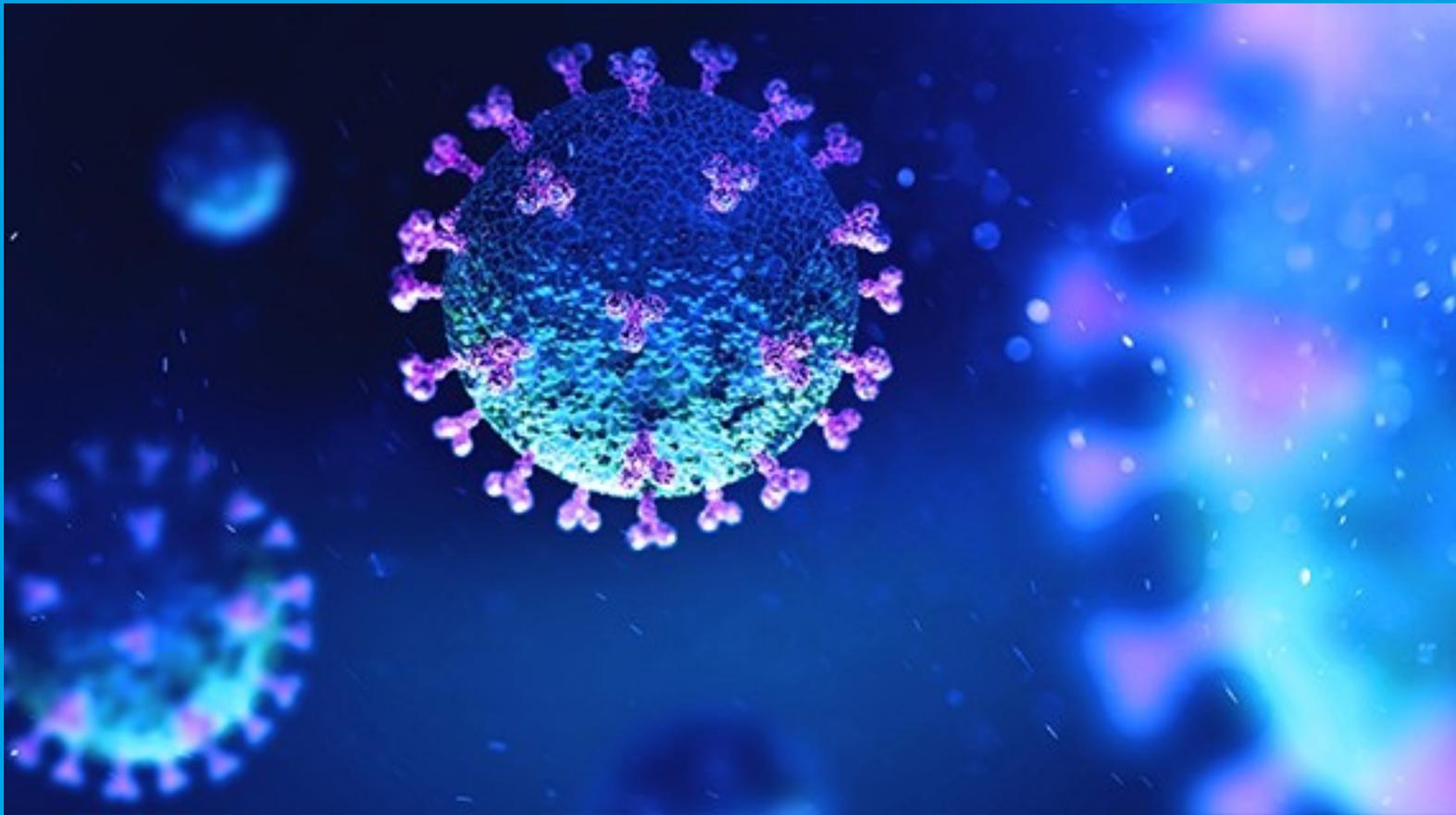


Roadmap for Reform of International Legal Frameworks to Strengthen Cooperation in Responses to Public Health Emergencies

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The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

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This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust.

In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations.

This project examines two critical enablers of that trust: good governance and the rule of law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

- (1) International governance frameworks for public health emergencies.
- (2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, courts and police.
- (3) Reforms that may be needed to data governance (national and international) given the scale of personal data sharing that is required.
- (4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

<https://binghamcentre.biicl.org/projects/the-role-of-good-governance-and-the-rule-of-law-in-building-public-trust-in-data-driven-responses-to-public-health-emergencies>

This report forms part of Work Package 1.

Roadmap for Reform of International Legal Frameworks to Strengthen Cooperation in Responses to Public Health Emergencies

The COVID-19 pandemic has highlighted cracks in the international legal frameworks aimed at dealing with public health emergencies (PHEs) of international concern. This Roadmap for Reform considers how these frameworks could be improved to strengthen international cooperation in addressing such emergencies.

International legal frameworks enable structured forms of international cooperation between States, international organisations (such as the WHO) and other actors operating on an international plane (including, Corporations and Philanthropic Organisations). Cooperation, as a component of attempting to achieve global solidarity, is critical in preparing for, identifying and responding to such emergencies. However it is clear from the experience with COVID-19 so far that **existing legal frameworks have resulted in deficiencies in implementation and enforcement and, eventually, inadequate international cooperation in response to the crisis.** This is partly explained by a failure to learn from previous crises, as well as a lack of clarity with respect to the applicable legal obligations. Hence the need for reform, which has been widely acknowledged.

This Roadmap should be read alongside other outputs of the project which provide analysis of some of the leading concerns and seek to provide principles applicable at the domestic level.¹ The response to crises, and reforms needed at the international and domestic level cannot and should not be divorced from each other. The Roadmap has the benefit of hindsight and is not intended to critique specific decisions made by States, the WHO or other bodies, but rather to identify broad lessons to be learnt from the COVID-19 experience. It is also not exhaustive of potential reform ideas and must be seen within the evolving broader landscape.

The recommendations made in this Roadmap are organized according to (1) general recommendations concerning the obligations of States and other international actors; recommendations relating to different phases of a public health emergency, ranging from (2) preparation and prevention for PHEs and (3) notification of a PHE (4) responses to a PHE and finally (5) pathways for effective reform.

(1) General recommendations

- (a) States, international organisations and all actors must adhere to their international obligations (substantive and procedural) under the international Health Regulations (IHR) and other relevant instruments. Such obligations include the obligation of cooperation as set out, in particular, in Articles 43 and 44 of the IHR. Interstate cooperation in the timely

¹ See all project outputs at: <https://binghamcentre.biicl.org/publications/rule-of-law-and-good-governance-principles-for-national-responses-to-public-health-emergencies>

notification of public health risks and the sharing of associated information is not a discretionary activity. It instead encompasses a legally binding obligation, within and beyond the IHR framework.

- (b) Obligations in the global health law sphere cannot be divorced from obligations emanating from other fields of international law and must not be used to undermine other commitments and obligations of States, international organisations and others.²
- (c) All obligations including those of cooperation and sharing of information and resources should be conducted in good faith.
- (d) The implementation of obligations must also be achieved with a view towards the reduction of global inequality (between and within States) and the realization of the right to health for all.

(2) Preparation and Prevention

- (a) The International Community, including through the World Health Organization (WHO) and other bodies, should develop support structures to assist States in collecting and managing data, monitoring the rise of infections and other predictors of pandemics. It should further develop protocols for data collection and sharing, respecting the right to privacy of data subjects. Such protocols should be disseminated more widely whilst supporting the capacity of national systems to be in a position to contribute to such international data collection and sharing.
- (b) In the exercise of their duty to cooperate, States should continue to share data and analysis (whilst respecting the privacy of all involved), sharing information about preventive efforts. The WHO should be further empowered to monitor such data sharing, ensuring that common standards are upheld.
- (c) States, international organisations, civil society, corporations and others should cooperate on issues that could help prevent further disease (e.g. environmental protection; reduction of damage to the natural environment). This will require a clear global health dimension to negotiations and efforts across different fields of international law. Information sharing between states and other stakeholders should be fostered to provide accurate accounts of activities that can impact the natural environment.

² See in this regard: Richard Mackenzie-Gray Scott and Jean-Pierre Gauci, [International Law Applicable to Public Health Emergencies](#) (BIICL, 2021)

- (d) All actors involved should continue to support States in developing their national health systems in order to be able to align their effort with the above recommendations and achieve the highest possible level of physical and mental health for residents.
- (e) In order to help streamline the flows of resources that are needed during a PHE, States should develop a multilateral legal framework that sets out clear obligations and guidelines on public procurement during times of emergency. This could contribute to a more equitable distribution of resources during a PHE and avoid the need (and risks associated with) *ad hoc* approaches . Such policy could also help regain public trust in procurement practices by making them more transparent, including with respect to their supply chains.
- (f) All efforts must be made to mitigate vaccine inequity between (and within) States. This would require the recognition of vaccines as a (global) public good, the engagement of State, inter-State and non-State measures, and supporting States in improving their own domestic manufacturing and distribution capacities. Procurement protocols such as those discussed above can also go some way towards overcoming some of the inequities seen in the context of COVID-19 vaccine distribution.

(3) Notification

Whilst new tools and instruments may be required in specific fields, States, international organizations and all involved must abide by existing requirements and should be supported in doing so. This includes the following:

- (a) Coordinated responses based on accurate and complete epidemiological data can reduce the impact in terms of human life and economic loss. States have a duty to cooperate in the surveillance, prevention, and control of epidemic and pandemic disease through reporting of potential 'public health emergencies of international concern' (PHEIC) and by sharing accurate, up-to-date epidemiological data on situations that can rapidly evolve and cause transboundary harm. The duty to cooperate in the context of PHEIC involves a sustained practice of timely, consistent, and accurate information-sharing and consultation for both the notifying State and the WHO as well as other possibly affected States and international standard-setting bodies. States and international organisations should support States in ensuring they are able to uphold these obligations.
- (b) PHEIC-related obligations of cooperation are tailored with reference to a specific context, namely the need to give early notice to the WHO of any events which may constitute a public health threat in order to facilitate an internationally coordinated response. States must assess whether a potential PHEIC exists and, if so, notify - within 24 hours - the WHO of the assessment and of any health measure which the State in question has already adopted in response. Such obligations also exist when insufficient epidemiological data is available. States must keep the WHO advised and consult with the WHO on appropriate health measures to respond to the public health risk. Once lodged, timely, accurate and complete information enables the WHO to shape an early effective and internationally coordinated

response. The 24-hour notification requirement of Article 6(1) of the IHR is a critical legal component of the IHR, and notification is a core element of the WHO Constitution.

- (c) In return for States sharing information about potential outbreaks within their territories, other States should respond proportionately and in ways that avoid damage to the reporting State.
- (d) The formulation of certain IHR provisions, discussed in WP1.2 of the present research, are insufficiently precise and leave open the possibility of differing interpretations about the exact level and type of cooperation required from each State Party, the exact type of PHEIC-related data that must be shared by States, and the degree of State discretion in discharging their duty to cooperate under the IHR. These interpretative gaps could weaken the collective ability of States and the WHO to respond effectively to a health crisis in a coordinated manner. Comprehensive guidance and support on the interpretation and operationalisation of the IHR notification requirements should be developed and communicated by the WHO to a) further develop data sharing protocols and b) provide precise definitions for disease notification in order to ensure more effective notification of health threats between States and between States and the WHO.
- (e) States should not use the pretext of other States' non-compliance to avoid their own obligations to notify the WHO. Concurrently, the WHO's working practices should be re-considered in order to foster more efficient responses.

(4) Responses

- (a) Policy coherence is essential when States engage and cooperate across different areas of international law. Global health considerations, and practical measures of cooperation, must be considered in efforts across relevant fields including trade law and others. Facilitation measures in other fields should be adopted to facilitate cooperation and broader solidarity amongst States. Green channelling can be adopted, which entails automatically clearing goods for export/import without physical verification by authorities. Such practices, in addition to assisting states in improving their own domestic manufacturing capabilities, would allow goods such as vaccines (and other medicines) and personal protective equipment (PPE) to be distributed to where it is needed most. The determination of such needs must be made on the basis of pre-agreed, publicly available criteria and must be underpinned by reliable data.
- (b) Measures should be developed to incentivize reporting and notification in line with existing obligations. This would include the avoidance of countermeasures that may be reflexively applied, and which may result in undue burdens on States who will effectively find themselves being penalized for notification. The (timing of) any invocation of State responsibility should be carefully considered against the broader purpose of achieving effective cooperation between States. Sanctions should not be imposed if they are likely to hinder the response to a health emergency.

(5) Pathways for reform

The above recommendations can only be achieved through the use of a mix of tools available at the international level. There is a need for enhanced global coordination of responses, including the responses of international organisations, States and other actors. Such coordination would allow cooperation to be more effective.

- (a) Process-oriented developments must also be considered as a tool towards substantive cooperation. This includes strengthening the law making and enforcement powers of relevant international bodies. Other process focused areas should also be covered including, as noted above, the regulation of procurement.
- (b) The development of a 'Pandemic Treaty', as recommended by some States, may be an opportunity to develop international law across various relevant fields. It must however avoid pitfalls such as creating conflicting legal obligations, replicating existing inequities and inequalities, and/or creating multi-track responses whereby developments are only undertaken by a subset of States. Like the pandemic, responses must be global in their nature and outlook. Such an instrument could help to provide clarity on State obligations to prevent, detect, and respond to pandemic threats and to strengthen WHO powers, including by providing clearer definitions on the exact level and type of cooperation required from each State Party in pandemic situations. It must also build on existing international law. Alternative and complementary avenues include revising the IHR or negotiating a subsequent soft-law instrument regarding its interpretation, the latter of which could be implemented through a resolution of the World Health Assembly.
- (c) States should continue to work through existing structures to further evolve the existing frameworks. These include working through the WHO (and its health assembly), but also through the structures of other fields of international law including the World Trade Organisation and human rights bodies.
- (d) Collaboration on health matters should be channelled through health professionals within States and separated as far as possible from political processes which are more likely to be influenced by external factors.
- (e) Similarly, States and international organisations must take advantage of all tools in the international law toolbox to help advance cooperation in the governance of public health emergencies. This includes the use of both hard and soft law instruments.
- (f) States may well consider utilising the dispute settlement mechanisms set out in Article 75 of the WHO Constitution and Article 56 of the IHR to a) promote State compliance with the legal obligations under the IHR and b) seek to facilitate the uniform interpretation and application of the IHR provisions. States are obliged to consult and cooperate to settle any IHR-related disagreement between them via diplomatic means before submitting the matter to the WHO Director-General or other institutional dispute settlement mechanisms, such as arbitration. States must cooperate to avoid escalation once a dispute has arisen and, throughout the dispute settlement process, cooperate with the body to which the dispute has

been submitted. Such cooperation involves action taken at various stages: first, cooperation during negotiations or other diplomatic means of the parties' choice; second, cooperation after the submission of the dispute to the WHO Director-General, and; third, cooperation with the arbitration body, should the parties choose to have recourse to arbitration.

- (g) Further clarification of, and reliance on analysis of, human rights standards, including but not limited to, the right to health, is required in order to inform and underpin developments in other areas of international law.
- (h) States must use their diplomatic and legal powers to pressure States and other actors from spreading disinformation and misinformation that undermines trust in scientific evidence and responses to health crises.
- (i) Effective international responses also require States to regulate the conduct of businesses within their territory and/or jurisdiction. This should be done on the basis of existing and emerging international standards, including the UN Guiding Principles on business and human rights (UNGPs). In particular, the commentary to the UNGPs Principle 9 recommends greater policy coherence at the international level, including where States participate in multilateral institutions that deal with business-related issues: "Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches. Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights."³ The draft treaty on business and human rights, currently under negotiations at the UN, proposes that States "shall ensure that their domestic laws facilitate access to information, including through international cooperation".⁴ Specifically, draft Article 13 on international cooperation clarifies that states recognise the importance of international cooperation for the implementation of a legally binding treaty on business and human rights. This includes financial and technical assistance and capacity-building, and will undertake effective measures in this regard including by promoting technical cooperation and capacity-building among policy makers, parliaments, judiciary, national human rights institutions, and business enterprises, by sharing experiences, good practices, challenges, information and training programmes; and by raising awareness about the rights of victims of business-related human rights abuses and the obligations of States.⁵
- (j) Building public trust in responses to a PHEIC must go beyond national systems and structures, extending to the international plane if responses to global problems are to be effective.

³ UN Guiding Principles on business and human rights, Principle 9, Commentary
https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁴ OEIGWG CHAIRMANSHIP THIRD REVISED DRAFT, LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, 17 August 2021, Article 7, Access to Remedy
<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

⁵ Ibid., Article 13 International Cooperation.

- (k) Beyond the specific measures to increase cooperation, States have considerable power to lead by example during PHEs. They can foster diplomacy that is rooted in solidarity and policies aimed at improving global public health outcomes.

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