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Enforcing the obligation to notify under the international health regulations

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Symposium
International Law in Pandemic Times

To sue or not to sue

Enforcing the obligation to notify under the international health regulations

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Various areas of international law highlight the value of information and the essential role of the obligation to notify in fulfilling other duties. The current COVID-19 global crisis has further stressed the significance of notification requirements, given the hypothesized possibility that the pandemic could have been averted had the obligation to notify been fulfilled. Through International Court of Justice ("ICJ") cases that analyze this obligation, mainly relative to the customary duty to prevent or not to cause transboundary harm, I discuss the legal consequences of its breach, broadly scrutinize the use of litigation in enforcing such obligation, and posit that instead of adjudication, a more suitable approach to ensuring compliance consists of international organizations facilitating cooperation among States and other non-State actors.

Demanding accountability for the pandemic

Some writers blame China for the pandemic, alleging that its lack of transparency and delay in notifying the World Health Organization ("WHO") about events in Wuhan prevented WHO and Member States from timely addressing what eventually became a public health emergency of international concern. Per the general case theory, belated notification and/or omission of critical information constitute a breach of the obligation to notify under Article 6 of the International Health Regulations ("IHR" or "Regulations") (2005). This breach obliges China to repair the harms, specifically economic losses and moral hardships, being experienced by people across the globe. I neither advance any side nor speculate on the merits of the potential case. Instead, I ask whether it is worthwhile for injured States to sue China before the ICJ. Assuming jurisdictional basis can be established, and China is found to have violated the IHR (2005) notification requirements, the trillion-dollar question that matters for those seeking monetary payoffs, is, can injured States obtain compensation through the suit? What is the pecuniary value of a violation of the obligation to notify? To answer these questions, I examine the outcomes of disputes concerning a breach of such obligation and identify potential issues that diminish the probability of financial returns.

Monetizing breach

The International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") support the hypothetical plaintiffs' theory. ARSIWA, Article 31 provides for the obligation to make full reparation for injury – defined as including "any damage, whether material or moral" – caused by an internationally wrongful act. To emphasize, "reparation" is the generic term for a range of measures to address or correct the breach of an international obligation. "Compensation", in the sense of "financially assessable damage including loss of profits", is only one of the different forms that reparation can take [ARSIWA, Article 36]. The assessment of compensation can include replacement or repair costs of destroyed or damaged property and "incidental damage arising … out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act" [ILC Commentary to ARSIWA]. Remarkably, in only one of three cases has the ICJ required a State to pay compensation for breach of its

obligation to notify. In others, reparation took the form of "satisfaction", which "may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality" [ARSIWA, Article 37].

Breach-injury causation

To obtain compensation, sufficient causal link between the failure to notify and the injuries to persons or property is critical. In the _ (concerning interrelated due diligence and environmental protection duties), because harms (to the river ecosystem and the riparian States' economies) arising from the lack of notification were not established, the Court deemed its finding/declaration of breach as appropriate satisfaction. It concurrently rejected claims for compensation and restitution or restoration of the *status quo ante. Pulp Mills* can nonetheless be read as suggesting that, because procedural obligations have a separate existence, they can be independently breached and thereby engage State responsibility. The duty to compensate, however, is contingent on the demonstration of a violation-injury causation. Relatedly, following the Seabed Disputes Chamber Advisory Opinion (on States' responsibilities under the Law of the Sea Convention relative to sponsored activities in the Area), evidence of breach of a procedural obligation, e.g. notification requirement, can be instrumental in proving noncompliance with due diligence duties to prevent significant transboundary harm. If it can be shown that China's purported concealment of pertinent information or belated response to the imminent outbreak within its territory necessitated the restrictive measures presently causing adverse socioeconomic effects, then one can plausibly argue that its failure to notify triggered the obligation to pay compensation.

Information-sharing as requisite and expression of cooperation

In the *LaGrand* case, the ICJ adjudged a commitment (to implement measures ensuring future compliance with related treaty obligations) as adequate reparation, meeting the injured State's request for general assurance of non-repetition. The internationally wrongful omission (to inform the accused of their entitlement to consular assistance) in *LaGrand* is substantially different from the supposed non-disclosure relative to COVID-19. However, the Court's explanation about the consular notification obligation being part of the initial phase of "an interrelated regime designed to [implement] the system of consular protection" is applicable by analogy to the IHR (2005). The required notification under Article 6 is "the starting point for a dialogue between WHO and the notifying State Party on further event assessment, potential investigation and any appropriate public health response measures" [WHO Guidance for the Use of Annex 2]. In this international legal framework, which operates on the principle of informational cooperation, WHO serves as a "central component in the fulfilment of [States'] obligation to co-operate" – similar to the Commission's role in *Pulp Mills,* wherein the duty to inform is the first step to realizing States' shared objectives. The obligation to notify is essential to international cooperation, because it is the information relayed by the knowledgeable State that enables other States, often through an international organization, to collectively evaluate a given situation and coordinate their actions.

Proving knowledge and its consequences

More promising for those seeking indemnification is the *Corfu Channel* case, wherein the State was held liable to compensate the damage to persons and property resulting from explosions within its territorial waters, because it failed to warn other States about the risky situation in that area under its exclusive control. *Corfu Channel* also offers important insights on evidentiary matters, i.e. the circumstances under which a State is presumed to know certain facts, and what the implications are upon establishing such knowledge. First, exclusive territorial control broadens "the methods of proof available to establish [a State's] knowledge," meaning, the plaintiff "should be allowed a more liberal recourse to inferences of facts and circumstantial evidence," given the difficulty of establishing a negative fact (omission) and its effects. Second, possession *per se* of knowledge about potential harms creates an obligation to notify others of such risk. Failure to share this information generates international responsibility for loss and damage caused by the

risky situation, which a State had prior knowledge of. The foregoing lessons would help in judicially demanding compensation for injuries incurred due to the pandemic.

Conclusion

Lawsuits necessarily involve a calculated risk, since they can trigger political and economic backlash, including international trade and travel restrictions, which the Regulations seek to avoid in the first place. Given the scant precedent for successfully obtaining compensation, it makes little *economic* sense to litigate before the ICJ a failure to notify. Building a case and gathering evidence would require injured States to use considerable material and technical resources, which might be better spent on economic recovery and social protection efforts. The disastrous impacts of omitting valuable information thus compel a search for alternative means to enforce the obligation to notify.

Rules-based dispute settlement systems – as what developed in the trade and investment regimes – depoliticize the implementation of international legal obligations. Without discounting the importance of these systems, I submit that instead of an adversarial approach, global health governance requires an international organization with reinforced independence, expertise, and credibility and more clearly-delineated functions that include serving as an "information clearinghouse", i.e. facilitating international cooperation, which necessitates, and is manifested through, information-sharing among States and non-State actors. The Regulations' silence about the legal consequences of violating its provisions seemingly presumes that institutional mechanisms would adequately address compliance issues. The COVID-19 global crisis, however, reveals that WHO has limited recourse against uncooperative, non-transparent States. Reforms, such as hardening the WHO's "soft" emergency powers and emphasizing the significance of the legal duty to cooperate, are thus imperative. Closer public scrutiny, particularly through the monitoring role of civil society, both at the global and domestic levels, should also be promoted. Indeed, the WHO's database comprises not only information collected on its own and those relayed by States, but reports from other international organizations [Art. 14] and concerned non-State actors [Art. 9] as well.

The IHR (2005) imposes legal obligations on both WHO and the Member States. Problematically, WHO's performance of its obligations remains quite dependent on information that States provide. Although the Organization can arguably enforce the States' obligation to notify by acquiring the pertinent information itself, it cannot singlehandedly achieve the ultimate goal of preventing pandemics. Such objective further entails recognition of interdependence, solidarity, and collective action, with each Member State implementing health measures/responses based on the most complete, accurate, and updated information generated, consolidated, verified, and made available by WHO. Information-sharing is a vital but not the sole component of the international regulatory regime for health. Therefore, the decision whether or not to sue for breach of notification requirements has to also consider those other components that require an enduring relationship, which might be disrupted by litigation.

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