts were specifically chosen because of their function in the same countries as the previous phase, to gain a more complete picture of the situation in these countries, a significant proportion of the interviews were broader in scope. Indeed, the literature underlines that the phenomenon of state compliance that contributes to the understanding of WHO's normative leadership is not exclusively linear and vertical (from the international organization to the State) but involves a large number of actors (national and international) whose influence can be considerable. The flexibility of the interviews made it possible to reflect this dimension, in particular by interviewing representatives of civil society and practitioners. In addition, the interviews were conducted in a semi-structured manner to achieve a dual objective: that of allowing a degree of spontaneity without prejudging responses, and that of guiding the interview at a minimum to obtain complementary responses to the previous phase without risking too much repetition that could reduce the richness of this phase. The interviews were then subjected to qualitative analysis, i.e., the content was studied and coded according to a previously defined analysis grid guided by the theoretical framework.

[29] Following these empirical phases, the methodology concludes by combining all the data collected and analyzed to revisit the theoretical framework and issue recommendations to WHO concerning its normative leadership and the ways in which it can be enhanced.

Main Project Methodology



[30] Constructing an empirical study involves making choices based on a variety of factors (feasibility, technical conditions, etc.), which necessarily have an impact on the results and analyses derived from them. As illustrated above, empirical methodological constructs differ according to the objectives pursued and the questioning at the heart of the analysis. Although the two options presented help to shed light on the relationship between international and domestic law through the more precise prism of state convergence and the normative leadership of WHO, they both present limitations and contributions that must sometimes be emphasized.

2. THE POTENTIAL AND CHALLENGES OF EMPIRICAL UNDERSTANDING OF WHO'S NORMATIVE LEADERSHIP

139

[31] As a means of empirical evaluation, the two methodological constructs have in common that they offer a richer understanding of the phenomenon under study, namely, respectively, state convergence and WHO's normative leadership. However, their strengths and limitations are not perfectly identical, and thus one may be preferred over the other, depending on the needs of the analysis and its expected impact. Similarly to the previous section, a separate presentation seems appropriate, starting with the benefits and challenges of the "convergence ratio" tool associated with the points system (A), which was tested before the dual construction favoured for the broader evaluation of WHO's normative leadership (B).

2.1 THE COVID-19 PROJECT: SHORT-TERM GRANULAR ANALYSIS

[32] As highlighted in the introduction, empiricism offers jurists a relevant avenue to support their analyses. As such, with regard to the first methodological construct that constitutes "a project within a project," several strengths and limitations can be highlighted to best inform the scope of such research.

[33] First and foremost, the development of a system of points associated with the behaviour of norm-receiving States in line with the content (and conditions) of WHO's norms provides a concrete and meticulous assessment of alignment between the State and WHO. Thanks to the precise level of detail now available on the convergence of States, it became easier to compare States with each other, by being able to position all the States studied on the same "convergence spectrum."

[34] Furthermore, convergence is measured at a specific point in time and can be measured again at another point in time, enabling longitudinal analysis and tracking of convergence over time. In this respect, an analysis tool has been specifically created to enrich this longitudinal characteristic, namely *de facto* compliance. This tool makes it possible to account for the case where a State finds itself aligned with a position newly adopted by WHO, without having modified its legal framework (see I-A). This is a case of passive convergence, capturing situations where WHO has in fact adapted its norms to positions already adopted by States. The State would thus become convergent with the new WHO norm because the latter is in line with State behaviours already observed. Such a possibility was at the root of the discussions surrounding WHO's change of position regarding the widespread wearing of masks by the population in June 2020.

Under certain conditions, it considered that it would be appropriate to recommend this measure, which had already been adopted by many countries (WHO, June 5, 2020).

[35] The granularity and level of precision provided by this type of empirical analysis could be useful for many studies in other areas of international law and in other national contexts if their main goal is to compare actions over time or space (between several actors).

[36] However, such an analysis requires a great deal of rigour to be able to track the evolution of the phenomenon under study. Indeed, it is important to ensure that the collection of documents associated with the problems observed is exhaustive. It is therefore preferable, in terms of the feasibility and credibility of the research, to make a more drastic selection by limiting one or more of the material, temporal or geographical fields of analysis.

[37] In addition, as it is imperative to trace the behaviour to be studied exhaustively, it is necessary to use a variety of sources, namely, in the context of the COVID-19 project, those offering access to legal instruments (e.g., country-specific databases) and official government positions (e.g., websites of ministries, public health agencies) as well as less official sources, which are essential for understanding the positions taken by state authorities that are not transcribed on official websites (e.g., media, press conferences).

[38] Lastly, a final challenge must be presented, relating specifically to real-time analysis during a period of crisis. In the context of the COVID-19 project, the scale of the pandemic and the crisis surrounding it led to a proliferation of normative instruments dictated by urgency, as the situation evolved and new scientific knowledge emerged.³³⁹ Since the main data for the research were norms (from WHO and the States), this context made the research more complex. Similarly, the fact that data collection was carried out in real time made it essential to regularly monitor new normative developments in the five States analyzed and at the WHO up to the established end date of the research. Paradoxically, the speed of certain updates meant that we had to use IT tools, such as the Wayback Machine, which provide access to automatic website archiving. Indeed, it was often the case that the new normative provision replaced the previous one so quickly that the old one was not yet, or no longer, accessible on the databases and legal information platforms used for the research.

[39] Despite these challenges, conducting research using this methodology yields unique results that offer a finer-grained view of the reality of state behaviour without being determined exclusively by theoretical apprehensions, or in our specific case of the COVID-19 crisis, by media discourse. The COVID-19 pandemic occupied the information sphere for many months, focusing attention on the measures recommended by WHO and those taken by States to respond to and manage this crisis. The

³³⁹ By way of illustration, Velásquez pointed out that by mid-2020, some six months after the first reported cases of Covid-19, WHO had already adopted over 400 normative instruments dedicated to pandemic management. See: Velásquez, G., "The World Health Organization Reforms in the time of COVID-19", 2020, South Centre, Geneva, Research Paper, No. 121, pp. 4-5.

meticulous, granular assessment of state positions in relation to WHO norms enabled us to go beyond the media coverage of the issue to reveal a sometimes different reality in terms of state convergence. For example, a discrepancy was observed between the public discourse of former Brazilian President (but in office at the time of the analysis) Jair Bolsonaro, who was hostile to WHO, and the significant degree of convergence between Brazilian domestic law and WHO recommendations throughout the reference period (Régis et al., 2021).

[40] In light of the rigour, regularity and diversity of the sources to be solicited, this type of empirical methodology seems suited to short-term analyses.

2.2 THE MAIN PROJECT: A RICH ANALYSIS OF MULTIPLE CHALLENGES

[41] In the context of the main project, the chosen methodology offers other strengths and richness that compensate for the various challenges and limitations which, however, deserve to be known before envisaging similar research.

[42] Firstly, the fact that the temporal delimitation of the analysis is not based on a specific event or crisis, but solely on technical grounds associated with the data collection tools used (in this case, legal databases), makes it possible to dissociate normative leadership and, more broadly, state compliance, from a crisis context. This methodological choice makes it possible to go beyond the “crisis model of international law” (Charlesworth, 2002) and look at references to WHO norms outside a health crisis context for the States studied. It follows, for example, that from a quantitative point of view, mental health emerged as the health issue most present in the data collected, with the COVID-19 pandemic in third place.

[43] Similarly, anchoring this research in time also makes it possible to dissociate state compliance from a specific government in a given State. It is indeed recognized that, for the same country, some governments may prove far more hostile to international law and to WHO than others that follow or precede them. Research spanning more than thirty years has provided us with a picture of the State’s attitude towards WHO norms in the seven countries analyzed, without it being defined by a specific political context. This observation also extends to the economic and social context that is essential for health-related studies. Indeed, compliance with WHO norms may require significant capacities on the part of States, capacities that can evolve over thirty years. These different variables are more observable when the empirical study extends over several decades.

[44] Another advantage of the long period covered by the analysis is the possibility of including a key legal instrument: case law. The inclusion of judicial decisions is of fundamental interest in empirical analyses designed to apprehend the relationship between international law and domestic law, particularly under the prism of the study of the normative leadership of an international organization. Indeed, observing references to international law in domestic case law from a quantitative and qualitative standpoint opens up an additional avenue for understanding the insertion and integration of international law into domestic law.

[45] What's more, in the context of our analysis, a closer study of case law revealed that the relationship between WHO norms and the domestic law of the seven countries in question was not limited, for example, to the application of binding WHO norms by judges. Indeed, under the cloak of case law as a source of law lies a diversity of situations in which the norms of the international organization are used by all those involved in case law (judges, parties and their lawyers, experts). In addition, WHO norms have been used because of the factual data they contain (e.g., reports on the health situation, on access to medicines in different countries) or because of the scientific standards they propose (e.g., electromagnetic field).

[46] In addition, the richness of the empirical analysis is also based on the absence of any material predetermination regarding the WHO norms collected. This methodological choice thus leaves no room for bias associated with norms that might more readily attract the attention of researchers *a priori* because of their legal nature (e.g., *WHO Framework Convention on Tobacco Control*) or the context to which they relate (e.g., *Covid-19 Pandemic Declaration*).

[47] Lastly, supplementing the data from domestic law with varied but focused and structured interviews increases empirical knowledge of WHO's normative leadership. Because of the diversity of the interviewees, the interviews enabled us to go beyond the single official state voice to obtain that of key people in the process of transiting WHO norms from the international to the national/local level (e.g., healthcare professionals, NGOs). Interviews were also used to extend the scope of analysis, both temporally (e.g., people who had worked in the healthcare field before 1990) and geographically (e.g., people representing other States and regions outside the sample).

[48] While the empirical methodology has made it possible to gain a more concrete understanding of WHO's normative leadership, and *a fortiori*, to offer new options for understanding the relationship between WHO norms and the law of its Member States, it is important to highlight the challenges it raises, as well as the few limitations it entails.

[49] In fact, the limited number of guidelines associated with empirical analysis greatly enriches the latter but results in a certain unpredictability in the quantity of data collected. From the outset, the systematic survey of references to the WHO in the domestic law of the seven target countries produced a total of 41,715 search results (from the various legal databases). While this data is of interest from an overall quantitative point of view, given the size of the team and the project, this number is far too high to enable a more detailed quantitative analysis, based on data derived from the content of each result, and *a fortiori* for a qualitative analysis involving a study of each result. The research team therefore had to introduce selection criteria to bring the number of search results down to a realistic level. In addition, the number of outcomes identified for each of the seven target countries is unbalanced, in a way that cannot be easily explained by macro-economic data (population, wealth, GDP, proportion of GDP devoted to health, etc.). To guarantee the validity of the comparative aspect of the research, it was therefore essential to ensure that the selection criteria chosen to reduce the number of results were of interest to all seven States studied, and did not disproportionately affect the analysis of a country's law, particularly for those States for which few results were found (New Zealand and Israel). For example, it was envisaged

to exclude administrative court decisions. In the end, however, this criterion was rejected on two grounds. Firstly, it would have been necessary to propose a common definition of “administrative justice.” Secondly, given the importance of administrative justice in France, excluding court rulings in this field would have undermined the validity of the comparative aspect of the research. Recourse to the expertise of jurists from the various countries under study was essential at this stage.

[50] It should also be pointed out that despite the addition of exclusion criteria and the cleaning up of duplicates, the number of search results to be studied in greater depth remained significant (12,839). This led to sampling for certain countries, after establishing that a ceiling of 1,000 results per country was acceptable from the point of view of both the validity and feasibility of the analysis. To maintain the representativeness of the results, a rigorous statistical approach was essential. In this respect, three variables had to be associated with the sampling to maintain the representativeness of the results: the year of adoption, the nature of the instrument (laws/regulations/court decision) and, for federal States, the source of the instrument (federal / sub-federal level).

[51] While the use of Excel spreadsheet software was appropriate for the COVID-19 project, it proved far too limited for the general project and its 4,915 legal instruments to be analyzed. Indeed, during the COVID-19 project, initial observations highlighted the limitations of Excel for qualitative analysis, particularly of a comparative nature. Given the large number of results, it was decided to use NVivo for the main project. This software did, however, have its limitations, given the scope of the research. These included the fact that the research team had to create a “NVivo project” for each State (a total of seven projects, which could not be merged), and follow a strict protocol for importing the legal instruments to be analyzed into the software. As the software was unable to handle hundreds of court rulings, laws and regulations whose page counts could exceed 100 pages, only those paragraphs containing at least one reference to WHO were copied and pasted into a Word document, which was then imported into NVivo. During the analysis phase, the researchers worked with the long version of the legal instrument but only coded the paragraphs integrated into the software.

CONCLUSION

[52] By presenting two empirical legal methodologies, this article has sought to highlight the strengths associated with this type of research which, by presenting more concrete results, offers a finer understanding of the influence of international law on national jurisdictions. Although this research approach is not always easy, depending on the scope of the research envisaged, the new legal knowledge it generates justifies encouraging researchers to consider it in support of their analyses.

[53] Using this type of methodology in these research projects has made a significant contribution to our understanding of WHO’s normative leadership and the behaviour of

States in relation to its norms. The data collected, hitherto unknown,³⁴⁰ provide an additional foundation that complements theoretical knowledge in this field.

[54] More specifically, as part of the COVID-19 project, the empirical study yielded some surprising results, particularly about the behaviour of States concerning WHO recommendations, in contrast to the media discourse on the same subject. In addition, a much more granular understanding of States' behaviour and their "rate" of convergence/divergence opens the way to more precise comparisons (between States and over time) and makes it possible to account, for example, for the normative conditions laid down by WHO that have been least respected or, on the contrary, most respected. This type of information is essential for WHO, which is now in a position to know the angles on which to work more and exercise its normative leadership. Depending on the nature of the conditions least complied with, WHO could be led to revise its definitions if it is a question of clarity, to provide greater assistance for States if it is a question of capacity, or to better justify the importance of this condition if it is a simple lack of will on the part of States.³⁴¹

[55] As part of the main project, a mixed empirical approach (quantitative and qualitative) has enabled us to observe the complexity of the relationship between international and domestic law. These are far from being expressed exclusively by reference in laws and regulations by the competent authorities or, for monist States, in court rulings by judges. Landing of WHO norms in domestic law is multifaceted (e.g., integrated into an appendix, mentioned in a medical report submitted to the judge, incorporated into another instrument cited by the legislator) and in the hands of a multitude of actors (e.g., an expert, a party to the dispute). The empirical approach has also revealed the sometimes surprising use of WHO norms in certain contexts. The idea that only its binding norms would be used by national authorities has been replaced by the observation that references to WHO norms cover a wide range of cases: from websites to simple recommendations to highly contextual reports on a country's health capabilities. WHO's normative leadership can thus be expressed through a variety of normative products that it can call upon. These observations of domestic law were supplemented by interviews, which enabled us to understand "why" WHO norms were used by actors (international, regional, national and local), and what challenges they faced (e.g., lack of capacity in certain countries, as explained by actors in the field). This rich data provides a more comprehensive picture of the application of WHO norms in domestic law.

340 For example, recently, the WHO Evaluation Office mentioned the value of conducting such empirical research into the domestic laws of countries to be better equipped to understand the factors that hinder and facilitate the adoption of WHO standards by states. See: WHO, Evaluation Office, "Evaluation of WHO's Normative Function", July 2017, p. i and WHO, Evaluation Office, "Evaluation of WHO normative function at the country level", December 2023, p. 23.

341 By way of illustration, in the context of WHO recommendations on the widespread use of masks, the conditions that were least met by States were the fact that national measures had to justify the feasibility of widespread mask use, and the fact that certain parameters (e.g., filtration efficiency, breathability, maintenance) had been taken into account when authorizing the use of non-medical masks. On WHO measures on this subject, see in particular: WHO, "Advice on the use of masks in the context of COVID-19: Interim guidance", June 5, 2020, <<https://iris.who.int/handle/10665/332293>>

[56] Lastly, the empirical contribution (which is added to the theoretical apprehension) can also prove to be a decisive tool for understanding a phenomenon or a subject little commented on in the literature. Here, for example, WHO is not the international organization that has been the most extensively studied in terms of its norms and normative potential. The construction of the theoretical framework had therefore led the researchers to include the wider literature on international norms (and their relationship with domestic law and policy), regardless of which authority adopted them. The empirical study focusing exclusively on WHO thus made it possible to observe in greater detail the factors relating to state compliance (found in the literature) that emerged or did not emerge, in the case of WHO specifically.

[57] The new knowledge obtained from these two research projects provides an enhanced understanding of the trajectory of WHO norms and their influence on States, helping us assess the impact of this organization's normative leadership and plan for the future in this area, as well as support global health governance.

BIBLIOGRAPHY

International norms

Constitution of the World Health Organization, 14 U.N.T.S. 185, July 22, 1946 [1948].

WHO, *WHO Framework Convention on Tobacco Control*, 2003, <https://fctc.who.int/publications/i/item/9241591013>.

WHO, *International Health Regulations*, 2509 U.N.T.S. 79, May 23, 2005 [2007].

WHO, Evaluation Office, "Evaluation of WHO's normative function", July 2017.

WHO, *Strategic preparedness and response plan for the novel coronavirus*, Official website, February 4, 2020, www.who.int/publications-detail-redirect/strategic-preparedness-and-response-plan-for-the-new-coronavirus.

WHO, *Advice on the use of masks in the context of COVID-19: Interim guidance*, WHO website, June 5, 2020, <https://apps.who.int/iris/handle/10665/332293>.

WHO, Evaluation Office, "Evaluation of WHO normative function at country level", December 2023.

Literature

Askie, L. M., et al., "Establishing the impact of WHO's normative and standard-setting functions: a call for papers", 2023, *Bulletin of the World Health Organization*, 101, 10.

Cane, P. and Kritzer, H. M., (eds.), *The Oxford Handbook of Empirical Legal Research*, Oxford, Oxford University Press, 2010.

Charlesworth, H., "International Law: A Discipline of Crisis", 2002, *The Modern Law Review*, 65, 3, 377–392.

Chayes, A. and Chayes, A. H., "On Compliance", 1993, *International Organization*, 47, 2.

Gesualdi-Fecteau, D. and Bernstein, E. (eds.), *La recherche empirique en droit : méthodes et pratiques*, Montréal, Thémis, 2022.

Kingsbury, B., "The Concept of Compliance as a Function of Competing Conceptions of International Law", 1998, *Michigan Journal of International Law*, 19, 2, 345–372.

Régis, C. and Kastler, F., "Vers une meilleure compréhension de l'impact de l'action normative de l'Organisation mondiale de la santé (OMS) à l'intérieur des frontières des pays: une étude Canada-France", in C. Régis, L. Khoury and R. P. Kouri (eds.), *Health Law at the Frontier. Les rencontres en droit de la santé*, Volume 2, Montréal, Éd. Yvon Blais, 2018, 373–404.

Régis, C. and Kastler, F., "Improving the World Health Organization's Normative Strategy with Respect to Global Health Goals: What Should We Aim For?" 2018, 51-1 *Revue belge de droit international*, 51, 1, 138–151.

Régis, C., Larouche, P., Cadeddu, S. B. M., Foucault, G., Cohen, M. and Denis, J.-L., "National compliance with World Health Organization norms during the pandemic: a comparative empirical study", 2021, *Revue belge de droit international*, 1, 2, 312–348.

Weldon, I. and Hoffman, S. J., "Bridging the commitment-compliance gap in global health politics: Lessons from international relations for the global action plan on antimicrobial resistance", 2020, *Global Public Health*, 16, 1, 60–74.