

# EXPERIMENTALIST GOVERNANCE IN GLOBAL PUBLIC HEALTH: THE CASE OF UNAIDS

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## ABSTRACT

As a species of “new governance,” global experimentalist governance has been proposed as a way to address the challenges of transnational cooperation. However, while a number of cases of experimentalist governance have been observed at the national and regional levels, only a few cases have been identified at the global level. We identify and analyze a case of experimentalist governance in the global response to HIV/AIDS. A special program to coordinate the United Nations’ response to the AIDS pandemic—UNAIDS—is the chief orchestrator of

these efforts, and the Global AIDS Response Progress Reporting (GARPR) system is the primary institutional mechanism through which this experimentalism operates. This article first examines whether the architecture of the UNAIDS system meets the basic *structure* of global experimentalist governance and finds evidence of a strong “family resemblance” to the ideal type. Going further, the paper then analyzes the *performance* of the UNAIDS system in three countries over time: Haiti, Indonesia, and Peru. The evidence demonstrates that the empirical performance of the program has improved over time, suggesting the operation of a recursive learning process, which is a central feature of experimentalist governance. Although the global AIDS regime may have exceptional qualities that make it unrepresentative of global governance in general, the analysis reinforces the argument that experimentalist governance is possible at the transnational level.

## I. INTRODUCTION

### A. From “New Governance” to “Global Experimentalist Governance”

Legal and political pluralism and complexity challenge the ability of the international order to address fundamental transnational problems like migration, climate change, infectious diseases, humanitarian crises, human trafficking, and financial regulation. “International Old Governance” no longer appears fully up to the task of dealing with these problems, while “New Transnational Governance” appears promising, but it is often piecemeal and untested.<sup>1</sup> Gráinne de Búrca, Robert Keohane, and Charles Sabel, however, have argued that a new strategy of transnational governance can be discerned. They call this strategy “global experimentalist governance” (GXG), and they find it already at work in international regimes like human rights, ozone, and fishing.<sup>2</sup> This strategy builds on a now substantial body of legal scholarship on “new governance,” which stresses flexible regulation, soft law, and collaborative governance. GXG draws these ideas together into an integrated, multilevel system of mutual learning and action.<sup>3</sup>

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<sup>1</sup> Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT’L L.* 501, 501 (2009).

<sup>2</sup> Gráinne de Búrca et al., *New Modes of Pluralist Global Governance*, 45 *N.Y.U. J. INT’L L. & POL’Y* 723, 723 (2012) [hereinafter Búrca, *New Modes*]; Gráinne de Búrca et al., *Global Experimentalist Governance*, 44 *BRIT. J. POL. SCI.* 477, 477 (2014) [hereinafter Búrca et al., *Global Experimentalist Governance*].

<sup>3</sup> For an overview of the “new governance” in legal scholarship, see generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary*

Búrca, Keohane, and Sabel identify five key elements of GXG: (1) deliberation among stakeholders about a shared problem; (2) leading to the development of open-ended framework goals (as opposed to prescriptive regulations) to address the problem; (3) which are delegated to the stakeholders themselves, so as to leave them free to experiment and customize their strategies; (4) while requiring them to report on their progress, which is monitored and subjected to peer review; and which (5) becomes the basis for the periodic reevaluation and updating of the framework goals.<sup>4</sup> The relevance of this recursive learning approach has been demonstrated at the domestic level and for the European Union, but the extension to the transnational level has been more limited.<sup>5</sup> If experimentalist governance is challenging to apply at the domestic and EU levels, it is arguably even more challenging at the global level, where regime complexity, legal pluralism, cultural diversity, and sensitivities regarding sovereignty are even more pronounced and where the “penalty default” (a sanction for not participating) is often less evident.<sup>6</sup> However, the same factors that make transnational experimentalist governance more challenging at the global level may also make it more valuable.<sup>7</sup>

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*Legal Thought*, 89 MINN. L. REV. 342 (2004); Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

<sup>4</sup> Búrca et al., *Global Experimentalist Governance*, *supra* note 2, at 478–79.

<sup>5</sup> See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14(3) EUR. L.J. 271 (2008) [hereinafter Sabel & Zeitlin, *Learning from Difference*]; SABEL & ZEITLIN, EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE (2010); Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227 (2010); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011); JONATHAN ZEITLIN, EXTENDING EXPERIMENTALIST GOVERNANCE? THE EUROPEAN UNION AND TRANSNATIONAL REGULATION (2015).

<sup>6</sup> Búrca et al., *Global Experimentalist Governance*, *supra* note 2, at 479–80, 482.

<sup>7</sup> In addition to three cases noted by De Búrca, Keohane, and Sabel, other scholars have observed elements of experimentalism—or the potential for experimentalism—in global money laundering, financial regulation, forestry, and climate change. See generally Mark T. Nance & M. Patrick Cottrell, *A Turn Toward Experimentalism? Rethinking Security and Governance in the Twenty-First Century*, 40 REV. INT’L STUD. 277 (2014); Elliot Posner, *International Financial Regulatory Cooperation: An Experimentalist Turn?* in EXTENDING EXPERIMENTALIST GOVERNANCE? THE EUROPEAN UNION AND TRANSNATIONAL REGULATION 196 (Jonathan Zeitlin ed., 2015); Malcolm Campbell-Verduyn & Tony Porter, *Experimentalism in European Union and Global Financial Governance: Interactions, Contrasts, and Implication*, 21 J. EUR. PUB. POL’Y 408 (2014); Christine Overvest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REG. & GOVERNANCE 22 (2014); Chiara Armeni, *Global Experimentalist Governance, International Law and Climate Change Technologies*, 64 INT’L & COMP. L.Q. 875 (2015); Charles F. Sabel & David G. Victor, *Governing Global Problems Under Uncertainty: Making Bottom-Up Climate Policy Work*, 144 CLIMATIC CHANGE 15

This article explores the plausibility of GXG as a strategy for transnational new governance, and draws out both the opportunities and constraints GXG is likely to encounter in practice. We selected global public health as the domain for this exploration, which has not yet been explored in the GXG literature. Global public health fits well into the wider description of the evolving international order described by Búrca, Keohane, and Sabel.

Global public health is one of the oldest sectors of international cooperation, extending back to the “disease conventions” of the 19<sup>th</sup> century.<sup>8</sup> The World Health Organization (WHO) was created after World War II, and it became the cornerstone of a comprehensive and integrated international public health regime. Since the 1990s, however, partly in response to globalization, the global public health regime has become more complex, pluralistic and decentered as it has struggled with novel infectious diseases—like AIDS, SARS, H5N1 and Ebola—and with endemic diseases—like malaria and tuberculosis.<sup>9</sup> Public-private partnerships have increasingly been used to address specific diseases and a range of new public health institutions, and networks have sprung up within and outside the WHO framework.<sup>10</sup> Global public health has clearly become a “regime complex”—an “array of partially overlapping and non-hierarchical institutions governing a particular issue area.”<sup>11</sup> If GXG materializes out of regime complexes, as Búrca,

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(2017); Gráinne de Búrca, Professor at NYU Law School, European University Institute, Human Rights Experimentalism, Max Weber Lecture No. 2015/02 (2015).

<sup>8</sup> See David P. Fidler, *The Future of the World Health Organization: What Role for International Law*, 31 VAND. J. TRANSNAT'L L. 1079 (1998) (providing a legal prospective); see also Fidler, *The Globalization of Public Health: The First 100 Years of International Health Diplomacy*, 79 BULL. WORLD HEALTH ORG. 842 (2001).

<sup>9</sup> See generally Richard Dodgson, Kelley Lee & Nick Drager, *Global Health Governance: A Conceptual Review*, Discussion Paper No. 1 (2002), [http://apps.who.int/iris/bitstream/10665/68934/1/a85727\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/68934/1/a85727_eng.pdf); David P. Fidler, *Germs, Governance, and Global Public Health in the Wake of SARS*, 133 J. CLINICAL INVESTIGATION 799 (2004); Laurie Garrett, *The Challenge of Global Health*, 86 FOREIGN AFF. 14; Theodore M. Brown et al., *The World Health Organization and the Transition from “International” to “Global” Public Health*, 96 AMER. J. PUB. HEALTH 62 (2006); Derek Yach & Douglas Bettcher, *The Globalization of Public Health, II: The Convergence of Self-Interest and Altruism*, 88 AMER. J. PUB. HEALTH 738 (1998); David P. Fidler, *Architecture Amidst Anarchy: Global Health's Quest for Governance*, 1(1) GLOBAL HEALTH GOV. (2007); Julio Frenk & Suerie Moon, *Governance Challenges in Global Health*, 368 NEW ENG. J. MED. 936 (2013); Jon Lidén, *The World Health Organization and Global Health Governance: Post-1990*, 128 PUB. HEALTH 141 (2014).

<sup>10</sup> Kent Buse & Gill Walt, *Global Public-Private Partnerships: Part I-A New Development in Health?*, 78 BULL. WORLD HEALTH ORG. 549, 551–58 (2000); K. Buse & G. Walt, *Global Public-Private Partnerships: Part II-What are the Health Issues for Global Governance?*, 78 BULL. WORLD HEALTH ORG. 699, 700–07 (2000); Kent Buse & Andrew M. Harmer, *Seven Habits of Highly Effective Global Public-Private Health Partnerships: Practice and Potential*, 64 SOC. SCI. & MED. 259, 260–69 (2007).

<sup>11</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004).

Keohane, and Sabel suggest is possible,<sup>12</sup> then the global public health domain seems a likely place to find it. Not only does the global public health sector have a well-developed, multi-level architecture and a deep appreciation for international interdependence, but it is also deeply committed to monitoring and measuring the results of its interventions. These features lend themselves to GXG.

In our initial investigation, we focused on the Stop TB program, a global public-private partnership developed to address tuberculosis, which the WHO declared a global health emergency in 1993.<sup>13</sup> A number of features of this public-private partnership initially seemed to fit the GXG model quite well, including broad framework goals around increasing case detection and early detection, developed through stakeholder deliberation and a system for monitoring and evaluating results.<sup>14</sup> In addition, local ‘units’ funded through its TB Reach program are given discretion to use innovative means to meet the broad aims.<sup>15</sup> As a grantmaking organization, the Stop TB program does include a process through which it monitors and evaluates its grants.<sup>16</sup>

However, after investigating the case in some depth, we determined that the GXG fit was limited. Despite the features just described, it was more difficult to identify a recursive learning process at work within the program. It is this recursive learning that is at the heart of experimentalist governance. As we learned through interviews with key informants, one of Stop TB’s central goals is to provide “seed” funding to smaller-scale and early-stage projects in order to compete for funding from the Global Fund to Fight AIDS, Malaria, and Tuberculosis (Global Fund), which provides the majority of international donor funding for TB control. Thus, the program is less focused on ‘learning by doing’ than it is in generating sufficient knowledge about context-specific interventions to allow fledgling projects to successfully secure longer-term funding and scale.<sup>17</sup>

Reasoning that perhaps grant-making institutions were less likely to adopt the full experimentalist package, we also explored the implementation of the new

<sup>12</sup> Búrca et al., *Global Experimentalist Governance*, *supra* note 2, at 479.

<sup>13</sup> John M. Grange & Ali Zumla, *The Global Emergency of Tuberculosis: What Is the Cause?*, 122.2 J. ROYAL SOC’Y PROMOTION HEALTH 78, 78–79 (2002).

<sup>14</sup> Jacob Kumaresan et al., *Global Partnership to Stop TB: A Model of an Effective Public Health Partnership [Stop TB Partnership]*, 8 INT’L J. TUBERCULOSIS & LUNG DISEASE 120, 126–28 (2004).

<sup>15</sup> See Aamir J. Khan et al., *Engaging the Private Sector to Increase Tuberculosis Case Detection: An Impact Evaluation Study*, 12(8) LANCET INFECTIOUS DISEASES 608, 609–10 (2012) (providing an example of TB reach grantee effort).

<sup>16</sup> See World Trade Organization, *Monitoring and Evaluation for TB/HIV Collaborative Activities*, STOP TB, [http://www.stoptb.org/wg/tb\\_hiv/assets/documents/M&E%20TBHIV%20Fact%20Sheet.pdf](http://www.stoptb.org/wg/tb_hiv/assets/documents/M&E%20TBHIV%20Fact%20Sheet.pdf) (last visited Mar. 1, 2018); *see also* Khan et al., *supra* note 15, at 611 (discussing TB Reach’s involvement in monitoring project performance).

<sup>17</sup> The Stop TB Partnership, *Leading the Fight Against TB*, STOP TB 7, <http://www.stoptb.org/assets/documents/resources/publications/acsm/FINAL%20UPDATE%20STOP%20TB%20BROCHURE.pdf> (last visited Mar. 1, 2018) (“TB REACH provides The Global Fund with a pool of successful models to be scaled up at country level.”).

International Health Regulations (IHR) promulgated by the WHO. Here, we also found that the broad architecture of IHR implementation resembled experimentalist governance.<sup>18</sup> Upon closer inspection, however, IHR also seemed to lack significant and systematic recursive learning, in addition to its limitations in terms of inconsistent implementation and compliance.

### **B. The Global AIDS Regime and Global Experimentalist Governance**

After evaluating several initiatives in the field of global public health as described above, we eventually came to focus our attention on the global AIDS regime. The global response to HIV/AIDS is often described as one of the most successful public health initiatives of the past 50 years.<sup>19</sup> It has involved the creation of local, regional, national, and transnational institutions; the design and implementation of pioneering mechanisms of inclusion and accountability; and cooperation and coordination between state and non-state actors, including mobilized citizen groups, non-profit organizations, corporations, foundations, and intergovernmental organizations. This effort has required quite a bit of governance. As Michel Sidibé, the current Executive Director of UNAIDS has explained, “governance—the ways we organize ourselves within countries and at the international level to tackle such challenges [as HIV/AIDS]—is the glue that has held the response together; and it ushered in many innovations.”<sup>20</sup> Key elements of this governance strategy fit the experimentalist model better than other global public health institutions that we surveyed.

Experimentalist governance emerged gradually along with the development of the global AIDS regime itself. Four years after the first cases of AIDS were discovered in 1981, this novel disease had spread to all regions of the globe. By many accounts, the international response to HIV/AIDS got off to a slow start, particularly in Africa.<sup>21</sup> As Smith and Whiteside write: “International responses between 1986 and 1996 were characterized by denial, underestimation and over-simplification.”<sup>22</sup> The WHO initiated an international surveillance program in 1983 and established its Global Programme on AIDS in 1987. These programs failed to fully mobilize a coherent international response due to lack of

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<sup>18</sup> Rebecca L. Katz et al., *Disease Surveillance, Capacity Building and Implementation of the International Health Regulations (IHR [2005])*, 10 (Supp. 1) BMC PUB. HEALTH 1, 1–4 (2010).

<sup>19</sup> Michel Sidibe & Kent Buse, *AIDS Governance, Best Practices for a Post 2015 World*, 381 LANCET 2147, 2147–48 (2013).

<sup>20</sup> *Id.*

<sup>21</sup> Stefano M. Bertozzi et al., *The Evolving HIV/AIDS Response and the Urgent Tasks Ahead*, 28 HEALTH AFF. 1578, 1578–90 (2009); Julia H. Smith & Alan Whiteside, *The History of AIDS Exceptionalism*, 13 J. INT’L AIDS SOC’Y 47, 50 (2010).

<sup>22</sup> Smith & Whiteside, *supra* note 21, at 50.

funding and capacity.<sup>23</sup> By 1997, a year after UNAIDS launched to catalyze a more forceful global effort, nearly 11.7 million people had died from AIDS and over 30 million people were living with HIV/AIDS worldwide.<sup>24</sup>

Despite the slow start, there was an early awareness that AIDS required a unique response—a sensibility known as “AIDS exceptionalism.” A sense of urgency, a feeling that the disease was unique, and high levels of social mobilization led AIDS to be framed as a human rights issue.<sup>25</sup> This human rights frame was reinforced with the announcement of an effective but expensive anti-retroviral treatment (ART) for HIV/AIDS in 1996. Although ART transformed HIV/AIDS into a treatable chronic disease, the cost of ART remained beyond the financial capacity of most citizens in developing countries.<sup>26</sup> This led to calls for access to such medications to be treated as a human rights issue rather than as simply a healthcare matter. The exceptional nature of the AIDS pandemic was also reinforced by the unprecedented framing of AIDS as a security crisis by the UN Security Council.<sup>27</sup> Resolution 1308 marked the first time the Council had ever treated a disease as a security issue. The framing of AIDS as both a human rights and a global security issue galvanized financial support and national commitment for a much more assertive global response.<sup>28</sup>

This combination of urgency, political commitment, and financial support catalyzed the creation of a distinctive international AIDS regime. This regime includes a major funding mechanism, the Global Fund, created in 2002, and a major US initiative announced by the Bush Administration in 2003 (President’s Emergency Plan for AIDS Relief, or PEPFAR).<sup>29</sup> Perhaps most importantly for the purposes of this article, however, this international momentum led to the creation of UNAIDS, the first and only joint program in the UN system, which was launched in 1996 and continues to serve as a principal coordinating mechanism in the global AIDS regime. In 2001, the UN General Assembly sponsored a special session (UNGASS) on AIDS, producing a global commitment to concrete objectives for a global response and creating the Global AIDS Response Progress Reporting (GARPR) system to monitor national progress towards achieving those

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<sup>23</sup> J. Lidén, *The World Health Organization and Global Health Governance: Post-1990*, 128 PUB. HEALTH 141, 141 (2014).

<sup>24</sup> Bertozzi et al., *supra* note 21, at 1582.

<sup>25</sup> Smith & Whiteside, *supra* note 21, at 49.

<sup>26</sup> *Id.* at 51.

<sup>27</sup> S.C. Res. 1308 (July 17, 2000).

<sup>28</sup> Simon Rushton, *Framing AIDS: Securitization, Development-ization, Rights-ization*, 4 GLOBAL HEALTH (2010) (arguing that the security frame was largely an expedient one to move the issue up the international agenda, but that it has otherwise been a relatively minor framing).

<sup>29</sup> Smith & Whiteside, *supra* note 21, at 51.

objectives.<sup>30</sup> Orchestrated by UNAIDS, these global commitments and GARPR have become central tools of the global AIDS regime.<sup>31</sup>

While the public health literature relating to global HIV/AIDS response is very extensive, the literature on the governance of the response is less developed.<sup>32</sup> A few governance scholars have noted the importance of the UNGASS reporting system and the role that civil society and UNAIDS play in managing that system.<sup>33</sup> However, most accounts focused on UNAIDS itself have been interested in its somewhat unusual institutional design within the UN system.<sup>34</sup> Its role as the critical orchestrator in a wider system of experimentalist governance has not been fully appreciated.

In the remainder of the article, we argue that UNAIDS and the GARPR reporting framework developed by UNGASS embody the core ideas of global experimentalist governance. We are sensitive to the fact that UNAIDS, like many UN and UN-affiliated institutions, has been the subject of significant criticism both

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<sup>30</sup> This reporting system was originally known as the UNGASS Reporting System, but it was renamed the Global AIDS Response Progress Reporting (GARPR) in 2011. See generally World Health Organization et al., *The Progress report 2011: Global HIV/AIDS response*, UNAIDS (Nov. 20, 2011), [http://www.unaids.org/en/resources/documents/2011/20111130\\_UA\\_Report](http://www.unaids.org/en/resources/documents/2011/20111130_UA_Report).

<sup>31</sup> Note that there are several other important actors in this regime. Wolfgang Hein et al., *Conceptual Models for Global Health Governance*, in MAKING SENSE OF GLOBAL HEALTH GOVERNANCE: A POLICY PERSPECTIVE 72 (2009) (identifying several actors, and describing the global governance of HIV/AIDS as a nodal network, in which GFATM, PEPFAR, private foundations (particularly the Bill and Melinda Gates Foundation participate as nodes).

<sup>32</sup> See generally Dennis Altman, *AIDS and Questions of Global Governance*, 11 GLOBAL CHANGE, PEACE & SECURITY 195 (1999); James Putzel, *The Global Fight Against AIDS: How Adequate are the National Commissions?*, 16 J. INT'L DEV. 1129 (2004); Hakan Seckinelgin, *A Global Disease and Its Governance: HIV/AIDS in Sub-Saharan Africa and the Agency of NGOs*, 11(3) GLOBAL GOVERNANCE 351 (2005); WOLFGANG HEIN, SONJA BARTSCH & LARS KOHLMORGEN, GLOBAL HEALTH GOVERNANCE AND THE FIGHT AGAINST HIV/AIDS (2007); Marie Woodling et al., *New Life in Old Frames: HIV, Development and the "AIDS plus MDGs" Approach*, 7 GLOBAL PUB. HEALTH S144 (2012).

<sup>33</sup> See Allyn Taylor et al., *Nonbinding Legal Instruments in Governance for Global Health: Lessons from the Global AIDS Reporting Mechanism*, 42 J.L. MED. & ETHICS 72 (2014) (providing a positive discussion of the Global AIDS Response Progress Reporting, and its predecessor, the UNGASS Reporting System); see also Julia Smith et al., *The Role of Civil Society Organizations in Monitoring the Global AIDS Response*, 20 AIDS & BEHAV. 1 (2016).

<sup>34</sup> Erin R. Graham, *The Promise and Pitfalls of Assembled Institutions: Lessons from the Global Environment Facility and UNAIDS*, 8 GLOBAL POL'Y 52, 52–53 (2016); Olivier Nay, *What Drives Reforms in International Organizations? External Pressure and Bureaucratic Entrepreneurs in the UN Response to AIDS*, 24 GOVERNANCE 689, 690 (2011); Sophie Harman, *Searching for an Executive Head? Leadership and UNAIDS*, 17 GLOBAL GOVERNANCE 429, 429–30 (2011); Devi Sridhar, *Coordinating the UN System: Lessons from UNAIDS: A Commentary on Mackey*, 76 SOC. SCI. MED. 21, 21–23 (2013).

within public health literature,<sup>35</sup> and in the governance literature.<sup>36</sup> However, we also note that the literature on the “global HIV/AIDS” response as a case study in governance has largely overlooked the key role that UNAIDS plays, particularly vis-à-vis GARPR.<sup>37</sup> Clearly, UNAIDS is not the sole actor of importance in the global response to HIV/AIDS. However, it is the key actor in orchestrating the experimentalist elements of a global AIDS response, and analysis of its architecture and functionality will offer a new contribution to the empirical literature on GXG.

The article proceeds as follows: Part II provides a deeper examination of experimentalist governance, setting out in more detail the ideal type. Part III provides an overview of the UNAIDS program. Part IV then assesses both the structure and performance of this program in terms of global experimentalist governance ideals. It first assesses the extent to which the *structure* of UNAIDS’s coordinated response to HIV/AIDS embodies the architectural features of experimentalism. Moving beyond the formal program structure, Part IV then looks at the *performance* of the program over time. The section provides a detailed assessment of the regime in action by looking at how UNAIDS has performed in three separate countries over time: Haiti, Indonesia, and Peru. While it is impossible to isolate UNAIDS’s causal contribution to the positive disease outcomes observed in these countries, and indeed globally, the qualitative evidence suggests that the UNAIDS regime has contributed to these outcomes. We also argue that the performance of UNAIDS *as a program* has improved over time, which is a key indicator of the learning process at the heart of effective experimentalist governance.

## II. GLOBAL GOVERNANCE AND DEMOCRATIC EXPERIMENTALISM

### A. Governance, Global Governance, and “Good Governance”

Governance is an extensive topic in a variety of branches of scholarship as well as among the entities and organizations that engage in applied management activities across the world.<sup>38</sup> Its definitions are numerous and often contested

<sup>35</sup> Public health scholars have criticized intergovernmental institutions like UNAIDS for being too top-heavy and unresponsive to local needs. Mary Crewe, *Spectacular Failure—A View from the Epicenter*, 4 YALE J. HEALTH POL’Y L. & ETHICS 157, 157–58 (2004); Roger England, *The Writing is on the Wall for UNAIDS*, 336 BMJ1072, 1072 (2008); Graham, *supra* note 34, at 52.

<sup>36</sup> Hein et al., *supra* note 31, at 84 (addressing UNAIDS, “Poor in resources and dependent upon voluntary cooperation, it has never realized its potential to rationalize and coordinate UN actions.” See also Burriss et al., *supra* note 3, at 42 (stating that multilateral governance institutions have “legal and political” drawbacks, and that UN organizations have “inefficiencies.”).

<sup>37</sup> Hein et al., *supra* note 31, at 85.

<sup>38</sup> See generally DAVID LEVI-FAUR, THE OXFORD HANDBOOK OF GOVERNANCE (2012); CHRISTOPHER ANSELL & JACOB TORFING, HANDBOOK ON THEORIES OF GOVERNANCE (2016).

between disciplines. However, generally speaking, governance as a project has both theoretical and empirical aims. Broadly, it engages in theories of regulation and governance, and explores examples indicating the fragmentation of state sovereignty, the proliferation of state and non-state actors that now share the work of governing social and economic life, and the policy tradeoffs that emerge from this system. This fragmentation of state power has occurred both at the level of individual nations and at the international level.<sup>39</sup>

The basic observation that governance makes is that our world has grown less state-centered and more polyarchic, with multiple agencies, entities, and sites of governance in any given policy space.<sup>40</sup> State-centered systems of regulation have increasingly been replaced by distributed networks of actors engaged in governance, each with a certain amount of leverage or power over the particular policy area. This polyarchy has in turn required a shift from traditional regulatory tools in the form of fixed and uniform rules, to tools of governance that instead employ flexible and revisable standards.<sup>41</sup> Finally, while traditional regulatory systems focused on rule enforcement, global governance emphasizes mechanisms of cooperation and problem-solving.

In legal scholarship, the term new governance has been used to describe governing strategies that use non-binding rules or soft law coupled with flexibility and discretion in rule compliance, and collaborative, deliberative, or participatory modes of rule-making and implementation.<sup>42</sup> The term draws a contrast with traditional forms of regulation that are more hierarchical and prescriptive—for example, with command and control regulation.<sup>43</sup> However, new governance may be viewed as either an alternative to or a complement to old governance.

In public health, the term governance is used in a similar fashion, but with slightly different emphases. It often suggests a multi-sectoral and multi-level approach to public health and a strategy of broad-based mobilization of both state and non-state actors to support these efforts.<sup>44</sup> The term “global health governance” is used to draw a contrast with an international regime based largely on the cooperation of states via the World Health Organization (WHO).<sup>45</sup>

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<sup>39</sup> Burris et al., *supra* note 3, at 1–3 & nn.1–4.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> Nance & Cottrell, *supra* note 7, at 278–79.

<sup>42</sup> Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002); Lobel, *supra* note 3; GRÁINNE DE BÚRCA & JOANNE SCOTT, LAW AND NEW GOVERNANCE IN THE EU AND THE US (2006); Abbott & Snidal, *supra* note 1.

<sup>43</sup> Christopher Carrigan & Cary Coglianese, *The Politics of Regulation: From New Institutionalism to New Governance*, 14 ANN. REV. POL. SCI. 107, 114 (2011). *See generally* Lobel, *supra* note 3; Burris et al., *supra* note 3.

<sup>44</sup> Dodgson et al., *supra* note 9, at 6; Ilona Kickbusch & David Gleicher, *Governance for Health in the 21st Century*, World Health Organization [WHO] 1, 1–4 (2012).

<sup>45</sup> Dodgson et al., *supra* note 9, at 6.

All systems of governance, including those within global health governance, aim to achieve “good governance.” But certainly, not all governance is good. As Scott Burris explains:

Governance can be good in at least two senses: it can deliver good results and it can work through processes and institutions that meet broadly accepted standards of justice and due process.<sup>46</sup>

Governance is often described in network terms: the governance of any particular policy domain involves several “nodes” and this framework emphasizes the importance of information flow as a measure of the extent to which the governance system is “good.”<sup>47</sup>

Said differently, good governance is not simply “governance that works efficiently, but governance that works by fair and open processes towards just and socially beneficial ends.”<sup>48</sup>

### **B. Global Experimentalist Governance**

The management of transnational problems presents a major governance challenge due to the plurality of stakeholders and their political sensitivities around sovereignty and representation. As described above, the concept of governance reflects the desire to adapt to and mobilize this pluralism, particularly at the global level.

Global experimentalist governance offers one potential model for harnessing this pluralism while respecting the political and organizational constraints that it imposes. As described above, experimentalist governance establishes provisional framework goals for action, grants discretion to local units to craft context-specific means to meet the framework goals, monitors progress towards these goals via information pooling and peer review, and periodically revises framework goals. Said differently, this mechanism of governance establishes deliberately provisional frameworks for action, with the expectation that revisions will occur in light of lessons learned in implementation across various contexts.<sup>49</sup> Experimentalist governance is typically regarded as an example of “new governance,” in the legal sense described above.<sup>50</sup> However, its potential relevance to global health governance has not been previously explored.

Experimentalist governance privileges “learning from difference” and emphasizes the importance of recursive feedback that comes from learning-by-doing.<sup>51</sup> By recognizing that solutions to complex problems across multiple

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<sup>46</sup> Burris et al., *supra* note 3, at 3.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> *Id.* at 10–11.

<sup>49</sup> Sabel & Zeitlin, *Learning from Difference*, *supra* note 5.

<sup>50</sup> Búrca, *supra* note 5.

<sup>51</sup> Sabel & Zeitlin, *Learning from Difference*, *supra* note 5.

jurisdictions cannot be fully determined *ex ante*, it creates a process whereby problem-solving occurs iteratively, in contextually-specific ways, and in real-time. As described by Burca and Scott: “The idea of new or experimental governance approaches places considerable emphasis upon the accommodation and promotion of diversity, on the importance of provisionality and revisability—both in terms of problem definition and anticipated solutions, and on the goal of policy learning.”<sup>52</sup>

The institutional architecture of an experimentalist regime envisions a group of semi-autonomous local units, such as firms, nations, or states, organized under the umbrella of a central unit. The learning process involves four core elements linked together in a cycle:

First, broad provisional goals and metrics are established through a deliberative and collaborative exchange between the local units and a central unit, which may also include wider collaboration with the public or other stakeholders.<sup>53</sup>

Second, local units are given discretion to implement policies aimed at meeting these provisional goals and metrics.<sup>54</sup> In doing this, they often create opportunities for involvement by key stakeholders and civil society. It has been observed empirically that enrolling diverse sources of knowledge in this process may also produce better solutions more of the time.<sup>55</sup>

Third, in return for this autonomy, lower units must regularly report on their performance, and participate in a peer review process that compares their experiences and performance so that best practices and learnings can be pooled together and bubbled up to the central unit for further analysis and dissemination.

Finally, based on this shared learning, participants periodically revise the system’s broad framework goals and metrics.<sup>56</sup>

Scholars have articulated a few likely scope conditions for the establishment of experimentalist regimes. These include that the model is well suited to heterogeneous but interdependent settings—where different regulatory regimes or settings affect one another, which may create externalities, give rise to conflict, or hinder transactional or personal mobility; situations of strategic uncertainty—where there is a need to address a complex problem that is not amenable to resolution through hierarchy or the market; and situations involving polyarchic distribution of power—where no single actor has the ability to impose its own preferred solution upon all of the other actors.<sup>57</sup>

This experimentalist architecture can be executed through a number of different institutional arrangements. While the model envisions a central unit, this

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<sup>52</sup> BÚRCA & SCOTT, *supra* note 42, at 3.

<sup>53</sup> Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3(4) EUR. L. J. 313 (1997).

<sup>54</sup> Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 79 (2011).

<sup>55</sup> Burris et al., *supra* note 3, at 11.

<sup>56</sup> Overdeest & Zeitlin, *supra* note 7; Sabel & Zeitlin, *Learning from Difference*, *supra* note 5; Búrca, *New Modes*, *supra* note 2.

<sup>57</sup> Sabel & Zeitlin, *Learning from Difference*, *supra* note 5; Búrca, *supra* note 5, at 232–33.

unit is not a hegemon imposing its will. Indeed, experimentalist governance is explicitly understood to be polyarchic, with constituent units given the ability and responsibility to learn from, discipline, and set goals for one another. As a result, different configurations of units and organizational forms are possible. Scholars have identified experimentalist programs and processes in a wide variety of fields and locations. These include examples from the United States and the European Union in areas ranging from energy and food safety regulation, data privacy, child welfare, and environmental protection,<sup>58</sup> as well as fisheries,<sup>59</sup> human rights,<sup>60</sup> and trade.<sup>61</sup>

### **C. Global Health Governance**

As mentioned above, the term “global health governance” refers to less state-centric systems of cooperation than the more traditional “international” regime that is based largely on the cooperation of states via the WHO. There is a robust literature on global health governance.<sup>62</sup> However, to our knowledge, the global experimentalist governance framework has not yet been applied in the field of global public health.

Hein, Burris, and Shearing (2009) offer a significant exploration of conceptual models for global health governance (GHG) of HIV/AIDS in particular. These scholars frame their study in terms of changes in the broader context of governance: traditional state-based institutions have become more diversified both because of their “inherent limitations” and the increasing power of non-state actors.<sup>63</sup> The state remains a powerful actor, but now competes with non-state actors including corporations, religious groups, and non-governmental social advocacy and civil society organizations.<sup>64</sup> These shifts are visible in the health sector’s transformation from a set of individual state-level systems into a system of GHG, which is polyarchic and distributed.

These authors define the key challenges of GHG as improving democracy, efficacy, and coordination.<sup>65</sup> They define “good GHG” as governance that respects, defends, and promotes the right of people to the highest possible health; it is also

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<sup>58</sup> SABEL & SIMON, *supra* note 5; Sabel & Zeitlin, *Learning from Difference*, *supra* note 5.

<sup>59</sup> Búrca et al., *Global Experimentalist Governance*, *supra* note 2.

<sup>60</sup> *Id.*

<sup>61</sup> Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT’L L. 575 (2009).

<sup>62</sup> See, e.g., KENT BUSE, MAKING SENSE OF GLOBAL HEALTH GOVERNANCE: A POLICY PERSPECTIVE 7 (2009); Ilona Kickbusch, *Mapping the Future of Public Health*, 97 CAN. J. PUB. HEALTH 1, 6–8 (2006); Susan K. Sell, *The Quest for Global Governance in Intellectual Property and Public Health*, 77 TEMP. L. REV. 363, 364 (2004).

<sup>63</sup> Hein et al., *supra* note 31, at 72.

<sup>64</sup> *Id.* at 74.

<sup>65</sup> *Id.*

attentive to evidence.<sup>66</sup> With respect to the global governance of HIV/AIDS, they focus on the issue of how access to medicines has influenced the development of a global network of actors.<sup>67</sup> In describing this network, these authors briefly mention “democratic experimentalism,”<sup>68</sup> but do not apply its framework to their case study as a whole or to any component of the network they describe.

Importantly, this study almost entirely excludes analysis of UNAIDS. It states early on that: “UNAIDS was designed by the UN system as a superstructural node coordinating the activities of the several UN agencies substantially involved in HIV control. Poor in resources and dependent upon voluntary cooperation, it has never realized its potential to rationalize and coordinate UN actions.”<sup>69</sup> Instead, Hein, Burris, and Shearing focus on the WHO as “the most important organizational interface with governments in global health politics,”<sup>70</sup> further stating that “WHO remains near the center of GHG; as the official interface for traditional Westphalian governance.”<sup>71</sup> In this model, UNAIDS is a relatively unimportant node in the network; it is not separately analyzed for its potential structural benefits or empirical performance as an independent governance mechanism.

### III. UNAIDS: OVERVIEW OF DEVELOPMENT AND STRUCTURE

The global response to AIDS has many moving parts, with a polyarchic structure of many actors forming a global network. We argue that UNAIDS, as the “central unit” created by the UN system to mobilize the international response, is a vital part of the global network. Although the Global Fund is the main funder of HIV/AIDS efforts globally, and the United States’ PEPFAR program is the largest donor worldwide, UNAIDS has a chief role in coordinating the international response between and across nations. It is also responsible for administering and coordinating the GARPR reporting system. Therefore, it is important to describe the key features of this institution.

The development of UNAIDS grew out of a sense that the UN system and the WHO were responding too slowly to the HIV/AIDS crisis and were not achieving a sufficiently coordinated effort.<sup>72</sup> The push for reform came from bilateral donors and activists who wanted to invigorate a stronger response. A review of UNAIDS’s predecessor, the WHO Global Programme on AIDS, had found that coordination of the UN system was inadequate and that the WHO was

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<sup>66</sup> Hein et al., *supra* note 31, at 76.

<sup>67</sup> *Id.* at 78.

<sup>68</sup> *Id.* at 79.

<sup>69</sup> *Id.* at 84.

<sup>70</sup> *Id.* at 92.

<sup>71</sup> Hein et al., *supra* note 31, at 92.

<sup>72</sup> LINDSAY KNIGHT, UNAIDS: THE FIRST TEN YEARS (2008); Hein et al., *supra* note 31, at 84; Nay, *supra* note 34; Graham, *supra* note 34.

not providing satisfactory leadership for the global AIDS response, which was hampered by interagency tensions.<sup>73</sup>

Established by a Memorandum of Understanding between UN agencies in 1994, UNAIDS inherited some of these tensions. However, the new “joint programme” gradually built stronger commitment from the cosponsoring agencies—which include the WHO, World Bank, UN Development Programme, and others.<sup>74</sup>

A key impetus to create UNAIDS was the desire to strengthen national capacity to coordinate a multi-sectoral approach to the disease. To achieve this, UNAIDS adopted the WHO strategy of promoting national planning, an inheritance that the 2002 five-year evaluation of UNAIDS found to be very effective.<sup>75</sup> Responsibility for “prevalence statistics” was also moved from WHO to UNAIDS, reinforcing UNAIDS’s subsequent role as the central unit for monitoring the success of the global response.<sup>76</sup>

Other elements of an experimentalist architecture were brought about by a combination of the increased momentum for a strong international response and UNAIDS’s own activism. The UNAIDS Secretariat is credited with forging a stronger international consensus and mounting an effective advocacy campaign that targeted top world leaders.<sup>77</sup> The XIII International AIDS Conference, held in Durban, South Africa in July 2000, also helped to inject new vigor into the global response.<sup>78</sup> Shortly thereafter, the UN Security Council issued its first ever resolution (1308) on a public health issue, labelling the AIDS pandemic a “crisis.”<sup>79</sup> The Durban conference and the Security Council resolution, in turn, galvanized a special session of the UN General Assembly (UNGASS) in 2001, which led 189 UN member states to sign a Declaration of Commitment on AIDS. UNAIDS played

<sup>73</sup> See UNAIDS, *UNAIDS Second Independent Evaluation 2002-2008*, 1, UNAIDS/PCB (25)/09.CRP.8, 37 (Oct. 2, 2009) [hereinafter *UNAIDS Second Independent Evaluation 2002-2008*].

<sup>74</sup> Programme Coordinating Board, *Five-Year Evaluation of UNAIDS*, UNAIDS 5 (Nov. 11, 2002), [http://files.unaids.org/en/media/unaids/contentassets/dataimport/governance/pcb03/pcb\\_13\\_02\\_02\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/dataimport/governance/pcb03/pcb_13_02_02_en.pdf) [hereinafter *Five-Year Evaluation of UNAIDS*]. It is a “cosponsored programme” as opposed to an “agency.” *Id.* The initial cosponsors of UNAIDS were UNICEF, UNDP, UNFPA, UNESCO, WHO and the World Bank, and they were later joined by UNDCP and ILO. *Id.* Some of the cosponsors of UNAIDS (e.g., WHO, UNICEF, and UNDP) were “not enthusiastic” about a cosponsored program; however, they eventually upgraded the priority they gave to AIDS and built needed capacity. *Id.* at 20, ¶ 4.50. As the first evaluation of UNAIDS notes: “The history of UNAIDS’ first 5 to 6 years can be characterised as a slow 2 to 3 years in which much effort was devoted to consensus building, followed by a gathering momentum by the cosponsors. . .” *Id.* at 6. UNAIDS is unique in that it is the only “cosponsored” programme within the UN system.

<sup>75</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74 at 24, ¶ 4.69.

<sup>76</sup> *Id.* at 24, ¶ 4.5.

<sup>77</sup> *Id.* at 24–25, ¶¶ 4.1–4.3.

<sup>78</sup> KNIGHT, *supra* note 72, at 110–13.

<sup>79</sup> S.C. Res. 1308, *supra* note 27.

a critical role in this process.<sup>80</sup> Although non-binding, this Declaration of Commitment established a framework for international action, with concrete objectives and milestones.<sup>81</sup> The UNGASS Declaration also established a system for monitoring the progress of national AIDS programs in meeting these global objectives and milestones.

Additionally, and importantly, the Global AIDS Response Progress Reporting (GARPR) was assigned to UNAIDS. Several developments reinforced the integrity and value of this reporting system. First, UNAIDS has provided critical leadership in the development of this international monitoring and evaluation system for AIDS programs. Second, it has also been instrumental in promoting the global harmonization of indicators, which is regarded as one of the success stories of the global AIDS response.<sup>82</sup> Third, with leadership from UNAIDS, the United States and the United Kingdom, international donors forged an agreement in 2004 on the “three ones” principle: an agreement to acknowledge *one* national AIDS framework, *one* national AIDS coordinating authority, and *one* country-level monitoring and evaluation system.<sup>83</sup> Effective monitoring and evaluation, harmonized indicators, and unified country-level systems have created the basis for a strong reporting system.

Finally, while the UNGASS Declaration of Commitment is non-binding, this is a helpful, rather than detrimental, feature of the program. Non-binding legal instruments are sometimes disparaged by scholars as inferior to binding instruments like treaties. However, they may also have benefits.<sup>84</sup> Indeed, the UNAIDS case shows that under certain circumstances non-binding instruments can be quite effective. The flexibility of nonbinding instruments can facilitate cooperation among stakeholders with different goals and capacities. Furthermore, consensus may be easier to achieve among stakeholders because the process and outcome do not involve formal legal commitments or potential political consequences. Such nonbinding instruments have the capacity to be more responsive and easier to revise. These instruments also have the potential to more easily and directly include non-state actors in both negotiation and implementation.<sup>85</sup>

When the loose properties of a flexible, non-binding framework are combined with the tight properties of a unified and well-institutionalized reporting

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<sup>80</sup> KNIGHT, *supra* note 72, at ch. 5.

<sup>81</sup> Taylor et al., *supra* note 33.

<sup>82</sup> Deborah Rugg et al., *Efforts in Collaboration and Coordination of HIV/AIDS Monitoring and Evaluation: Contributions and Lessons of Two US Government Agencies in a Global Partnership*, 103 *NEW DIRECTIONS FOR EVALUATION* 33, 40 (2004); Laura E. Porter et al., *Beyond Indicators: Advances in Global HIV Monitoring and Evaluation During the PEPFAR Era*, 60 *J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES* S120, S120–21 (2012); Anna Holzscheiter et al., *Monitoring and Evaluation in Global HIV/AIDS Control—Weighing Incentives and Disincentives for Coordination Among Global and Local Actors*, 24 *J. INT’L DEV.* 61, 64–66 (2012).

<sup>83</sup> Holzscheiter et al., *supra* note 82, at 64.

<sup>84</sup> See generally Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *INT’L ORG.* 495, (1991); DINAH L. SHELTON, *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING LAWS IN THE INTERNATIONAL LEGAL SYSTEM* (2002).

<sup>85</sup> Taylor et al., *supra* note 33, at 76–77.

system, a transnational experimentalist regime may begin to take shape, as occurred in the case of UNAIDS. Building on this brief introduction to UNAIDS, we can now dig deeper into the extent that this regime embodies the major elements of experimentalist governance.

#### IV. GLOBAL EXPERIMENTALIST GOVERNANCE AND UNAIDS

In broad terms, there is little doubt that the UNAIDS program generally fits the institutional architecture described by the experimentalist governance literature. The UN Economic and Social Council's (ECOSOC) goals, the UNGASS Declaration of Commitment, and UNAIDS's own strategic goals provide the regime with a concrete strategic framework and measurable targets. The local units in this system—the UN member states—are given discretion to determine how to achieve these goals through a process of national planning and implementation, with assistance from UNAIDS.<sup>86</sup> The GARPR reporting mechanism established by UNGASS and administered by UNAIDS provides a means to monitor each member state's progress, and to pool information about global headway.<sup>87</sup> Finally, the regime's strategic framework has been revised several times, suggesting that the system is evolving over time in response to lessons learned. We describe the family resemblance to experimentalist governance in the first part of this section below.

To understand the extent that the global AIDS regime truly embodies experimentalist governance, however, we must dig into the details of how this system actually functions. To do this, we utilize the five and ten-year evaluations of UNAIDS (in 2002 and 2008 respectively) and country-specific progress reports for Haiti, Indonesia, and Peru. We also use supplementary documentation published by UNAIDS, assessments of UNAIDS by the UK government (2011 and 2013), and secondary materials including scholarly work about UNAIDS, news media, and other sources. This analysis proceeds in the second part of this section.

##### A. The Architecture of Experimentalist Governance

###### 1. Broad Framework Goals and Provisional Metrics: An Overlapping Amalgam

The first step in experimentalist governance is the development of broad framework goals by a central unit or regime. The first global AIDS strategy was

<sup>86</sup> U.N. General Assembly, Declaration of Commitment on HIV/AIDS: Special Session on HIV/AIDS (June 25–27, 2001), [http://www.unaids.org/sites/default/files/sub\\_landing/files/aidsdeclaration\\_en\\_0.pdf](http://www.unaids.org/sites/default/files/sub_landing/files/aidsdeclaration_en_0.pdf).

<sup>87</sup> *Global Aids Response Progress Reporting 2013: Construction of Core Indicators for Monitoring the 2011 UN Political Declaration on HIV/AIDS*, UNAIDS 7–10 (Jan. 2013), [http://files.unaids.org/en/media/unaids/contentassets/documents/document/2013/GARPR\\_2013\\_guidelines\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/document/2013/GARPR_2013_guidelines_en.pdf).

established by WHO in 1986, expanded in 1991, and endorsed by key stakeholders in 1992.<sup>88</sup> However, the first strategic plan for our purposes was the framework set out by ECOSOC in 1994, which set forth six founding objectives for a global response to AIDS. These objectives stated that UNAIDS will: (1) provide global leadership in response to the epidemic; (2) achieve and promote global consensus on policy and program approaches; (3) strengthen the capacity to monitor trends, and ensure that appropriate and effective policies and strategies are implemented at the country level; (4) strengthen the capacity of national governments to develop comprehensive national strategies and implement effective HIV/AIDS activities; (5) promote broad-based political and social mobilization to prevent and respond to HIV/AIDS; and (6) advocate greater political commitment at the global and country levels including the mobilization and allocation of adequate resources.<sup>89</sup> The ECOSOC objectives are the epitome of “broad framework goals”—they are indeed “loosely worded as activities, and there is no sense of the time-scale involved.”<sup>90</sup>

Further elaboration of a global strategic framework for HIV/AIDS began to intensify around 2000. First, the UN’s Millennium Summit passed the eight Millennium Development Goals.<sup>91</sup> Goal 6 was to combat HIV, Malaria, and other diseases.<sup>92</sup> This created two specific targets. Goal 6a was to halt and begin to reverse the spread of AIDS by 2015, and Goal 6b sought to achieve universal access to HIV/AIDS treatment by 2010. In 2000, the UNAIDS Programme Coordinating Board, which functions as the executive board, also established a global strategy framework with 12 broad strategic goals.<sup>93</sup> The 2001 UNGASS Declaration of Commitment then provided additional milestones and metrics for member states to meet in 2003, 2005, and 2010.<sup>94</sup> A UN System Strategic Plan was then written that built upon both the UNAIDS strategy and the Declaration of Commitment objectives. This combined global strategy included Millennium Development Goal 6, the UNAIDS strategy framework, the 2001 UN resolution, and the UN System Strategic Plan.<sup>95</sup> Together, they expressed a much deeper and more detailed

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<sup>88</sup> Joint United Nations Programme on HIV/AIDS, *The Global Strategy Framework on HIV/AIDS*, UNAIDS 3 (2001), [http://data.unaids.org/publications/irc-pub02/jc637-globalframew\\_en.pdf](http://data.unaids.org/publications/irc-pub02/jc637-globalframew_en.pdf).

<sup>89</sup> Economic and Social Council Res. 1994/24 (26 July 1994).

<sup>90</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74, at xiii, ¶ 21.

<sup>91</sup> Phyllida Travis et al., *Overcoming Health-Systems Constraints to Achieve the Millennium Development Goals*, 364 *Lancet* 900, 900 (2004).

<sup>92</sup> *Id.* See also United Nations, *Millennium Summit*, UN (Sept. 2000), [http://www.un.org/en/events/pastevents/millennium\\_summit.shtml](http://www.un.org/en/events/pastevents/millennium_summit.shtml).

<sup>93</sup> Joint United Nations Programme on HIV/AIDS, *UN System Strategic Plan for HIV/AIDS 2001-2005*, UNAIDS Annex 1, [http://data.unaids.org/una-docs/unssp\\_2001\\_2005\\_en.pdf](http://data.unaids.org/una-docs/unssp_2001_2005_en.pdf).

<sup>94</sup> Taylor et al., *supra* note 33, at 76.

<sup>95</sup> Joint United Nations Programme on HIV/AIDS, *UN System Strategic Plan for HIV/AIDS 2001-2005*, UNAIDS 1, [http://data.unaids.org/una-docs/unssp\\_2001\\_2005\\_en.pdf](http://data.unaids.org/una-docs/unssp_2001_2005_en.pdf) (last visited Mar. 1, 2018).

international commitment to fight HIV/AIDS. As Bertozzi, Martz, and Piot observe, 2001 was the “tipping point” for the global response.<sup>96</sup>

Following an overlapping regime logic, we note here that the applicable framework goals are not set out in a single document, but are rather an amalgam of different efforts that build upon and respond to one another. The ECOSOC goals were very generic, but they animated the work of UNAIDS. The Millennium Development Goals and the Declaration of Commitment objectives were more precise and were translated into concrete strategies through the UNAIDS strategy and the UN System Strategic Plan. Similar to the “loose-tight” properties we noted above, this amalgam mixed generic constitutional principles with a more concrete strategic agenda.<sup>97</sup>

## 2. Local Units Use Discretion to Meet Goals: National Planning and Implementation

The second step in experimentalist governance is to afford local units discretion to devise context-specific strategies for meeting the broad central goals. Working within the framework described in the previous section, UN member states have discretion to use local means to achieve the UNAIDS program’s broad goals. This discretion is guaranteed, in a sense, by the non-binding nature of both the Millennium Development Goals and the UNGASS commitments.<sup>98</sup> What the international community did impose, however, was the requirement that member states develop an inclusive and multi-sectoral *strategic planning framework*, which became the basis of international funding.<sup>99</sup> As UNAIDS describes in an early guidance document on national strategic planning, the framework’s purpose is to contextualize the response:

[P]lanning for HIV is based on situations which are different according to the population group addressed, and which may change rapidly over time. Planning for HIV therefore means devising strategies relevant to concrete situations, flexible enough to be adapted when that situation changes, and realistically taking available resources into account.<sup>100</sup>

<sup>96</sup> Bertozzi et al., *supra* note 21, at 1582.

<sup>97</sup> See JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), GETTING TO ZERO, 2011-2015 STRATEGY 17 (2010) (discussing the synergy between the UNAIDS strategic framework and MDG) [hereinafter GETTING TO ZERO]. See generally Andreas Rasche, *Global Policies and Local Practice: Loose and Tight Couplings in Multi-Stakeholder Initiatives*, 22 BUS. ETHICS Q. 679 (2012) (discussing tight and loose coupling).

<sup>98</sup> Taylor et al., *supra* note 33, at 76–77.

<sup>99</sup> Putzel, *supra* note 32.

<sup>100</sup> Joint United Nations Programme on HIV/AIDS, *Guide to a Strategic Planning Process for a National Response to HIV/AIDS*, UNAIDS 5 (1998), [http://data.unaids.org/publications/irc-pub01/jc267-stratplan1\\_en.pdf](http://data.unaids.org/publications/irc-pub01/jc267-stratplan1_en.pdf).

The response to this requirement has been very favorable. By 2007, 98% of countries reported the existence of a “national AIDS strategy.”<sup>101</sup>

Importantly, the national planning process is strongly encouraged to incorporate input from civil society. The process helps to localize planning strategies, and it builds the credibility of the efforts with local communities. Comparing UNGASS data from 2005 and 2007, Peersman et al. found that 86% of national planning processes incorporated civil society input in 2005 and 83% in 2007.<sup>102</sup> Further, the role of civil society in the UNGASS reporting process itself has reinforced the voice of civil society in national planning processes.<sup>103</sup> Civil society participation in the process has become a “norm” that “contribute[s] to the quality of the findings and promote[s] shared ownership of the report and coordinated follow-up action, as well as to encourage a shared vision of the future of the AIDS response amidst a culture of trust, knowledge-sharing and mutual support—all key ingredients of effective governance.”<sup>104</sup> These civil society groups are obviously different in each member state, depending on the particular demographics of the general population and the epidemic in each country. Because these groups are on the ground, they are able to assist in the creation of localized, country-specific (and even regionally-specific) solutions and strategies.

The UNGASS reporting system also strengthens the local planning capacity of member states.<sup>105</sup> When the UNGASS commitments went into effect in 2001, few member states had the infrastructure or capacity to chart internal progress in the area of HIV/AIDS. Through the UNGASS reporting process, more and more member states have built up their monitoring and evaluation capacities. This improvement allows each member state to focus on local gaps and needs in its own infrastructure, in service of meeting broad goals.

In this regime, local units are also tasked with implementing the national strategic plans that they devise. A later section of this article will describe in some detail how the implementation efforts vary on the ground depending on regional or local context, and the ways in which UNAIDS assists in those efforts. However, from a structural perspective, the UNAIDS regime has a number of features that devolve to local units the autonomy to craft and implement broad goals set by the central UNAIDS unit.

### 3. Information Pooling: Monitoring and Evaluation and Data Tracking

The third step in an experimentalist governance cycle is the pooling of information from lower-level units. In the case of UNAIDS, this is accomplished

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<sup>101</sup> Greet Peersman et al., *Increasing Civil Society Participation in the National HIV Response: The Role of UNGASS Reporting*, 52 *J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES* S97, S99 (2009).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at S99–S100.

<sup>104</sup> Taylor et al., *supra* note 33, at 78.

<sup>105</sup> *Id.* at 80.

through a number of initiatives, including an active Secretariat, best practices development and dissemination, monitoring and evaluation programs, UNGASS sessions and regional meetings, the GARPR reporting system, and other data tracking mechanisms.

Collecting and disseminating data is a critical component of functional global governance regimes. Adding new data to baseline data over time enables benchmarking and improvement assessment. UNAIDS has not always shined in this area. Indeed, the first evaluation of UNAIDS found that a “lack of data” was a major problem in expanding country-level responses.<sup>106</sup> However, the program has implemented a number of course corrections over time.

While the first program evaluation was critical of UNAIDS’s data efforts, it also found that the Secretariat was playing a “focal point, hub and broker” role, including a key role as a “knowledge administrator for best practice information.”<sup>107</sup> Indeed, the collection and dissemination of best practices documents has become an integral part of UNAIDS’s data efforts. UNAIDS first began a well-regarded “best practices” collection in 1996, to meet the original ECOSOC goals.<sup>108</sup> The project consisted of publishing a series of booklets on best practices and then actively distributing the results—a significant budget item for UNAIDS.<sup>109</sup> Through publications, its website, and the provision of technical support, UNAIDS continues to provide best-practice guidance to countries. For instance, a 2013 report described lessons learned from eight country case studies on building efficient and sustainable responses to HIV.<sup>110</sup>

Monitoring and enforcement are also critical elements of effective information gathering and analysis. A Monitoring and Evaluation (M&E) Reference Group (MERG) was established in 1998 to harmonize M&E protocols. It played an important role in helping to convince different agencies and other international stakeholders that harmonized indicators were important.<sup>111</sup> In 2000, based on input from national AIDS program managers and international stakeholders, UNAIDS published a landmark guidance document entitled *National AIDS Programs: A Guide to Monitoring and Evaluation*, which established the international standard for AIDS M&E.<sup>112</sup> Regional meetings were then held to

<sup>106</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74, at 31 ¶ 5.11.

<sup>107</sup> *Id.* at 35–36, ¶ 6.18.

<sup>108</sup> *Id.* at 16, ¶ 4.35.

<sup>109</sup> See generally Joint United Nations Programme on HIV/AIDS, *Summary Booklet of Best Practices*, UNAIDS (2000), <http://www.nzdl.org/gsdmod?e=d-00000-00---off-0cdl-00-0---0-10-0---0---0direct-10---4-----0-11--11-en-50---20-about---00-0-1-00-0--4--0-0-11-10-0utfZz-8-00&cl=CL1.27&d=HASH0163330ae52ec1045e6bb349.23&gc=1>; SUE FUNNELL, AN EVALUATION OF THE UNAIDS BEST PRACTICES COLLECTION: ITS STRENGTHS AND WEAKNESSES, ACCESSIBILITY, USE AND IMPACT (1999).

<sup>110</sup> Joint United Nations Programme on HIV/AIDS, *Efficient and Sustainable HIV Response: Case Studies on Country Progress*, UNAIDS (2013), [http://www.unaids.org/sites/default/files/media\\_asset/JC2450\\_case-studies-country-progress\\_en\\_0.pdf](http://www.unaids.org/sites/default/files/media_asset/JC2450_case-studies-country-progress_en_0.pdf).

<sup>111</sup> T. Alfvén et al., *Global AIDS Reporting-2001 to 2015: Lessons for Monitoring the Sustainable Development Goals*, 21(1) AIDS & BEHAV. S5, S7 (2017).

<sup>112</sup> Rugg et al., *supra* note 82, at 69.

examine how countries could do a better job in M&E and to identify general lessons about the challenges that countries faced in developing M&E programs.<sup>113</sup>

Holzscheiter, Walt and Brugha (2012) distinguish between harmonization of donor indicators and alignment of M&E objectives with country-level programs. The purpose of the former is to make comparative data available on country and program effectiveness and performance. They note that it is a challenge to “close the (audit) circle”<sup>114</sup>—linking global indicators with improved implementation on the ground—because harmonized indicators are also used by donors for purposes of their own accountability. While country-level M&E programs for AIDS are still considered suboptimal, there are many signs of improved commitment to M&E at the national level, notably in high-burden countries.<sup>115</sup>

In addition, UN Special Sessions are an important site of data pooling and aggregation for the UNAIDS program. Indeed, the UN Special Session on HIV/AIDS was a milestone of UNAIDS’s first five years.<sup>116</sup> UNGASS sessions have been held annually ever since, with the most significant being in 2001 and 2006. The UNAIDS Secretariat provides much of the support to organize the UNGASS sessions.<sup>117</sup> A central purpose of these sessions is to review the state of the AIDS pandemic and the progress of member states towards meeting UNGASS commitments.<sup>118</sup> These meetings have had a significant bearing on UNAIDS’s work to support countries in monitoring and reporting on progress.

Furthermore, and critically for the success of the regime overall, the GARPR reporting process is a central mechanism by which information from local units is pooled and disseminated. Reporting requires member-states to provide

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<sup>113</sup> Rugg et al., *supra* note 82, at 69. An external assessment of MERG by Ernst & Young in 2011 found that it functions effectively as a technical body for the harmonization and coordination of indicators, but found that stakeholders wanted MERG to take on a more “strategic” role. Ernst & Young, *Assessment of the Global Monitoring and Evaluation Reference Group*, AIDS SPACE (2011), <http://www.aidspace.org/getDownload.php?id=1833>. Arguably, the desire for MERG to play an expanded role reflects the core role that M&E plays in the global AIDS response.

<sup>114</sup> Holzscheiter et al., *supra* note 82, at 65.

<sup>115</sup> See Peersman et al., *supra* note 101, at S102; Alfven et al., *A Decade of Investments in Monitoring the HIV Epidemic: How Far Have We Come? A Descriptive Analysis*, 12 HEALTH RES. POL’Y & SYS. 62, 65–70 (2014). The UNAIDS also provides tools for countries to assess their M&E system. See Kayode Ogungbemi et al., *Using UNAIDS’s Organizing Framework to Assess Nigeria’s National HIV Monitoring and Evaluation System*, 2 J. PREVENTATIVE MED. 372, 372–77 (2012) (providing the example of Nigeria); Holzscheiter et al., *supra* note 82, at 66 (noting the UNAIDS Country Harmonization and Alignment Tool (CHAT) that maps the relationship between AIDS stakeholders).

<sup>116</sup> See Nay, *supra* note 34 (arguing that the UNAIDS Secretariat played a major role in an internal reform process that occurred in the mid-2000s and that focused the organization on results-based management, and that this role built on both the external demands for reform by donors and a wider New Public Management movement that sought to reform the UN system as a whole).

<sup>117</sup> *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 38, ¶ 3.7.

<sup>118</sup> *Id.*

information on a range of core indicators (e.g., access to treatment), plus information on their budgetary and policy commitments to fighting the pandemic.<sup>119</sup>

Beyond its utility within the UNAIDS program, GARPR data has also proven useful more broadly. It has allowed comparison and tracking of the national commitment to AIDS, and is widely used by the international AIDS community. The WHO, for example, uses the data to evaluate progress towards improving access to antiretroviral treatment.<sup>120</sup> It also enables them to examine and compare results in high burden countries and regions, identifying countries and regions that are doing well and less well in “scaling up”<sup>121</sup> ART coverage. The GARPR data has also been used by WHO to establish a baseline for the adoption of new treatment guidance.<sup>122</sup> In HIV prevention, the GARPR data has been used to identify elements of prevention programs that are improving, stagnating, or deteriorating.<sup>123</sup> Peersman et al. argue that the GARPR data “has helped to clarify the value of closer collaboration between government and civil society in the HIV response.”<sup>124</sup> Thus, the GARPR reporting process is a key mechanism by which the UNAIDS program pools data from local units.

#### 4. Framework Revision: Updates to Goals

Finally, the last step in experimentalist governance is iterative learning over time, based upon lessons learned at the local level. In the case of UNAIDS, the basic framework goals and strategies have been continually revised. Earlier, we noted that the UN Economic and Social Council (ECOSOC) set out the initial framework document for UNAIDS in 1994. The following year, the UNAIDS Secretariat approved its first strategy framework based on the ECOSOC goals.<sup>125</sup> However, in evaluating the continuing relevance of these very general goals, the five-year evaluation of UNAIDS concluded that:

In general, the ECOSOC goals remain relevant. But their structure and phrasing are counter-productive to efforts to improve performance and accountability. The goal (sic) should

<sup>119</sup> T. Alfvén et al., *supra* note 111, at S6–S7.

<sup>120</sup> See generally WORLD HEALTH ORGANIZATION, GLOBAL UPDATE ON HIV TREATMENT 2013: RESULTS, IMPACT, AND OPPORTUNITIES (2013).

<sup>121</sup> *Id.*

<sup>122</sup> See generally L. J. Nelson et al., *Adoption of National Recommendations Related to Use of Antiretroviral Therapy Before and Shortly Following the Launch of the 2013 WHO Consolidated Guidelines*, 28 AIDS S217 (2014); Somya Gupta, Brian Williams & Julio Montaner, *Realizing the Potential of Treatment as Prevention: Global ART Policy and Treatment Coverage*, 11 CURRENT HIV/AIDS REPS. 1 (2014).

<sup>123</sup> See generally WORLD HEALTH ORGANIZATION, GLOBAL UPDATE ON THE HEALTH SECTOR RESPONSE TO HIV, 2014 (2014); Stefano M. Bertozzi et al., *Making HIV Prevention Programmes Work*, 372 LANCET 831 (2008).

<sup>124</sup> Peersman et al., *supra* note 101, S100.

<sup>125</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74, at 21 ¶ 4.56.

be revised, to create a simple, clear and measurable objective that will drive the work of the programme and towards which roles and functions can be defined.<sup>126</sup>

Building on the more concrete objectives introduced by the 2001 Special Session on HIV/AIDS,<sup>127</sup> UNAIDS crafted a revised plan for the period 2001–2005 that went much further than the 1996–2000 plan.<sup>128</sup> The new plan placed performance monitoring of the 2001 UNGASS objectives at the center of its strategy.<sup>129</sup>

The next major revision of the UN framework was produced by a UN General Assembly High Level Meeting on HIV/AIDS in 2006. This meeting declared a global goal of achieving universal access by 2010.<sup>130</sup> Following this meeting, the UNAIDS Programme Coordinating Board (PCB) called for the development of a new strategy framework to support this objective, as well as other commitments voiced in the 2001 and 2006 Declarations on HIV/AIDS.<sup>131</sup> This call led to the development of the UNAIDS Strategic Framework for 2007–2010, which was endorsed by the Board in late 2006. As described by the second UNAIDS evaluation, “[t]his document was endorsed by the PCB at its 19th meeting in December 2006 as the principal guide to global, regional and country-level planning, implementation and monitoring progress of UNAIDS support. The strategy was later updated to cover the period 2007–2011.”<sup>132</sup>

The next strategic framework, developed by UNAIDS for 2011–2015, continued to build directly on the objectives set out in UN Millennium Development Goal number 6 and on the 2001 and 2006 UN HIV/AIDS Declarations. The central theme of the strategy was “getting to zero,” and its three core goals were: (1) zero new infections; (2) zero deaths; and (3) zero discrimination by 2015.<sup>133</sup> To achieve these objectives, the strategy emphasizes three key strategies: prioritizing prevention, catalysing a next generation of treatment, and promoting HIV/AIDS as a human rights and gender equality issue.<sup>134</sup> In addition, the Strategy specifies 10 concrete “milestones” to measure the progress toward achieving these strategies.<sup>135</sup>

<sup>126</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74, at xiv. The second UNAIDS evaluation also found that the original ECOSOC objectives remained relevant for UNAIDS. See *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 38–39.

<sup>127</sup> G.A. Res. S-26/2 ¶¶ 3.8–3.18 (Aug. 2, 2001).

<sup>128</sup> See generally *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73.

<sup>129</sup> The UNAIDS Programme Coordinating Board reviewed progress towards meeting the 2001-2005 strategic plan and updated the plan to reflect changing conditions and lessons learned. Programme Coordinating Board, *14<sup>th</sup> PCD Meeting, June 2003*, UNAIDS (May 3, 2003), <http://www.unaids.org/en/aboutunaids/unaidsprogramme coordinatingboard/pcb meetingarchive/14-pcb-meeting>.

<sup>130</sup> G.A. Res. S-26/2 ¶¶ 3.8–3.18 (Aug. 2, 2001).

<sup>131</sup> *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 41, ¶ 3.15.

<sup>132</sup> *Id.* at 41, ¶ 3.16.

<sup>133</sup> Ernst & Young, *supra* note 113; GETTING TO ZERO, *supra* note 97, at 21.

<sup>134</sup> GETTING TO ZERO, *supra* note 97, at 21–22.

<sup>135</sup> *Id.* at 13.

The Strategy for 2011–2015 was the product of extensive internal and external consultations held intensively from March through October 2010.<sup>136</sup>

### **B. Experimentalism in Action: Performance through Time**

When considering the extent to which the UNAIDS program may be experimentalist, one way to analyze the issue is to scrutinize the architectural “family resemblance” to experimentalism just described above. Indeed, on this count, the regime fares well—it includes structural elements that map clearly onto each aspect of an experimentalist governance framework. However, another outcome of interest is how the program is actually performing in relation to the thing it purports to govern; in this case, the object of governance is global response to HIV/AIDS. On this count, we must evaluate the performance of the program in different places and at different points over time.

Certainly, the global rate of HIV/AIDS is decreasing. New HIV infections and AIDS-related deaths have both declined in the past decade at a global level.<sup>137</sup> For example, as of 2014, new HIV infections had fallen globally by 38% since 2011, and new infections among children have declined globally by 58% in that time.<sup>138</sup> At the same time, AIDS-related deaths have declined globally by 35% since 2005.<sup>139</sup> Just between 2014 and 2016, the number of people living with HIV on antiretroviral therapy increased by a third, reaching 17 million—a number that exceeded the 2015 target set by the UN General Assembly in 2011 by 2 million.<sup>140</sup> Of course, not all regions have experienced identical or even similar declines. For instance, new HIV infections declined by 39% between 2005 and 2013 in sub-Saharan Africa, while new infections declined by only 27% during the same time

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<sup>136</sup> See Programme Coordinating Board, 27th Meeting of the UNAIDS Programme Coordinating Board: Report of the Twenty-sixth Meeting of the PCB, UNAIDS 1, 5–6 (Nov. 5, 2010), [http://files.unaids.org/en/media/unaids/contentassets/documents/pcb/2010/pcb27\\_20101105\\_pcb\\_report\\_26\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/pcb/2010/pcb27_20101105_pcb_report_26_en.pdf) (describing the consultations in preparation for the new strategy). The leadership of UNAIDS has been sensitive to the need to encourage a forum to deliberate about global strategy for the AIDS response. See Michel Sidibé et al., *People, Passion and Politics: Looking Back and Moving Forward in the Governance of the AIDS Response*, 4 GLOBAL HEALTH GOVERNANCE 8 (2010).

<sup>137</sup> Of course, we recognize that it is not possible to authoritatively attribute these results to experimentalist governance. There are two basic problems here, common to nearly all program evaluation. First, many factors may affect these rates and it is difficult to isolate the causal connection between the declining rates and experimentalism. Second, there is a counterfactual problem: it is possible that declines might have been even greater had the regime been organized in a non-experimentalist fashion.

<sup>138</sup> *Fact Sheet 2014 Global Statistics*, UNAIDS, [http://files.unaids.org/en/media/unaids/contentassets/documents/factsheet/2014/20140716\\_FactSheet\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/documents/factsheet/2014/20140716_FactSheet_en.pdf) (last visited Mar. 1, 2018).

<sup>139</sup> *Fact Sheet 2014 Global Statistics*, *supra* note 138.

<sup>140</sup> *Global AIDS Update*, UNAIDS 1 (2016), [http://www.unaids.org/sites/default/files/media\\_asset/global-AIDS-update-2016\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/global-AIDS-update-2016_en.pdf).

period in Asia and the Pacific, and rose by 5% in Eastern Europe and Central Asia.<sup>141</sup>

These statistics indicate at least two implications for UNAIDS. First, the global burden of this disease is in fact declining, but not uniformly so. Second, this non-uniformity underscores the necessity that local regions and countries have the authority and obligation to identify their own contextually-specific strategies and solutions.

In this regard, we must evaluate how the system itself is working overall and over time, *independently* of, and beyond simply the rate at which global HIV/AIDS rates are falling. Regarding this outcome, the five- and ten-year UNAIDS program evaluations, as well as concurrent and subsequent country-level reports, indicate that the program itself is performing better against its framework goals iteratively over time.

A first indicator of system performance is that the reporting mechanism is working: more countries are in fact reporting each year. In 2003, 103 of 189 members submitted their national progress reports.<sup>142</sup> By 2013, 186 out of 193 UN Member States submitted reports—“the highest rate for any international health and development mechanism.”<sup>143</sup>

In his introduction to the UNAIDS guidance document on the 2015 reporting round, UNAIDS Executive Director Michel Sidibé noted that many countries have also made progress toward establishing even more fine-grained monitoring:

In September 2014, 127 countries were able to report their six-monthly ART [Antiretroviral treatment] and PMTCT [Prevention of Mother-to-Child Transmission] data, and 57 countries broke it down by sub-national level. This illustrates the progress in national monitoring systems, and how countries are focusing their responses where smarter investments will bring greater programmatic gains.<sup>144</sup>

In addition, and importantly, progress reports are not simply being produced, but are also being used diagnostically to upgrade national performance. Peersman et al. note that the 2003 UNGASS reports led to the identification of weak

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<sup>141</sup> Joint United Nations Programme on HIV/AIDS, *The Gap Report*, UNAIDS 9 (2014), [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Gap\\_report\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf).

<sup>142</sup> Nicole Massoud et al., *Has the United Nations General Assembly Special Session on HIV/AIDS Made a Difference?*, 2004(103) *NEW DIRECTIONS FOR EVALUATION* 49, 60 (2004).

<sup>143</sup> Joint United Nations Programme on HIV/AIDS, *Global Report: Report on the Global AIDS Epidemic 2013*, UNAIDS 9 (2013), [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_Global\\_Report\\_2013\\_en\\_1.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Global_Report_2013_en_1.pdf).

<sup>144</sup> Joint United Nations Programme on HIV/AIDS, *Global AIDS Response Progress Reporting 2015*, UNAIDS 4 (UNAIDS 2015), [http://www.unaids.org/sites/default/files/media\\_asset/JC2702\\_GARPR2015guidelines\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/JC2702_GARPR2015guidelines_en.pdf).

M&E systems at the national level as one of the major weaknesses in the global reporting system.<sup>145</sup> The 2004 agreement to support one M&E system in each country was an important result of these findings. Alfven et al. describe how M&E spending and performance have expanded between 2001 and 2010, finding that the percentage of total AIDS spending allocated to HIV M&E in high-burden low and middle income countries increased from 1.1% in 2007 to 1.4% in 2010, and that M&E system performance increased from 52% in 2006 to 89% in 2010 for high-burden countries.<sup>146</sup> A particularly powerful and novel indicator used by UNGASS reporting system is the National Composite Policy Index (NCPI). This index creates transparent insights into the budgetary, policy, and political commitments of nations to an effective AIDS response, including an analysis of commitment to an effective M&E system. Among other uses, the NCPI data has been used to identify countries with legal and policy barriers to effective AIDS response.<sup>147</sup>

The progress reports have also given the global AIDS community insight into the quality of national programs and strategic planning. Bertozzi et al., for instance, used the UNGASS country reports to demonstrate the weakness of AIDS prevention programs at the national level and to show that these programs had not shown much improvement between 2003 and 2007.<sup>148</sup> In addition, the core indicators included in the progress reports indicate that civil society has been effectively incorporated into the national strategic planning process in the vast majority of countries,<sup>149</sup> and increasingly so over time.

Importantly, the five- and ten-year evaluations of the UNAIDS program detail the extent to which the program performs against each of the original ECOSOC resolution goals, and thus provide an important set of insights into the performance of the program longitudinally. The five-year evaluation concluded that the program had been at least partly successful in achieving all six goals. It offered a set of major recommendations, including that UNAIDS streamline its information and capacity development efforts to improve services to member states, and that it boost its coordination services in order to better explain to member states what UN resources are available and to assist in strengthening national capacity.<sup>150</sup>

<sup>145</sup> Peersman et al., *supra* note 101, at S102.

<sup>146</sup> Alfven et al., *supra* note 115. In a recent review of the global AIDS effort, Bertozzi et al. describe the limits of the Three Ones strategy: The internationally agreed Three Ones developed by UNAIDS aimed to align efforts of diverse actors around the leadership of one national authority in support of one national strategy, monitored through one national monitoring framework. Although the Three Ones did facilitate multi-stakeholder action, it also showed how donor priorities and reporting requirements are not easily aligned for a shared purpose simply by the logic of a soft agreement if the national coordinating body is not empowered by a clear mandate and authority. Bertozzi et al., *supra* note 21.

<sup>147</sup> Gruskin et al., *Identifying Structural Barriers to an Effective HIV Response: Using the National Composite Policy Index Data to Evaluate the Human Rights, Legal and Policy Environment*, 16(1) JAIDS J. INT'L AIDS SOC'Y 18000 (2013).

<sup>148</sup> Bertozzi et al., *supra* note 123.

<sup>149</sup> Peersman et al., *supra* note 101.

<sup>150</sup> *Five-Year Evaluation of UNAIDS*, *supra* note 74, at 24, ¶ 4.69.

The ten-year program evaluation of UNAIDS in 2008 was also positive, but more circumspect. Overall, it identified numerous improvements, and concluded that the program's primary challenges were now to improve and strengthen the efficiency, flexibility and responsiveness of the program.<sup>151</sup> Among the main successes at ten years, the report identified greater and more meaningful involvement of people living with HIV/AIDS in policy decisions and implementation, and found that the group had significant impact with regard to introduction of legislation, enriching global debates, and influencing global policy.<sup>152</sup> Furthermore, the evaluation found that the program was very successful in working with and involving civil society.<sup>153</sup> Finally, the report identified UNAIDS's provision of technical support to national AIDS responses as a significant success, finding that UNAIDS's capacity to respond to support requests had increased.<sup>154</sup>

The second evaluation also involved a series of in-depth country-level evaluations focusing on the evolving role of UNAIDS in strengthening national health systems and infrastructure, the involvement of civil society and persons living with HIV in the policy and implementation processes, and the provision of technical support to national AIDS responses.<sup>155</sup> We selected three countries for closer examination: Haiti, Indonesia, and Peru. These countries represent different levels of economic development and different HIV/AIDS populations, and therefore provide significant cross-sectional insight into how UNAIDS functions in a range of circumstances. Program evaluators also visited these three countries during the earlier five-year evaluation, giving us some insight into the evolving role of UNAIDS in these local environments over time. We now consider the program's performance over time in each country.

### 1. Haiti

Despite the significant turmoil that Haiti has faced over the last two decades, the country has made progress in combatting HIV/AIDS. Overall, the number of annual deaths from HIV/AIDS in Haiti climbed through the 1990s to peak in 2000, but has since declined. In 2013, the annual number of deaths was approximately half the peak rate. The number of new infections has also steadily declined since 1990, and was at less than half its peak rate in 2013.<sup>156</sup> The estimated

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<sup>151</sup> *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 17.

<sup>152</sup> *Id.* at 23–24.

<sup>153</sup> *Id.* at 15.

<sup>154</sup> *Id.* at 42.

<sup>155</sup> *Id.* at 23.

<sup>156</sup> Joint United Nations Programme on HIV/AIDS, *Epidemiological Fact Sheet on HIV and AIDS in Haiti*, UNAIDS <http://www.unaids.org/sites/default/files/epidocuments/HTI.pdf> (last visited Mar. 1, 2018).

HIV prevalence for adults (ages 15–49) has also declined from 2.60 in 2001 to 1.80 in 2011,<sup>157</sup> and down to 1.7 in 2015.<sup>158</sup>

The 2009 UNAIDS program country report for Haiti finds that UNAIDS has been active in finding local solutions to support global goals around HIV/AIDS prevention and treatment. The report highlights that while UNAIDS in Haiti was working toward meeting all of its goals as defined by the overall program framework, it has had particular success in positively leveraging certain features of Haiti's political and social environment, especially the prominence of its civil society and service provider groups. This is an important indication that the "local unit" is effectively identifying and executing strategies tailored to local circumstances.

A key example is in the context of leveraging civil society organizations for HIV/AIDS services. The report notes that the political environment in Haiti is challenging and that government leadership and governance are weak.<sup>159</sup> In this environment, the provision of basic services is largely in the hands of civil society organizations rather than government agencies. Data from 2006 showed that 82% of all funding for HIV services in Haiti was channeled through civil society organizations.<sup>160</sup> Given the particular political landscape in Haiti, UNAIDS has been less successful in its goal of helping strengthen government infrastructure. However, the program has been more successful, and in fact "instrumental," in its efforts to develop policy and implementation processes that capitalize on the strong presence and power of civil society organizations in the country. The report notes, for instance, the strong role of UNAIDS in advocating for better representation of people living with HIV/AIDS and supporting the development of a network of organizations from this community.<sup>161</sup>

In addition, the UNAIDS Secretariat and its cosponsors have prioritized support to civil society groups in Haiti in order to strengthen their organizations, improve networking, and ensure that such groups have a meaningful voice in the national response.<sup>162</sup> Overall, UNAIDS is credited by many stakeholders as having played an important role in enhancing civil society involvement. Indeed, during the

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<sup>157</sup> Joint United Nations Programme on HIV/AIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2012*, UNAIDS A4 (2012), [http://www.unaids.org/sites/default/files/media\\_asset/20121120\\_UNAIDS\\_Global\\_Report\\_2012\\_with\\_annexes\\_en\\_1.pdf](http://www.unaids.org/sites/default/files/media_asset/20121120_UNAIDS_Global_Report_2012_with_annexes_en_1.pdf) [hereinafter *Global Report: UNAIDS 2012*].

<sup>158</sup> Joint United Nations Programme on HIV/AIDS, *UNAIDS Data 2017*, UNAIDS 8–12 (2017), [http://www.unaids.org/sites/default/files/media\\_asset/2017\\_data-book\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/2017_data-book_en.pdf) [hereinafter *UNAIDS Data 2017*].

<sup>159</sup> Joint United Nations Programme on HIV/AIDS, *UNAIDS Second Independent Evaluation 2002-2008: Haiti Final Summary Report*, UNAIDS 2 (Oct. 2, 2009), [http://data.unaids.org/pub/informationnote/2009/20091002\\_finalhaiti\\_crp8\\_en.pdf](http://data.unaids.org/pub/informationnote/2009/20091002_finalhaiti_crp8_en.pdf) [hereinafter *Haiti Final Summary Report*]; *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 86, ¶ 6.7.

<sup>160</sup> *Haiti Final Summary Report*, *supra* note 159, at 10, ¶ 3.34.

<sup>161</sup> *Id.* at 3, ¶ 2.8.

<sup>162</sup> *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 86, ¶ 6.7, 102.

years leading up to the 2009 report, civil society representation on policy and decision-making bodies increased significantly. This is perhaps most true for organizations representing people living with HIV, which have gained a stronger and more formal position in policy and implementation processes.<sup>163</sup>

Another critical success of the UNAIDS program in Haiti has been its ability to provide support for the national response and for organizations within the relevant communities. Technical and administrative support is absolutely crucial to the success of this program, just as the absence of support from international coordinating agencies has been a significant failure in other transnational governance efforts such as WHO's International Health Regulations. In particular, the UNAIDS Secretariat in Haiti is "widely seen" as having provided vital and high quality technical support to the national HIV response.<sup>164</sup> Examples of such assistance include support for the preparation of funding proposals to the Global Fund, technical support to civil society organizations and networks, support for the preparation of UNGASS reports, conducting a number of key studies within Haiti related to HIV/AIDS, and training and technical input for the development of a national monitoring and evaluation system.<sup>165</sup> All of these activities will aid in the continued ability of UNAIDS to support the implementation of local strategies to meet the broad goals of the UNAIDS program. These activities indicate that the program is in fact producing measurable benefits in terms of its process and its outcomes, and importantly, improving over time.

## 2. Indonesia

Unlike Haiti, annual deaths from HIV/AIDS and the number of new infections in Indonesia are not declining. In fact, they have increased since 2000.<sup>166</sup> The estimated HIV prevalence for adults (ages 15–49) has also increased from <0.1 in 2001 to 0.3 in 2011,<sup>167</sup> and up to .5 in 2015.<sup>168</sup> While the causes of this epidemiological situation are complex, the UNAIDS country reports for Indonesia indicate that UNAIDS is active and engaged in context-specific problem-solving efforts within the country. This is important; as noted earlier, while rates of HIV/AIDS infection are one outcome of interest in analyzing UNAIDS as an experimentalist governance regime, another outcome of interest is how the program itself is performing over time.

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<sup>163</sup> *Haiti Final Summary Report*, supra note 159 at 10, ¶ 3.36, 13 ¶ 3.52.

<sup>164</sup> *Id.* at 11, ¶ 3.44.

<sup>165</sup> *Id.* at 6, ¶ 3.18, 11, ¶ 3.44.

<sup>166</sup> Joint United Nations Programme on HIV/AIDS, *Epidemiological Fact Sheet on HIV and AIDS in Indonesia*, UNAIDS, <http://www.unaids.org/sites/default/files/epidocuments/IDN.pdf> (last visited Mar. 1, 2018).

<sup>167</sup> *Global Report: UNAIDS 2012*, supra note 157, at A6.

<sup>168</sup> Joint United Nations Programme on HIV/AIDS, *Indonesia Factsheet 2015*, UNAIDS, <http://aidsinfo.unaids.org> (last visited Feb. 14, 2017).

The 2009 final country report for Indonesia describes the successes and challenges of the UNAIDS effort there. It highlights the value of UNAIDS and its success in providing support to local actors to find and implement context-relevant strategies and solutions to meet the program's broad goals.

Understanding Indonesia's particular political and social contexts has been critical to the operation of UNAIDS in this country. The 2009 report explains that the demographics of the HIV epidemic have changed, and the national response to HIV has evolved since the UNAIDS five-year evaluation.<sup>169</sup> A set of national laws, federal agencies, and commissions has been established to address HIV and AIDS.<sup>170</sup> The National AIDS Commission has grown to include a number of civil society organizations, and local AIDS commissions have been established in all of Indonesia's 33 provinces and 100 priority districts.<sup>171</sup> Additionally, Indonesia's Third National Strategic Plan (2007–2010) included a comprehensive and integrated approach involving government, civil society, and the private sectors.<sup>172</sup>

The 2009 report clearly indicates that UNAIDS in Indonesia made significant progress on responding to and implementing recommendations from the five-year evaluation. Among other findings, key points of progress included advocacy for political and resource commitments both within the country and internationally, support for national monitoring and evaluation efforts to generate data to inform national responses, and sharing best practices for horizontal learning and replication.<sup>173</sup> More specifically, the report highlights successes in UNAIDS's work with civil society, including achievements in securing more meaningful involvement of people living with HIV, and the provision of technical support to strengthen national capacities.

With regard to achievements in the development of civil society actors, the report notes that UNAIDS has been successful in including organizations of vulnerable populations in monitoring and evaluation efforts, for instance, through participation in UNGASS shadow reporting. Stakeholders agree that one of the greatest achievements of UNAIDS in Indonesia has been increasing the involvement of persons living with HIV/AIDS (PLHIV) in all aspects of the national response.<sup>174</sup> Among other manifestations of its commitment to this issue, the UNAIDS Secretariat recruited PLHIV as staff members, provided space for PLHIV groups to meet and to work, and supported the establishment of PLHIV networks. The Secretariat has supported the development of advocacy messages and training for PLHIV spokespersons, and has pushed for the inclusion of PLHIV in policy-making forums. The report notes that PLHIV in Indonesia "perceive that

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<sup>169</sup> Joint United Nations Programme on HIV/AIDS, *UNAIDS Second Independent Evaluation 2002-2008: Country Visit to Indonesia: Summary Report*, UNAIDS 2, [http://data.unaids.org/pub/basedocument/2009/20090501\\_sie\\_countrysummaryreport\\_indonesia\\_en.pdf](http://data.unaids.org/pub/basedocument/2009/20090501_sie_countrysummaryreport_indonesia_en.pdf) (last visited Mar. 29, 2018) [hereinafter *UNAIDS Indonesia Summary Report*].

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 3.

<sup>174</sup> *UNAIDS Indonesia Summary Report*, *supra* note 169, at 11.

they are engaged in the national response as equals,” which is a significant achievement.<sup>175</sup>

Finally, regarding UNAIDS’s provision of technical support, the report states that government, civil society, and UNAIDS agree on the need for a more coordinated strategy for technical support. Nonetheless, stakeholders agreed that UNAIDS had provided “considerable” support to government and civil society partners in Indonesia.<sup>176</sup> One example is UNAIDS’s support for the National AIDS Commission, particularly with a focus on strengthening monitoring and evaluation, leadership, organizational strengthening, and resource mobilization.<sup>177</sup> UNAIDS has also provided support for the business sector, the media, and for political leaders in focusing the HIV/AIDS message and national effort. Indeed, UNAIDS is seen as so effective and relevant that the National AIDS Commission Secretary noted that, without UNAIDS, it “would not exist.”<sup>178</sup>

A more recent country progress report from 2012 further highlights the performance of UNAIDS in Indonesia over time. The report notes that several initiatives at the national and regional policy levels were engaged to keep AIDS high on the agenda, and that new policy actions including Presidential Regulations had been passed to accelerate responses in high need areas.<sup>179</sup> AIDS Commissions in Indonesia, which have been assisted by UNAIDS, have grown in “skill and importance” in recent years. As of 2011, the report indicates that there are functioning AIDS Commissions in all 33 provinces of Indonesia, as well as in 200 priority districts and cities, an increase of 100% from 2007.<sup>180</sup> Thus, UNAIDS in Indonesia has helped local infrastructure expand in scope over time and has itself become a more robust program within the country.

### 3. Peru

Nationally, the annual number of deaths from HIV/AIDS in Peru peaked in 2005, and has steadily declined to half that peak rate in 2013.<sup>181</sup> Further, the estimated HIV prevalence for adults (ages 15–49) has declined from .5 in 2001 to .4 in 2011, and down to .3 in 2015.<sup>182</sup>

<sup>175</sup> *UNAIDS Indonesia Summary Report*, *supra* note 169, at 11.

<sup>176</sup> *Id.* at 9.

<sup>177</sup> *Id.* at 9.

<sup>178</sup> *Id.* at 10.

<sup>179</sup> INDONESIAN NATIONAL AIDS COMMISSION, REPUBLIC OF INDONESIA COUNTRY REPORT ON THE FOLLOW UP TO THE DECLARATION OF COMMITMENT ON HIV/AIDS (UNGASS) REPORTING PERIOD 2010-2011 2 (2012).

<sup>180</sup> *Id.* at 3.

<sup>181</sup> Joint United Nations Programme on HIV/AIDS, *Epidemiological Fact Sheet on HIV and AIDS in Peru*, UNAIDS, <http://www.unaids.org/sites/default/files/epidocuments/PER.pdf> (last visited Feb. 14, 2017).

<sup>182</sup> *Global Report: UNAIDS 2012*, *supra* note 157, at A5; Joint United Nations Programme on HIV/AIDS, *Peru Factsheet 2015*, UNAIDS, <http://aidsinfo.unaids.org> (last visited Feb. 14, 2017).

The country evaluations of UNAIDS Peru indicate that UNAIDS is actively involved in context-specific infection prevention, treatment, and control strategies within Peru. The reports also highlight the critical value of UNAIDS in providing support to the local HIV/AIDS efforts within the nation, and its improvements over time.

Peru has experienced strong economic growth in the last decade. As a result, many bilateral aid partners have withdrawn from the country, and the government has had to become more involved in the funding and coordination of HIV/AIDS services and advocacy. In this context, UNAIDS enjoys a privileged position as a trusted neutral partner.<sup>183</sup> Peru did not submit the NCPI report in 2004 or 2006, but did submit one in 2008 and 2010.<sup>184</sup>

The 2009 country report describes UNAIDS Peru's response to the five-year evaluation. It highlights how the program continues to work toward policy and implementation efforts such as providing technical support to assist in the development of national strategies and capacities, and securing financial support from key external partners, particularly the Global Fund.<sup>185</sup>

The five-year UNAIDS evaluation set forth 16 recommendations applicable at the country level. Of these, the 2009 country report found that UNAIDS Peru made high or medium progress in 13 of 16 of these recommendations.<sup>186</sup> Working with civil society has been a key achievement. Indeed, the 2009 report notes unanimity among stakeholders with regard to the critical and positive impact of UNAIDS in this area.<sup>187</sup> Among other achievements, UNAIDS has played a key role in ensuring that civil society is represented and actively involved in the national HIV response.

The 2009 report also emphasizes that technical support to the national AIDS response has and continues to be a priority for UNAIDS in Peru.<sup>188</sup> The report highlights several important achievements of the UNAIDS program in this regard. These include supporting the government with the development of UNGASS reporting, developing a technical support plan for the National Multi-sectoral Strategic Plan (known as PEM), and supporting the preparation of several rounds of proposals to the Global Fund.<sup>189</sup> UNAIDS has also provided assistance with the preparation and launch of a national advocacy campaign to address stigma toward PLHIV, and supported the Ministry of Education in developing guidelines

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<sup>183</sup> Joint United Nations Programme on HIV/AIDS, *UNAIDS Second Independent Evaluation 2002-2008: Country Visit to Peru: Summary Report*, UNAIDS 2 (Oct. 2, 2009), [http://files.unaids.org/en/media/unaids/contentassets/dataimport/pub/informationnote/2009/20091002\\_finalperu\\_crp14\\_en.pdf](http://files.unaids.org/en/media/unaids/contentassets/dataimport/pub/informationnote/2009/20091002_finalperu_crp14_en.pdf) [hereinafter *UNAIDS Peru Summary Report*].

<sup>184</sup> Joint United Nations Programme on HIV/AIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010*, UNAIDS Annex 2 (2010), [http://www.unaids.org/globalreport/documents/20101123\\_GlobalReport\\_full\\_en.pdf](http://www.unaids.org/globalreport/documents/20101123_GlobalReport_full_en.pdf).

<sup>185</sup> *UNAIDS Peru Summary Report*, *supra* note 183, at 3.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 9.

<sup>188</sup> *Id.* at 11.

<sup>189</sup> *Id.* at 5.

and manuals for sex education that have now been rolled out to all schools.<sup>190</sup> Additionally, UNAIDS has actively promoted and supported regional support networks, and has provided substantial support in the process of developing a national monitoring and evaluation framework.<sup>191</sup> The program has also been active in providing technical guidance, support for resource mobilization, and training to groups representing PLHIV.<sup>192</sup>

A recent 2012 progress report reinforces the sense that Peru's infrastructure is developing rapidly, and that UNAIDS continues to play an important part in the process. Furthermore, civil society has become more consolidated and continues to be active in the national HIV/AIDS response, including organizations of vulnerable populations like homosexuals, transgender persons, and sex workers.<sup>193</sup> Overall, UNAIDS in Peru continues to look for local solutions to challenges in HIV/AIDS prevention and treatment, and has improved its functioning as a program over time.

## V. CONCLUSION

We have argued that global public health is favorable terrain for global experimentalist governance. As a field, it is polyarchic and multi-level. The UN and its specialized agencies play an orchestrating role with respect to member states and to partner organizations, which—particularly in the area of HIV/AIDS prevention, treatment and control—have considerable autonomy and discretion to pursue solutions to broadly shared public health objectives in context-specific ways. The global public health community has a commitment to evidence-based practice and it routinely invests in serious monitoring and evaluation of program outcomes. In addition, public health problems are persistent through time, so there are considerable incentives for these institutions to engage in continuous improvement by upgrading the performance of relevant stakeholders and programs. Last but not least, nations are clearly globally interdependent with respect to disease outbreaks, since outbreaks of international concern are often difficult or impossible to prevent or contain. These factors make global public health a good case for exploring the potential of experimentalist governance.

In terms of its architecture, the UNAIDS program clearly fits the framework of experimentalist governance. First, the program has established basic framework goals for working toward halting the AIDS pandemic. Second, the UNAIDS regime explicitly allows each UN member state to meet these framework goals in ways that make sense to each of them. Third, the program has numerous mechanisms, including, in particular the Global AIDS Response Progress Reporting system, which assist the program with pooling information in order to provide feedback about individual and collective progress towards achieving framework

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<sup>190</sup> *UNAIDS Peru Summary Report*, *supra* note 183, at 6.

<sup>191</sup> *Id.* at 11.

<sup>192</sup> *Id.* at 12.

<sup>193</sup> MINISTERIO DE SALUD, INFORME NACIONAL SOBRE LOS PROGRESOS REALIZADOS EN EL PAÍS: PERU 2010-2011 20 (2012).

goals. Finally, the regime has demonstrated that it is capable of periodically revising the basic framework goals.

It is somewhat more challenging to discern whether this architecture translates into a continuous and recursive learning process. To make this more difficult judgment, it is useful to distinguish process and outcome indicators. In terms of process indicators, we can evaluate whether the individual units and the central unit are enacting the process of learning at each of the four dimensions of the experimentalist architecture: (1) Are member states contributing to the articulation of the basic framework goals? (2) Are member states exercising their discretion to develop customized strategies for achieving these goals? (3) Are member states collecting information and reporting on their progress in meeting the framework goals and is UNAIDS diligently collecting this information and providing feedback on the results? (4) And finally, is the pooled information feeding into the process of revising the basic framework goals?

These four process indicators are more or less being met: (1) With respect to member state input into the framework goals, these goals have been established by a UN special session, which is a representative process that requires the agreement of member states; (2) with respect to exercising their discretion, nearly all member states have national AIDS strategies and coordinating bodies, though the strength of national commitments can clearly vary; (3) although member state M&E systems vary in quality, there has been substantial improvement and nearly all countries now submit progress reports; UNAIDS also does a good job of pooling this information and making it available to the global AIDS community; and (4) these progress reporting results have been available to the UN special sessions when they have met to revise the framework goals in 2006 and 2011.

Outcome indicators, by contrast, would indicate whether this continuous learning process actually led to upgraded performance of member states and the entire UN system over time. Are member states, UNAIDS, and the global AIDS regime as a whole improving their ability to prevent, reduce, and manage HIV/AIDS over time as a result of this learning process? The five- and ten-year UNAIDS program evaluations and the country progress reports indicate that both UNAIDS and member states have refined their strategies and improved their capacities over time and that UNAIDS has made important contributions in nations as diverse as Haiti, Indonesia, and Peru. With the exception of worsening conditions in Indonesia, global and member-state HIV/AIDS statistics also reinforce the sense that there has been continuous improvement through time. However, here is a limit our analysis. It is extremely difficult to causally attribute these outcomes to experimentalism or to determine the magnitude of this learning effect due to the multivariate and complex nature of national and global public health. However, this limitation is not fatal to the analysis. As stated earlier, one outcome of interest is the extent to which the global burden of HIV/AIDS is declining. But another quite separate outcome of interest is whether the UNAIDS system itself is responding in real-time to changing conditions and learning to improve its performance as a program over time. This latter outcome is well supported by available evidence. We cannot be sure UNAIDS is responsible for the global decline of HIV/AIDS, but the evidence indicates that UNAIDS is

learning and improving as a program over time in a way that experimentalist governance would expect, *independently* of the global decline of disease.

Although we have focused our analysis on UNAIDS, it is important to recall that the global AIDS response is a regime complex.<sup>194</sup> UNAIDS itself is a “joint programme” of the United Nations. While UNAIDS has been designed to create a focal point for the UN’s work on AIDS, the global AIDS response is clearly a joint effort rather than a unilateral effort of UNAIDS. For example, it is WHO that typically provides health guidelines for AIDS, such as guidelines for using antiretrovirals.<sup>195</sup> The regime complex idea is particularly relevant for understanding global efforts to support monitoring and evaluation. Although UNAIDS has taken a leadership role in M&E, it is supported by the efforts of, at least, PEPFAR, the Global Fund, UN Children’s Fund, and WHO.<sup>196</sup> The World Bank contribution to M&E has been particularly notable.<sup>197</sup> Additionally, the Global Fund has contributed to M&E strengthening at the country level.<sup>198</sup> As the coordinating body for the global AIDS response, however, UNAIDS has established constructive working relations with these other organizations and served as an important bridge between different international institutions.<sup>199</sup> While this article has focused on UNAIDS as an important and perhaps overlooked node in the global network, we also acknowledge the utility and presence of these other players in order to have a full understanding of the regime and its functionality.

Finally, we acknowledge again that UNAIDS is not without its critics, and indeed other organizations, governments, and stakeholders have noted room for improvement within the program. For example, an analysis of the program by the UK government in 2011 claimed that UNAIDS did not provide sufficient guidance for HIV/AIDS interventions in emergency settings and in fragile states.<sup>200</sup> It also stated that, while UNAIDS can point to “significant contribution to facilitating progress on HIV/AIDS at the global level,” it struggles to show consistent results

<sup>194</sup> Overdevest & Zeitlin, *supra* note 7, at 1.

<sup>195</sup> See, e.g., World Health Organization, *Consolidated Guidelines on the Use of Antiretroviral Drugs for Treating and Preventing HIV Infection, Recommendations for a Public Health Approach*, WHO (2d ed., 2016), [http://apps.who.int/iris/bitstream/10665/208825/1/9789241549684\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/208825/1/9789241549684_eng.pdf?ua=1).

<sup>196</sup> Porter et al., *supra* note 82; Regien G. Biesma et al., *The Effects of Global Health Initiatives on Country Health Systems: A Review of the Evidence from HIV/AIDS Control*, 24 HEALTH POL’Y & PLANNING 239 (2009).

<sup>197</sup> Holzscheiter et al., *supra* note 82, 70–71.

<sup>198</sup> *Id.*; *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 30, ¶ 94.

<sup>199</sup> The second UNAIDS evaluation concluded that UNAIDS had created a constructive working partnership with the Global Fund. However, the relationship with PEPFAR has less developed less rapidly. See *UNAIDS Second Independent Evaluation 2002-2008*, *supra* note 73, at 13–14.

<sup>200</sup> *Multilateral Aid Review, Assessment of the Joint UNAIDS Programme*, UK 2 (2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/267151/UNAIDS-1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267151/UNAIDS-1.pdf).

at the individual country level, which requires strategic thinking and action.<sup>201</sup> With regard to strategic and performance management, the UK report found that, while UNAIDS uses the results of independent monitoring and evaluations to improve its delivery and performance, its framework is “process focused” and needs to more clearly link “inputs, outputs, and outcomes.”<sup>202</sup>

However, even this critical analysis concludes that UNAIDS is quite likely to make positive changes in response to the findings. Indeed, a 2013 follow-up report by the UK government found the program had improved in several areas, including strategic and performance management, and particularly had improved its results framework used to monitor the combined results of the cosponsors.<sup>203</sup>

Our analysis supports the conclusion that the UNAIDS program, including the GARPR mechanism, represents a working model of experimentalist governance in a core domain of global public health. We believe this case indicates that global health governance may indeed be a fertile place to look for other global experimentalist governance regimes. The “exceptionalism” of the global AIDS regime and the weakness of recursive learning in the other public health regimes we examined (including Stop TB and the implementation of the International Health Regulations) suggest that the AIDS response may be relatively unique. However, the global public health field has a number of features that in general may lend themselves to experimentalism. These include an established multi-level architecture and a deep commitment to monitoring and evaluation. Therefore, even if the specific architecture of UNAIDS is a one-of-a-kind example of experimentalism; its case demonstrates the feasibility of experimentalist governance at the transnational level, and particularly within global health governance. Future empirical research should explore other areas of global health governance to identify additional examples of experimentalist governance.

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<sup>201</sup> *Assessment of the Joint UNAIDS Programme*, *supra* note 200.

<sup>202</sup> *Id.* at 3.

<sup>203</sup> *Multilateral Aid Review, Assessment of the Joint UNAIDS Programme*, UK 2 (2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264377/UNAIDS-2013-summary-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264377/UNAIDS-2013-summary-assessment.pdf).

