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Global Health Governance by Information: Confronting the Costs of Cooperation

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Much of the work of international organizations (IOs) turns on information.¹ As consumers, IOs take in information from public and private, governmental and nongovernmental sources using techniques, when authorized, such as monitoring and surveillance. As producers, IOs create knowledge by establishing conclusions, writing reports, and making decisions. As distributors, IOs disperse intelligence through publications and pronouncements. Everything hinges, in the first place, on the ability of IOs to collect public and non-public information that is accurate, complete, and timely. Without access to such information, many IOs (or their component parts) simply could not function. They depend upon information to operate as much as they depend upon money. And just like money, which IOs with very few exceptions cannot collect on their own, IOs depend upon states to provide them with much of the information they need.

Because the work of IOs in the creation and dissemination of knowledge is potentially so valuable and consequential to states, creating what some have called “governance by information,” states have established frameworks both to bolster IO knowledge gathering, production, and distribution and also to control it, creating what some have called IO “governance by information.”² States wish to use IOs as information generators and providers, but at the same time they don’t want IOs to act entirely independently. States seek to use the unique standing and capacities of IOs to serve their ends by providing IOs with information and establishing systems for its collection, but they also wish to ensure that IOs use the powers bestowed upon them to create and distribute knowledge in ways that align with their own interests. They do so by establishing rules on how, when, and for what purposes IOs can use information.³ The familiar tension between the two inclinations—the concurrent desires for IO action and state control and autonomy—plays out in the carefully constructed texts of legal instruments, such as the International Health Regulations, 2005 (IHR), and in the application of those agreements in the context of specific cases, like the current pandemic. IO information regimes simultaneously empower and restrict, but on their own terms they are designed to allow IOs to accomplish their tasks by, in the first instance, obligating states to provide IOs with the information they require.

In practice, however, information regimes are quite fragile. They are especially delicate when the information that states are required to produce is sensitive or when its provision has, or will likely have, harmful political and economic costs for the state or its citizens that are do not overcome disclosure’s benefits. In such circumstances, states will often seek to withhold or conceal information, impeding or delaying the work of the IO. In normal times, the problem of noncooperation is tempered by a lack of urgency and the relatively low stakes, but in crises, when the timely and accurate production of information is crucial to the collective well-being, the recalcitrance of states is especially problematic. The COVID-19 pandemic highlights starkly the fault lines in the information regime for global health emergencies, the challenge of designing a better rule-based system, and the alternative information-gathering measures that have been created to compensate for the limits of the current regulatory regime.

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For many international organizations, across a range of subject matter areas, access to information is essential. The International Monetary Fund cannot identify risks to the international monetary system without monitoring the economic and financial policies of its member countries (bilateral surveillance) and scrutinizing regional and global economic

trends (multilateral surveillance). The Prosecutor of the International Criminal Court cannot investigate and prosecute individuals for international crimes without gathering evidence of possible wrongdoing. And the Director-General of the World Health Organization cannot determine the existence of a public health emergency of international concern (PHEIC) under the IHR absent information pertaining to the manifestation of disease or an occurrence that creates a potential for disease. Without information, these organizations cannot function effectively.

Much non-public and non-readily accessible data can be obtained only from states or collected only in their territory, so IOs depend upon states to provide this information or allow them physical access to it. The IMF holds in-person consultations with state officials and relies on government-generated statistics. International criminal tribunals require access to government documents and permission to enter a state's territory to gather other forms of evidence. The WHO needs reporting from public health authorities on the prevalence of disease or permission to send its own personnel to evaluation conditions on the ground. International organizations are often dependent on states for the information they need to do their work, and the failure to provide that information or allow for its collection can prevent or delay the organization's work.

The constitutive documents and related texts of international institutions recognize the critical role of information cooperation to the operation of organizations and the privileged position of states in providing access to information by establishing sharing and other disclosure obligations on member states. Article IV(3) of the IMF Articles of Agreement requires its members to "provide the Fund with the information necessary for . . . [the Fund's] surveillance [of its exchange rate policies]." Article 93 of the Rome Statute of the International Criminal Court obligates its states parties to provide assistance in relation to the Court's investigations and prosecutions, including through the provision of records and documents, the execution of searches, and the examination of places or sites. And Article 6 of the IHR requires "Each State Party [to] notify WHO, by the most efficient means of communication available, . . . and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory . . . , as well as any health measure implemented in response to those events." These information-forcing obligations are designed to ensure that IOs have the ability to carry out their functions.

Despite the clear relationship between institutional capacity and information disclosure, and the obligations that apply under international agreements, states are sometimes reluctant to cooperate or cooperate fully with international organizations.⁴ In the example

of the international criminal tribunal, a state might not want to disclose information that incriminates one of its own nationals or a state may decide to disclose some evidence but not all relevant evidence in order to bias the investigation. Or a third state might not want to release to the tribunal information obtained through classified intelligence gathering for fear of compromising the sources and methods of its collection. In the case of the WHO, a state might not want to make known an event that may constitute a public health emergency for fear that other states might take actions, such as restrictions on trade and travel, that could cause it and its citizens economic harm.⁵ As the WHO noted in its review of the Ebola epidemic, “there are clear disincentives for countries to report outbreaks quickly and transparently, as they are often penalized by other countries as a result.”⁶ Indeed, the WHO has observed “substantial delays . . . in States Parties’ notification of events to WHO as well as their response to requests for event verification, in contravention of the relevant requirements” of the IHR.⁷ States, in other words, sometimes have political, economic, and national security incentives not to abide by their obligations to cooperate.⁸

Attempts have been made to mitigate these concerns by ensuring the confidentiality of the information provided to IOs or limiting the actions that IOs and third states can take in response to such information. International criminal tribunals have instituted confidentiality regimes to handle classified information. And the IHR seeks to curtail the restrictions that can be placed on travel once a PHEIC has been declared. These and other mechanisms have value, but when the risk of information disclosure is too great, procedures and rules in and of themselves are unlikely to coax states into releasing information they consider sensitive, as they are not confident that the IO or other states will themselves adhere to their obligations. The travel and economic restrictions imposed by states during past pandemics, as well as the current one, confirms these suspicions.

The consequences of non-cooperation for an organization’s ability to do its work—and hence for others that depend on that work—can be severe. The failure to disclose information may prevent a prosecutor from gathering incriminating evidence and therefore thwart the pursuit of international criminal justice, and it may also prevent a defendant from gaining access to exculpatory evidence and therefore lead to a wrongful conviction or an unfair trial. The failure to provide information to the IMF may lead to the organization’s inability to respond quickly and appropriately to a financial crisis. A state’s failure to notify the WHO of a public health event or its delaying of such a notification can lead to insufficient action by other states to contain and mitigate the harm, and hence the unnecessary and dangerous spread of disease. A state’s refusal to allow the WHO to send investigators to research onsite the origins of a disease may hinder efforts to find a cure.⁹ To the extent that states possess information critical or relevant to an international

organization's effective functioning, states can impede the organization from acting by restricting the disclosure of information.

While cooperation is critical, and the likelihood of noncooperation is well-known to the drafters of disclosure rules, formal enforcement mechanisms are typically weak in the event of noncompliance. The legal regimes that establish information obligations only guarantee the performance of those obligations through the decisions and actions of other states, individually or collectively. Under the statutes of the ad hoc international criminal tribunals (ICTY/ICTR), the responsibility to make a determination of noncompliance (and any consequences stemming therefrom) was given to the UN Security Council. Under the Rome Statute, the International Criminal Court's Assembly of States Parties makes this decision. Under the International Health Regulations, disputes between states regarding compliance are to be settled through negotiation or, by mutual consent, through other peaceful mechanisms. Disputes between the WHO and a state party are to be submitted to the World Health Assembly, which is made up of the organization's member states. Under none of these regimes has noncompliance led to sanctions. In practice, and seemingly by design, legal regimes themselves don't effectively punish a state for its failure to provide information.

That does not mean, however, that states are free to disregard information-forcing obligations, only, that such obligations will be enforced, if at all, through states' self-interest, by bilateral and multilateral diplomatic pressure, and perhaps too by public pressure. States participate in the IMF's Article IV surveillance because it is in their interest to do so, as they wish to benefit from the IMF's programs or from the overall stability that the IMF provides to the international monetary system. States will share classified information with international criminal tribunals when they wish to support the court generally or wish to influence a specific investigation and prosecution. They will disclose the outbreak of an epidemic in their territory when doing so will allow them to more effectively control that outbreak by receiving assistance from IOs and other states. States will avoid cooperation when it's not in their self-interest and when they can get away with it by being able to withstand any pressure placed upon them. Legal requirements and generalized concern for the international community are insufficient.¹⁰

Not surprisingly, in order to avert the negative consequences of disclosure and the international pressure to release information, states are tempted to keep sensitive information secret. They might actively suppress information domestically through impeding its collection and dispersion. They might prevent outside observers from coming into their territory to gather information. They might not voluntarily disclose the existence

of relevant information. And upon inquiry, they might deny the existence of any such information. Control of knowledge allows the state to decide whether, when, and what to disclose to outside actors. It allows states not to provide information, to provide incomplete information, to fabricate information, and to delay the supply of information.

Because states sometimes conceal information, states and non-governmental organizations, sometimes with the assistance of international organizations, have sought to gather this hidden information themselves. The Commission for International Justice and Accountability has collected (and continues to collect) evidence for the prosecution of individuals for international criminal wrongdoing during the Syrian civil war, which they hope will be used by an international tribunal, as well as by national prosecutors.¹¹ Non-state actors provide “shadow reports” to UN Human Rights Treaty bodies. The Global Outbreak Alert and Response Network (GOARN), a network of over 270 institutions and networks supported by the WHO, seeks “to engage the resources of technical agencies beyond the United Nations for rapid identification, confirmation and response to public health emergencies of international importance”¹² It does so in part now through the Epidemic Intelligence from Open Sources (EIOS) initiative, a public health intelligence network of networks that seeks to create a unified “approach to [the] early detection, verification, assessment and communication of public health threats using publicly available information.”¹³ With the formal processes of information collection blocked or stymied, states and non-state entities, together and separately, with and without the participation of international organizations, have taken it upon themselves to seek what states are not providing voluntarily. An operational system of information gathering runs in the background, supplementing and reinforcing the formal system.

But these efforts do not fully substitute for state cooperation. States like China that are able to keep a very tight control over information by severely restricting the use of the internet and by controlling travel can limit the ability of outside actors to collect the information the state seeks to conceal. EIOS only first identified a reference to what became known as COVID-19 in an article on the internet on December 31, 2019, weeks after the Chinese government was aware of the outbreak. What’s more, states, which want to control the information flow to IOs, have sought to set limits and preconditions on the use of information gathered in these alternative ways. Articles 9 and 10 of the IHR require the WHO to seek verification of third-party information from the state in whose territory the event is allegedly taking place, thereby allowing that state to impede the use of such information. As technology has increased the ability of public and private organizations to collect information without authorization, states have sought to control the use of such intelligence in the decisionmaking of international organizations.

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To those familiar with the information cooperation regimes for international organizations, and with global health in particular, what happened in late 2019 and early 2020 was unsurprising. China delayed notifying the WHO of the outbreak for fear of the domestic and international reaction (and out of a misplaced confidence that it could solve the problem itself), a delay that led to the virus's global spread. That delay was not the only thing that went wrong with the IHR system (or with the WHO's actions generally), but it was an important factor in the establishment and spread of the pandemic. China's measures were predictable, and indeed it can be said that its decisions were, if not the logical result, then the likely outcome of the information system codified by the IHR. Given the probable negative consequences of information disclosure for China, its ability to enact domestic measures to suppress information, and its actions during the SARS epidemic seventeen years before, only an idealist would have expected a different outcome.

The IHR system was designed on the assumption that states would provide timely information and that, in any event, the dispersal of information across borders is now uncontrollable and so the WHO would receive relevant information from third parties, if not from the state of the health event itself. One way or the other, from one of these information vectors or the other (the affected state or third parties), the WHO would be in a position to act quickly. At best, both assumptions were only partially correct in the case of COVID-19. China has cooperated, but reluctantly, slowly, and imperfectly. And the operational system of information gathering was helpful, but insufficient to provide early enough reporting that might have prevented or lessened a pandemic.

A workable system, as the drafters of the IHR correctly recognized, requires the timely provision of information through state cooperation and an operational back-up. Current WHO reform proposals recognize, at an abstract level, the need to improve both: by improving information disclosure by affected states¹⁴ and by enhancing the collection of data from non-state and non-affected state actors.¹⁵ But they are not of equal value. As COVID-19 shows, third-party, non-consensual information collection, no matter how good the coordination and no matter how advanced the technologies of surveillance, is no substitute for the full and early cooperation of affected states. Acquiring timely information requires confronting the political economy of public health emergencies and drafting international agreements that account for the costs of cooperation.

Notes

[1] See generally David Le Blanc & Jean-Marc Coicaud, *Information Gathering, Analysis, and Dissemination*, in *The Oxford Handbook of International Organizations* (OUP 2016).

[2] On “governance by information,” see Armin von Bogdandy & Matthias Goldmann, *The Exercise of International Public Authority through National Policy Assessment. The OECD’s PISA Policy as a Paradigm for a New International Standard Instrument*, 5 *International Organizations Law Review* 241 (2008). See also Michael Riegner, *Towards an International Institutional Law of Information* 12 *International Organizations Law Review* 51 (2015).

[3] States generally have been less concerned with the legitimacy and responsibility issues that stem from the growing public authority of international institutions. Such issues, however, have been raised by scholars. See Michael Riegner, *Towards an International Institutional Law of Information*, 12 *International Organizations Law Review* 51 (2015).

[4] See, most recently, Allison Carnegie & Austin Carson, *Secrets in Global Governance: Disclosure Dilemmas and the Challenge of International Cooperation in World Politics* (CUP 2020).

[5] See Catherine Z. Worsnop, *Concealing Disease: Trade and Travel Barriers and the Timeliness of Outbreak Reporting*, 20 *International Studies Perspectives* 344 (2019).

[6] WHO, *Report of the Ebola Interim Assessment Panel* (2015), para. 16.

[7] WHO, *Public health emergencies: preparedness and response - Annual report on the implementation of the International Health Regulations (2005): Report by the Director-General*, A72/8 (Apr. 4, 2019), para. 2.

[8] See also Sara E. Davies, *Securitizing infectious disease*, *International Affairs* 84: 2 (2008) 295-313.

[9] Selam Gebrekidan, Matt Apuzzo, Amy Qin and Javier C. Hernández, *W.H.O. Ceded Control to China in Murky Hunt for Virus Origin*, *NY Times*, Nov. 3, 2020, at A1.

[10] Pedro A. Villarreal, *The 2019-2020 novel coronavirus outbreak and the importance of good faith for international law*, *Völkerrechtsblog*, January 28, 2020, doi: 10.17176/20200128-225858-0.

[11] <https://cijaonline.org/>

[12]

https://extranet.who.int/goarn/sites/default/files/GOARN_one_pager_20201026_Web.pdf

[13] <https://www.who.int/initiatives/eios>

[14] <https://www.hhs.gov/about/agencies/oga/about-oga/what-we-do/international-relations-division/multilateral-relations/who-roadmap-2020.html> (United States); <http://gzh2.org/wp-content/uploads/2020/08/Non-paper-1.pdf> (France and Germany); <https://data.consilium.europa.eu/doc/document/ST-12276-2020-INIT/en/pdf> (European Union).

[15] Lawrence O. Gostin, Roojin Habibi, & Benjamin Mason Meier, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 *Journal of Law, Medicine & Ethics* 376, 380 (2020).

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