OVERLINE

Implementation of pandemic obligations: compliance as one part of the package

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Member States of the World Health Organization (WHO) are undertaking ambitious governance reforms to prevent, prepare for, and respond to pandemics, by concurrently negotiating both a new international legal instrument (henceforth called "the Pandemic Treaty") and amendments to the International Health Regulations (IHR). We therefore find ourselves at a critical juncture in global health governance, with the opportunity to strengthen pandemic prevention, preparedness, and response via international law. Though there is considerable overlap between these instruments, and the focus of their reform efforts, the push for a separate Treaty has been based on the idea that the global response to as pandemic event, and considerations of equity during that event are better addressed outside the IHR, which are overtly focused on preparedness and response.

One issue being given considerable prominence in each of these negotiations is how compliance by Member States with their obligations can best be achieved. We argue that any efforts to ensure compliance with these instruments should be seen as part of broader efforts to ensure effective and equitable implementation, as opposed to being overly focused on formal compliance mechanisms and the possibility of punitive action in response to non-compliance.

Compliance has dogged the IHR since their inception in 1969, notably during COVID-19, as widespread non-compliance saw numerous states acting in their own perceived self-interest, rendering WHO unable to coordinate an effective international response. This included failing to promptly share information with WHO and the international community and imposing disproportionate trade and travel restrictions against WHO advice. Moreover, many countries lacked the capacity to adequately control the pandemic – also an IHR compliance issue. Claims that the IHR have been ineffective during COVID-19 primarily due to failures of compliance and enforcement (as opposed to, for example, reflecting gaps in the substantive provisions of the Regulations, and/or a lack of national capacities or support for implementation) have become commonplace(*1*, *2*). Such calls appear to be finding traction in the current negotiations. Amendments to IHR have been proposed to both strengthen obligations and associated compliance mechanisms for preparedness and response, including through the creation of compliance assessment bodies. Additionally, the "zero draft" of the Pandemic Treaty proposes establishing "a universal peer review mechanism" and "cooperative procedures and institutional mechanisms to promote compliance … and also address cases of non-compliance"(*3*). The exact formulation of such mechanisms is yet to be agreed. There have also been high profile calls to strengthen accountability mechanisms in order to achieve greater compliance.

We challenge the empirical basis for some of these arguments and argue that the current focus on compliance in the literature, as well as the negotiations, often fails to reflect that the ultimate aim of agreeing new treaties is to implement them effectively. This means looking to what the Treaty intends to achieve as an overall package, rather than merely looking to the binary obligations contained within. This goes well beyond formal 'compliance'. For example, a focus on compliance can often become an overly legalistic search for, and concentration on, what an instrument specifically legally requires (as opposed to encourages or empowers), which might include an overemphasis on 'shall' provisions, and a downplaying of the importance of 'shall consider' and 'should' provisions and of the treaty's overarching purpose and norms. By contrast, an implementation focus can often provide more space for identifying how best practice implementation of all commitments, however expressed, can be supported and facilitated, including distinguishing between different kinds of commitments, and the reasons that different obligations might be breached, or at least not optimally implemented. A 'compliance' focus may suit some types of obligations – for example, those where obligations are clear, and contraventions are likely to be deliberate, such as failures to notify known information – but may not suit others, particularly those where the underlying issue might be a lack of resources or capacity.

Also problematic with this view is that states clearly consider a much broader range of responses to be punitive in nature – not just formal sanctions. For example, some States appear to view it punitive if an event in their territory is declared a 'public health emergency of international concern' (PHEIC), akin to WHO issuing a vote of no confidence in the State's ability to adequately respond. Equally, while not a formal sanction, imposition of trade and travel restrictions following declaration of a PHEIC, or following the notification by a state of public health information evidencing a risk, can be highly punitive in its impacts.(*4*) Such consequences may discourage both compliance and best practice implementation.

Compliance in international law

It is argued by some,(*5*) including the Independent Panel on Pandemic Preparedness and Response, (*6*) that poor IHR compliance is largely due to the lack of effective compliance mechanisms within the Regulations,(*7*) and that this could be rectified by the inclusion of such mechanisms (or even sanctions) in the Regulations and/or the Pandemic Treaty. Indeed, some scholars have gone so far as to claim that "enforcement mechanisms appear to be the only treaty design choice that holds promise of maximizing the chances of achieving intended effects" and that treaties "that do not have enforcement mechanisms are unlikely to be worth their considerable effort."(*2, p.6*) For instance, human rights treaties come under considerable criticism for making human rights outcomes worse , with a particular example of the UN Convention on the Rights of the Child, which was found to have harmful effects because it led to amongst others worsened human rights practices and increases in child labour (2). However this seems to ignore that before the signing of the treaty, there were considerable disagreements about the concept of child labor, and that it feels so abhorrent today in large part due to the socialization effects of the treaty which increase the rates of reporting of behavior that is perceived

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to be contrary to the treaty. Additionally, even these scholars acknowledge that effectiveness of a treaty can be enhanced through socialization, and changing norms over time.(*2*) This is not a linear process and is achieved through development of consensus and internalization of norms as opposed to enforcement.(*8*) Additionally other scholars have argued that states may comply due to the fear of reputational damage if they derogate from agreed norms(*9*). Thus compliance in this sense is not binary but more of a spectrum which may necessitate ongoing development of the norms of treaties over time.(*10*)

We therefore caution against any absolutism in respect to the utility of formal compliance or enforcement mechanisms, firstly because it is implementation that matters most, not formal compliance systems designed to punish errant behavior, and secondly, because "hard" compliance mechanisms go against the norm within international law, implying that it is unrealistic to expect States to agree to such mechanisms. Most treaties lack hard compliance mechanisms, and treaties that do contain them are often bilateral (e.g., arms control) or part of a broader regulatory framework (e.g., trade, climate change and protection of the ozone layer). For the most part, compliance and enforcement mechanisms are confined to reporting, some form of review powers exercised by intergovernmental or expert bodies, and, rarely, formal dispute settlement mechanisms (such as for the World Trade Organization).(*2*) A notable trend in environmental law is in favor of compliance mechanisms based on dialogue, identification of problems and mutual support, which are considered a useful approach to support implementation and compliance across a range of obligations. Even these forms of "soft" compliance can act as a deterrence against non-compliance, whereby States are concerned about public disclosures of their failures to comply with obligations.

In short, approaches to compliance need not be strict to be meaningful. Chayes and Chayes noted that standards of strict, absolute compliance are often ill-suited to international law, and that it is more realistic to think of an "acceptable" overall level of compliance "in the light of the interests and concerns the treaty is designed to safeguard."(*11 p.176*) They further noted that "What is an acceptable level of compliance will shift according to the type of treaty, the context, the exact behaviour involved, and over time."(11, p198)

To this end, it has become something of a cliché to quote that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"(12, p.47) but why non-compliance occurs is given insufficient emphasis in the literature, and in the negotiations thus far. It is not always the case that non-compliance is nefarious in nature, or a calculated action taken by a state pursuing its own self-interest. While such action is of course possible, particularly during an emergency event, it should not be the sole focus of our efforts around implementation and compliance. On many occasions, states may deviate from treaty obligations because of a lack of resources – be they financial, knowledge, human, or structural – or genuine uncertainty about what the treaty requires, or knowledge gaps and coordination problems within the legal regime. This is certainly the case when it comes to non-compliance with the prevention, detection and response "Core Capacities" (12a) requirements under the IHR and may also be the case for future resource-intensive obligations under the Pandemic Treaty.

Essential criteria for more equitable approach to implementation and compliance

Negotiators should try to reach satisfactory trade-offs and balance between rights and obligations, and mechanisms for implementation support and for compliance. Negotiators ought to carefully consider the optimal role of formal compliance mechanisms, especially during times of crisis where attention and resources may be better directed elsewhere, and to recognise such mechanisms as one part of the overall toolbox which is designed to support and facilitate implementation. This would demand, in the first instance, considering *why* non-compliance might occur, including the role of both resource scarcity and knowledge gaps. A holistic approach to implementation could include features such as regular Conferences of the Parties (COPs), whereby state parties can network, share best practices, make commitments to each other outside of the formal renegotiation of an instrument, and adopt a range of normative instruments needed to support implementation. For example, in the case of WHO's Framework Convention on Tobacco Control, the COP has adopted several implementation guidelines that clarify and elaborate upon often generally expressed treaty obligations, drawing on the best available, and often evolving, evidence (*13*) . Such precise and detailed – albeit softer – instruments, can generate higher levels of compliance (*14*). In multilateral environmental agreements, there is a particular emphasis on COPs being used for mutual learning and support, identification of specific and systemic problems, and linkage with technical and financial assistance to facilitate implementation and compliance.

Negotiators ought to be attentive to the inevitable costs of any compliance regime they create, especially for countries from the global south. Formal compliance mechanisms that cover the wide range of obligations in the IHR, as well as those currently proposed for the Pandemic Treaty, would entail high costs – in addition to the costs of compliance itself, such as with IHR Core Capacities requirements. The "reporting fatigue" arising from multiple and increasing treaty obligations is not a new issue, and is, for example, affecting credible compliance monitoring of UN human rights treaties.

Moreover, whilst negotiators are currently focused on the obligations contained within the amended IHR and new Pandemic Treaty, and how to maximize compliance with these two instruments, it ought not be forgotten that multiple other international law regimes that are also relevant to pandemic prevention, preparedness and response - e.g., environment, climate change, animal health, trade, intellectual property – are placing demands on states. Negotiators need to recognize that states will also be 'servicing' the cost and compliance requirements of such other regimes.

Finally, any holistic implementation regime should establish a governance framework that creates a sense of community including both governments and non-state actors, offers a space for discussion and review, and allows decisions on implementation and compliance to be taken in a dynamic manner, responding to the way in which circumstances and evidence, and implementation of the instruments themselves, evolve. For these reasons, negotiators ought to avoid overly detailed compliance provisions within the text of the instrument itself. Instead, negotiators ought to use the instrument to either create the compliance body or entrust this authority to the COP (or the World Health Assembly in case of the IHR), leaving the details of its composition and operation to be agreed later by these bodies.

Such an approach will provide states with a greater sense of flexibility and responsiveness in the compliance mechanism, informed by the early experiences of implementation, rather than seeking to establish a compliance regime for every obligation agreed to during the negotiations. This is particularly important, given the short timelines for both the IHR amendment and Treaty negotiations – with adoption of each currently planned for the May 2024 session of the WHA – and the sheer scale of potential obligations still on the negotiating table. This will also allow states to explore how they wish to ensure the overall effectiveness of the legal regime by using other

mechanisms to facilitate both best practice implementation and legal compliance, such as using soft mechanisms not backed up by the prospect of punitive action. These can range from the very soft such as meetings of ministers to discuss progress on compliance, to more concrete mechanisms which can be undertaken either by the WHO or non-governmental organisations such as benchmarking indexes against commonly agreed indicators.

Additionally, providing financial and technical support for implementation – especially for countries in the global south to strengthen national capacities, would potentially be a major incentive towards compliance. However, strong demands for "equity" in the current negotiations show that such support cannot be a form of "charity" and has to move away from a development assistance model. To this end some LMICs are pushing for 'common but differentiated responsibilities' being a key element of the Treaty, whereby high income countries bear a greater responsibility to address the substantive goals of the Treaty than low-income countries. Finding common ground will be a major challenge for negotiators, but essential for the success of the emerging normative framework.

Conclusion

Compliance has traditionally been one of the thorniest questions in international law, both theoretically and practically, and it will remain so long after these reforms have reached their conclusions. This is true of global health, and many other areas of international law. How should we understand compliance with international obligations given the infrequency of enforcement mechanisms and the traditional dominance of rational choice theories anticipating non-compliance if a cost-benefit calculation points states in that direction? And from a practical perspective, what can be done to create the basis for better compliance and, more importantly, for effective and equitable implementation of treaties, in particular those of a regulatory nature where there is no immediate reciprocity of benefits? The short analysis in this article defies simplistic assumptions about one-size-fits-all approaches or the absolute necessity of highly formalized and potentially antagonistic mechanisms backed up by the underlying threat of sanctions – the evidence on such approaches is clear: states almost never agree to such compliance regimes being included within treaty regimes. Therefore, the international community needs to look to more holistic approaches to implementation and compliance, considering the overall legal, institutional and political "package" and whether and how it can generate trust and mutual reliance.

In the case of the Pandemic Treaty and the IHR amendments, the rather complex texts available as of the time of writing reveal an overall tension between the priority for health security mechanisms (e.g. information and pathogen sharing and early notification of events) for countries of the global north; and an equally urgent claim for equity and fairness (e.g. guaranteed access to vaccines, medicines and other medical countermeasures, transfer of technology, financing) by countries of the global south. If negotiators succeed in achieving a "package deal" that merges those two claims as cohesive and complementary components of the Pandemic Treaty and strengthened IHR, it will in our view offer the best chance of an effective, equitable and satisfactorily implemented – and complied with – international regime on pandemic prevention, preparedness and response.

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12a "Core capacities" is a term of art for the obligation of IHR states parties to develop and maintain the capacity in their health systems to detect, assess and respond to disease outbreaks, as stipulated in Articles 5 and 13, and Annex 1, of the Regulations.

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