Any Port in a Pandemic: International Law and Restrictions on Maritime Traffic during the COVID-19 Pandemic

Tout port en cas de pandémie: le droit international et les restrictions du trafic maritime pendant la pandémie COVID-19

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Abstract

The current international framework that purports to regulate the spread of communicable disease in the context of maritime traffic is a fragmented, internally inconsistent, and inadequately enforced patchwork of treaties (including the International Health Regulations (2005)) and customary international law. The COVID-19 pandemic has tested the current framework and revealed it to be inadequate to deal with a major global health emergency. States have imposed or failed to impose varying control measures, the effects of which have been witnessed on board passenger vessels around the world. The cruise industry, in particular, has a

Résumé

Le cadre international actuel qui prétend réglementer la propagation des maladies transmissibles dans le contexte du trafic maritime est un patchwork fragmenté, incohérent et mal appliqué de traités (y compris le Règlement sanitaire international (2005)) et de droit international coutumier. Mis à l’épreuve par la pandémie COVID-19, le cadre actuel s’est révélé inadéquat face à une urgence sanitaire mondiale majeure. Les États ont imposé, ou non, diverses mesures de contrôle, les effets desquelles se sont manifestés à bord des navires à passagers du monde entier. L’industrie des croisières, en particulier, a un impact économique mondial impor-
significant global economic impact; therefore, appropriate, enforceable international regulation is necessary to ensure the adequate control of future communicable disease outbreaks.

**Keywords:** COVID-19; cruise ships; international health law; *International Health Regulations*; international maritime law; law of the sea; port states; quarantine; travel restrictions.

**Mots-clés:** COVID-19; droit international de la santé; droit maritime international; droit de la mer; états portuaires; navires de croisière; quarantaine; Règlement sanitaire international; restrictions de voyage.

**Introduction**

On 31 December 2019, the World Health Organization (WHO) was made aware of pneumonia cases of unknown origin, detected in Wuhan, China.\(^1\) As of 7 January 2020, the cause was established as a novel coronavirus (2019-nCoV),\(^2\) and, in less than a week, on 13 January 2020, the first internationally imported case was reported by the Thai Ministry of Health.\(^3\) Border closures started as soon as 21 January 2020, when North Korea banned all foreign tourists from entry.\(^4\) In total, six countries had implemented some form of restriction on international travel before the WHO declared a public health emergency of international concern on 30 January 2020.\(^5\) As of April 2020, every country in the world had imposed active border restrictions of some nature to attempt to control spread by reducing or eliminating the importation of cases through international

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\(^2\) Ibid.

\(^3\) Ibid.


border crossings. Many of these controls focused on airports; as of 20 April 2020, 30 percent of countries in the world had either completely or partially suspended international flights. Much literature has been published on international travel restrictions, particularly in regard to flights. However, control measures also had significant effects on sea traffic, including both passenger and cargo vessels. The resulting impacts on passengers, crew members, and others have been described as an “unprecedented humanitarian crisis.”

It has been suggested that there is a “strong international law frame in place” to regulate and protect public health on ships. However, though there are numerous, diverse relevant sources of law, including international conventions and customary law, this framework falls short of providing a workable system that adequately balances passenger or crew rights with clear rules on control measures for the spread of communicable disease. The 2005 International Health Regulations (IHR), the main specialized instrument intended to regulate restrictions on international traffic for public health purposes, deal directly with such restrictions and require them to be justified, but they exist within a larger framework of international legal obligations that is, in the case of maritime traffic and port restrictions, particularly complex. The framework’s fragmentation, internal inconsistency, and lack of adequate enforcement mechanisms mean that legal rights and responsibilities with respect to restrictions on maritime traffic are sometimes unclear, and, when states do not comply with the law, neither affected states nor individuals may have effective remedies.


Ibid.


Domestic sources and legal frameworks, including internal regulations and standards, contracts between operators and their customers and employees, and insurance arrangements are also relevant, but this article will focus on relevant sources of public international law.

International Health Regulations, 23 May 2005, 2509 UNTS 79, art 2 (entered into force 15 June 2007) [IHR].
Examples of Restrictions Imposed during the COVID-19 Pandemic

The restrictions on maritime traffic during the COVID-19 pandemic have resulted in real impacts on several large vessels that featured prominently in the media, including the Diamond Princess, the Ruby Princess, and the MS Zaandam.

The Diamond Princess incident in February 2020 resulted in an outbreak of COVID-19 on a cruise ship containing 3,711 passengers and crew, resulting in 712 infected persons, which, at the time, was the largest cluster outside China. When the Diamond Princess reached the port of Yokohama, it was refused disembarkation by the Japanese government, and quarantine was mandated.

The Ruby Princess is a somewhat opposite example — a case where no significant restrictions were placed on disembarkation — which ended catastrophically, prompting an official inquiry by the government of New South Wales, where the ship docked. The 2,700 passengers aboard were disembarked en masse, including passengers who had presented respiratory symptoms, only some of whom had been provided masks and hand sanitizer prior to disembarkation. In the weeks following this incident, twenty-eight passengers of the Ruby Princess died of COVID-19. There were also sixty-two confirmed secondary and tertiary cases as a result of the incident, and the source of 114 cases at a Tasmanian hospital is suspected to be one or both patients who acquired COVID-19 on the Ruby Princess. The unregulated disembarkation of persons from a vessel suspected to be infected with disease is clearly not the appropriate answer to this issue.

The MS Zaandam was refused moorage, resupply, and disembarkation of its more than twelve hundred passengers by every port along the ship’s South American route. The ship was initially denied passage through the Panama Canal, due to “sanitary reasons,” while COVID-19 ran rampant.

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14 Ibid.

15 Government of New South Wales (NSW), Special Commission of Inquiry into the Ruby Princess (Sydney: State of NSW through the Special Commission of Inquiry into the Ruby Princess, 2020).

16 Ibid at 147.

17 Ibid at 265.

18 Ibid at 266.

through the ship, ultimately resulting in the deaths of three passengers. Forty-eight hours later, passage through the canal was granted, and, three days later, passengers were finally permitted to begin disembarkation in Florida, twenty-five days after the ship’s departure from Buenos Aires and after it was resupplied at sea by another of Holland America’s ships.

However, the resolution of issues aboard these particular vessels does not mean the industry has returned to status quo, nor are the impacts limited to just ship passengers — crew remained trapped aboard cruise ships, as ports refused disembarkation. A report from 18 June 2020 found that up to eighty thousand crew members worldwide were still stranded aboard cruise ships, and a later study confirmed widespread reports of delayed repatriation, the denial of shore leave, prolonged contract extensions, and the deprivation of medical assistance among seafarers. Specific restrictions that states have implemented in an attempt to control the introduction or spread of COVID-19 include delaying the issuance of clearances in port; preventing the embarkation and disembarkation of crew and passengers; preventing

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22 Ibid.

23 Hines, supra note 19.


27 The US Centers for Disease Control and Prevention’s “No Sail Order” prohibits embarkation of cruise ships. See US Centers for Disease Control and Prevention, Order under Sections 361 & 365 of the Public Health Service Act (42 USC 264, 268) and 42 Code of Federal Regulations Part 70 (Interstate) and Part 71 (Foreign): Second Modification and Extension of No Sail Order and Other Measures Related to Operations (Atlanta: Centers for Disease Control and Prevention, 2020).

28 Wilhelmsen reports that Australia and Vietnam have prohibited shore leave and that Argentina prohibits any kind of crew change. See Ships Agency, supra note 26.

29 The MS Zaandam was refused moorage and disembarkation of its more than twelve hundred passengers by Argentina and Chile, finally disembarking in Florida more than two weeks later, after an at-sea resupply by another ship. See Hines, supra note 19.
the loading and/or unloading of cargo; imposing a mandatory quarantine; and flatly refusing ships permission to enter port. The impacts of these imposed restrictions have been significant.

**International Law Relevant to Maritime Traffic and Pandemics**

“International law and self-regulation largely govern the cruise industry.” In terms of the law governing restrictions on maritime traffic for public health reasons, both customary international law and a number of international agreements are relevant. Generally, customary international law allows states to control access to their internal waters as well as land territory, and there is no general right of entry into maritime ports. The right of states to regulate or restrict entry into internal waters and ports is considered to be an aspect of territorial sovereignty. A limited right of entry or access to places of refuge for a vessel in distress has long been recognized, based on “humanitarian considerations” and the protection of human

30 Though most ports have not directly prevented loading or unloading, some restrictions have had ripple effects that have negatively affected movement of cargo — for example, East Africa Community State partners, such as Kenya, Tanzania, and Uganda, imposed regulations on truckers to reduce spread in East Africa, but this resulted in the port of Mombasa banning drivers that were not tested and issued a certificate attesting to their absence of infection, affecting the efficacy of loading and unloading of cargo. See Shem Oirere, “COVID-19 Impacts Port Operations,” *GreenPort* (6 July 2020), online: <www.greenport.com/news/101/africa/covid-19-impacts-port-operations>.

31 *Wilhelmsen* reports that Japan mandates that any ship be at sea for fourteen days following departure of any prior port before arrival. See Ships Agency, *supra* note 26.

32 The Canadian federal government has prohibited cruise ships with an overnight capacity of more than one hundred persons from entering its waters, with those under one hundred persons permitted only subject to provincial/territorial/municipal regulation. See Transport Canada, *Interim Order No 3 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19)* (Ottawa: Transport Canada, 2020), ss 3–4.


life, although the scope and limits of this right are contentious. More generally, a customary norm of “elementary considerations of humanity,” obliging states to take steps to protect human life, is part of the law of the sea. The obligation in customary international law to protect the life of persons at sea applies regardless of the nationality of those persons or of their ship and includes the long-recognized duty to rescue persons in distress at sea. It has even been suggested that the requirement to take measures to protect people at sea is emerging as a general principle that should guide states’ actions and could inform the application of existing rules. Eventually, detailed analysis of the actions and decisions of states during the COVID-19 pandemic — to grant or deny access to their ports under various circumstances — may provide examples of state practice and opinio juris that could inform our understanding of these sometimes ambiguous and contentious areas of customary international law.


38 Lowe, supra note 35 at 610; Morrison, supra note 35 at 12, 126; Christopher F Murray, “Any Port in a Storm? The Right of Entry for Reasons of Force Majeure or Distress in the Wake of the Erika and the Castor” (2002) 63 Ohio State LJ 1465.

39 See generally Murray, supra note 38; Morrison, supra note 35. On potential claims of distress in the context of the COVID-19 pandemic, see Klein, “International Law Perspectives,” supra note 10 at 284–85.


42 Papanicolopulu, supra note 40 at 160–61, 167.

43 See e.g. Klein, “International Law Perspectives,” supra note 10 at 286 (suggesting that incidents during the pandemic may reflect differing views on the balance between sovereign rights of port states, on one hand, and humanitarian considerations or flag states’ authority, on the other).
Several international instruments govern different aspects of maritime traffic, some of which are relevant to public health-based restrictions. The IHR, which are binding on all WHO member states, are the instrument that most directly addresses public health measures affecting maritime traffic. International labour conventions are also relevant to the position of crew members, but a discussion of this distinct and substantial body of law is beyond the scope of this article.44 A range of other non-binding sources, including guidance issued by the WHO, the International Maritime Organization (IMO), and others, can also be relevant. For example, the IMO released a circular letter on 31 January 2020 urging cooperation between state health authorities and industry to manage disease spread.45 This was expanded with annexes over the following months, each containing considerations and recommendations for managing cases and outbreaks in different circumstances. In addition to the original circular letter, there have been at least twenty-six addendums posted,46 covering topics from the resumption of cruise operations in the European Union,47 to personal protective equipment,48 to crew changes in Singapore.49 Throughout these circulars, the IMO has stressed the importance of facilitating the movement of goods and the protection of the issuance of free pratique.50

44 For discussion, see e.g. Klein, “International Law Perspectives,” supra note 10 at 288–91; Cleopatra Doumbia-Henry, “Shipping and COVID-19: Protecting Seafarers as Frontline Workers” (2020) 19 Western Michigan University] Maritime Affairs 279. Similarly, other areas of law, including international refugee law, are relevant to specific concerns relating to the impact of restrictions on refugees and asylum seekers. See e.g. Salvo Nicolosi, “Non-refoulement during a Health Emergency,” EJIL Talk! (14 May 2020), online: <www.ejiltalk.org/non-refoulement-during-a-health-emergency/>; Bríd Ní Ghraíne, “COVID-19, Border Closures, and International Law” (4 May 2020), online: <www.dokumenty-iir.cz/Publikace/Reflections/reflection_Br%C3%ADd%20N%C3%AD%202020_covid-19_DEF.pdf>.


50 Ladeinde-Babalola, supra note 45 at 4.
INTERNATIONAL LAW OF THE SEA AND MARITIME CONVENTIONS

The most relevant of this category of treaties include the *United Nations Convention on the Law of the Sea* (UNCLOS), the *International Convention for the Safety of Life at Sea* (SOLAS Convention), the *Convention on Facilitation of International Maritime Traffic* (FAL Convention), and the *Convention and Statute on the International Regime of Maritime Ports* (Geneva Convention and Statute). All four conventions contain provisions relevant to some aspects of facilitating or regulating maritime traffic in ports and territorial seas. UNCLOS is considered foundational to the organization of the law of the sea. It is intended to provide a “comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources.” The treaty is therefore broad, but it does contain articles that are of some relevance to this analysis. It contains provisions requiring innocent passage to be permitted through a state’s territorial sea. Passage is defined as including stopping and anchoring, where such action is “rendered necessary by force majeure.” However, these articles do not stipulate any further obligations beyond permitting ships to stop and anchor where necessary.

On the surface, imposing a duty to render assistance pursuant to Article 98 of UNCLOS suggests that states are required to render assistance to ships in need of it. However, this article’s application has a limited scope. Pursuant to Article 86, the duty to render assistance only applies to vessels on the high seas and not to vessels that are in exclusive economic zones.

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54 The right of innocent passage also applies in certain circumstances in internal waters (UNCLOS, supra note 51, art 8(2)); innocent passage or archipelagic sea-lane passage in archipelagic waters (ibid, arts 52–53); and a right of transit passage or innocent passage in straits used for international navigation (ibid, arts 37–44, 45).


56 *Ibid*, art 98.
territorial seas, internal waters, or archipelagic waters.\textsuperscript{57} Ergo, even if a ship requires assistance, say due to the outbreak of communicable disease, there is no duty imposed on states under \textit{UNCLOS} to render assistance unless that ship is located on the high seas.\textsuperscript{58} This article echoes a general theme of \textit{UNCLOS}—namely, that coastal states maintain sovereignty and jurisdiction to regulate and enforce their laws in their own waters.\textsuperscript{59}

Another provision that is indirectly relevant to the question of port restrictions is Article 94, which obliges each state to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”\textsuperscript{60} The flag state is also specifically required to take measures to ensure safety at sea, including through “the manning of ships, labour conditions and the training of crews.”\textsuperscript{61} This requirement is understood to mean that the flag state is responsible for working conditions and more generally for conditions on board and, through its jurisdiction, will owe human rights obligations to both passengers and crew.\textsuperscript{62} Although it is the port state that will make the decision whether to allow entry or disembarkation and what assistance to provide, the flag state still maintains some responsibility for matters such as working conditions and medical assistance to both passengers and crew.

Treaties under international law are, of course, only binding upon parties to those treaties. Though a total of 168 states\textsuperscript{63} are party to \textit{UNCLOS}, this number is twenty-five states short of the 193 current United Nations (UN) member states.\textsuperscript{64} One notable state that is not party to \textit{UNCLOS} is...

\textsuperscript{57} Ibid, art 86.

\textsuperscript{58} Note that the \textit{International Convention on Maritime Search and Rescue}, 27 April 1979, 1405 UNTS 118 (entered into force 22 June 1985) [\textit{SAR Convention}] could also be relevant if an outbreak on a ship at sea were sufficiently serious to compromise the safety of the vessel or persons on board. The convention’s obligations relate to organization and coordination of search and rescue operations. The recognition of the duty to rescue in customary international law also mitigates the limitations of the \textit{UNCLOS} provision. See note 41 above and accompanying text.

\textsuperscript{59} Ladeinde-Babalola, \textit{supra} note 45 at 1.

\textsuperscript{60} \textit{UNCLOS}, \textit{supra} note 51, art 94(1).

\textsuperscript{61} Ibid, art 94(3)(b).

\textsuperscript{62} Klein, “International Law Perspectives,” \textit{supra} note 10 at 292; Papanicolopulu, \textit{supra} note 40 at 132, 150; Galani, \textit{supra} note 9.


the United States, despite the United States playing a significant role in the treaty’s development and, on some occasions, attempting to rely on certain provisions contained within it. To the extent that the substantive content of UNCLOS is also part of customary international law, however, the significance of this fact is diminished. For example, the flag state’s jurisdiction over a vessel and the duty to render assistance to a ship in distress are both considered to be customary law obligations as well as being reflected in UNCLOS.

The IMO has adopted a resolution that, like UNCLOS, may appear relevant at first glance – the IMO Guidelines on Places of Refuge for Ships in Need of Assistance. However, it is clarified under section 1.2 that this resolution likely is not equivalent to UNCLOS’s duty to render assistance, as it only applies when there is not a risk to human life and where the situation “could give rise to loss of the vessel or an environmental or navigational hazard.” This clarification is further supported by the resolution’s focus on seaworthiness, insurance, and legal authorities versus concerns relating to the health of crew or passengers. Therefore, it is likely not feasible for a ship to invoke these guidelines as justification for docking, disembarkation, or resupply. Furthermore, the status of this guideline as a resolution adopted by the IMO means that it is not binding on states.

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65 Tomlinson, supra note 34 at 137–38.
68 Papanicolopulu, supra note 40 at 96, 131.
70 Ibid, s 1.2.
71 Ibid, s 1.18.
72 Ibid, s 3.9.
73 The preamble to the IMO Guidelines specifically “[i]nvites” governments to take them into account, acknowledging their non-binding status, and Appendix 1 lists the conventions and protocols that are applicable in the circumstances contemplated in the guidelines. IMO Guidelines, supra note 69 at Preamble, Appendix 1.
The IMO’s FAL Convention enshrines practices and standards referencing the IHR and requiring public authorities of states not party to the IHR to apply their relevant provisions.\(^74\) However, there is currently no state that is party to the FAL Convention but not to the IHR.\(^75\) The FAL Convention contains provisions on the medical examination of passengers\(^76\) and on the fair and equitable application of sanitary measures,\(^77\) and it prohibits authorities from preventing the discharge or loading of cargo or supplies from ships not infected with a quarantinable disease except in “an emergency constituting a grave danger to public health.”\(^78\) Further, the FAL Convention compels states to allow disembarkation of passengers in cases of medical emergencies.\(^79\) Note that the concept of pratique that was originally referenced in sections 3.16.1 and 4.4 of the first draft of the FAL Convention was adapted and expanded under the IHR and will be analyzed accordingly later in this article.

Another key international law instrument, the SOLAS Convention, was developed in response to the sinking of the Titanic.\(^80\) The United States is a party to this convention, unlike UNCLOS.\(^81\) However, the applicability of the SOLAS Convention to circumstances of communicable disease outbreak is limited; it predominantly covers health and safety requirements such as fire suppression, ship construction, life preservers, lifeboats, and communication equipment. Some provisions of the SOLAS Convention pertain to port security and passenger safety of passenger and cargo ships, insofar as they regulate whether and why a ship may be denied entry or expelled from a port.\(^82\) However, the focus of the convention is on physical, not biological,


\(^{75}\) IMO, Status of IMO Treaties: Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions (18 August 2020) at 184–85; WHO, States Parties to the International Health Regulations (2005) (2020), online: <www.who.int/ihr/legal_issues/states_parties/en/>.

\(^{76}\) FAL Convention 2016 Annex, supra note 74, s 3.8. This section limits examination to passengers who are arriving from an area infected with a quarantinable disease within that disease’s incubation period, though additional examination is permitted in accordance with the IHR, supra note 12.

\(^{77}\) FAL Convention 2016 Annex, supra note 74, s 6.7.

\(^{78}\) Ibid, s 6.10.

\(^{79}\) Ibid, s 2.20.

\(^{80}\) Tomlinson, supra note 34 at 138–39.

\(^{81}\) Ibid at 198.

\(^{82}\) SOLAS Convention, supra note 51, ch XI-2.
hazards, so expulsion due to an outbreak of communicable disease would not be justified under the SOLAS Convention. Finally, the 1923 Geneva Convention and Statute speaks to the issue of access to ports by foreign vessels. It does not specifically provide for a right of access to ports, but it does require equality of treatment (as between one’s own vessels and those of other states parties as well as among vessels of other states), “subject to the principle of reciprocity,” with respect to freedom of access. States parties may deviate from this obligation “in exceptional cases, and for as short a period as possible,” where they are obliged to take measures “in case of any emergency affecting the safety of the State or the vital interests of the country.” The implications of these provisions for a general right of access to ports is said to be “the subject of dispute,” with the majority view being that they do not establish any such right but, rather, the more limited obligations of non-discrimination and reciprocity.

IHR

The IHR and their precursors address the rights and responsibilities of states in preventing or mitigating the international spread of disease. The objective of the IHR is to “prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.” The current version of the regulations, which were revised in 2005, was adopted by the World Health Assembly in May 2005 and came into force two years later. All WHO member states are parties, subject to reservations or rejection by any particular state.

Under the IHR, states are required to develop and maintain certain core public health capacities. These include specific capacities for points of entry, including ports. The COVID-19 pandemic demonstrates the importance of maintaining such capacities, but compliance with core capacity

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83 Geneva Convention and Statute, supra note 51. Note that this convention has a relatively small number of parties and “limited acceptance.” Morrison, supra note 35 at 61.
84 Geneva Convention and Statute, supra note 51, art 2.
85 Ibid, art 16.
86 Morrison, supra note 35 at 59–60. The statute’s provisions, in fact, have been argued as evidence that no free right of access exists in customary international law. De La Fayette, supra note 35 at 4.
87 IHR, supra note 12, art 2.
88 Ibid, art 59.
89 Ibid, arts 59–63.
91 Ibid, arts 19, 20, Annex 1B.
obligations has historically been poor.\textsuperscript{92} Other \textit{IHR} provisions deal with health measures that can be applied to travellers,\textsuperscript{93} the treatment of travellers,\textsuperscript{94} and health documents (for example, vaccination certificates, maritime declarations of health, and ship sanitation certificates).\textsuperscript{95} When a public health emergency of international concern is declared, as it was on 30 January 2020, the WHO director-general, on the advice of the Emergency Committee, will issue temporary recommendations regarding measures to be taken by states parties.\textsuperscript{96} As is now well known, the WHO did not recommend any restrictions on international travel or trade in response to the COVID-19 pandemic, but this stance was disregarded by most states.\textsuperscript{97} As will be discussed further below, “additional measures” (not authorized by the \textit{IHR}’s provisions or recommended by the WHO) may be taken by states if certain requirements are met under Article 43 of the \textit{IHR}.

The \textit{IHR} contain a number of provisions pertaining to the processes of docking, the embarkation and disembarkation of passengers and crew, and the movement of cargo. States are permitted to apply health measures to travellers on entry or exit, including, for example, requiring information about travel history or contacts or requesting a non-invasive medical examination; where there is evidence of a public health risk, additional measures are permitted.\textsuperscript{98} Health measures are generally not to be applied to ships that are in transit (that is, passing through waters within the state’s jurisdiction without calling at a port), although this is subject to Articles 27 and 43 as well as other “applicable international agreements.”\textsuperscript{99} Ships in transit coming from an area unaffected by a disease shall not be prohibited from taking on fuel, food, water, or supplies.\textsuperscript{100}

Article 27 allows the “competent authority” to undertake measures of control, if clinical signs or symptoms are found on board a conveyance, but it is supposed to do so in an “adequate” manner under the \textit{IHR} and follow any


\textsuperscript{93} \textit{IHR, supra note 12}, arts 23, 31. In all these provisions, “traveller” is defined as a person undertaking an international voyage, as per art 1 (1).

\textsuperscript{94} \textit{Ibid}, art 32.

\textsuperscript{95} \textit{Ibid}, arts 35–39.

\textsuperscript{96} \textit{Ibid}, art 15.


\textsuperscript{98} \textit{IHR, supra note 12}, art 23.

\textsuperscript{99} \textit{Ibid}, art 25.

\textsuperscript{100} \textit{Ibid}, art 25(a).
available WHO advice. After the *Diamond Princess* outbreak on 7 February 2020, the WHO released a document entitled *Operational Considerations for Managing COVID-19 Cases and Outbreaks on Board Ships*. This document was intended to be used as a supplementary resource in addition to the existing *Handbook for Management of Public Health Events on Board Ships* published by the WHO in 2016. Article 27 also permits the implementation of “additional health measures, including the isolation of affected conveyances, as necessary, to prevent the spread of disease,” provided measures are reported to the national IHR focal point. It is important to note that Article 27, like section 6.10 of the *FAL Convention*, stipulates that “[a]ny such conveyance shall be permitted to take on … fuel, water, food and supplies.”

Should an affected passenger ship call in to port, the WHO advises that the port should perform a risk assessment and that a decision may be made in consultation with the ship owner to end the voyage, at which point the vessel ought to be inspected and health measures such as cleaning and disinfection should be performed. The WHO recommends as best practice that any close contacts of a suspected positive case be isolated, preferably in an onshore facility, and, should the suspected case be confirmed positive, all close contacts must undergo quarantine in an onshore facility, not on board a ship. This recommendation tracks well with established science, which has found the removal of suspected cases can substantially reduce disease spread. Controlling and reducing the spread of communicable disease on cruise ships in general is difficult; environmental and human factors make them ill-suited as quarantine facilities, as close proximity and a generally aged population make them ideal grounds for disease propagation.

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105 *IHR*, supra note 12, art 27(1).
106 *FAL Convention* 2016 Annex, supra note 74, s 6.10.
107 *IHR*, supra note 12, art 27(2).
109 *Ibid* at 5.
110 Ladeinda-Babalola, supra note 45 at 5.
Quarantine on the Cruise Ship *Diamond Princess* in Japan Due to COVID-19” (2020) 6:2 Journal Medical Internet Research Public Health Surveillance e18821.

112 *IHR, supra note* 12, *art 1 (1).*

113 *Ibid, art 28(1).*

114 *Ibid, art 28(2).*

115 See notes 37–39 above and accompanying text. Other international agreements that might be relevant include human rights treaties and the *Geneva Convention and Statute, supra note* 51, which imposes obligations of non-discrimination regarding access to ports.

116 *IHR, supra note* 12.

117 *Ibid, art 28(1).*

118 *Ibid, art 43(1).*

minimizes discomfort and distress when implementing any health measures, including by “providing or arranging for adequate food and water, appropriate accommodation, … [and] appropriate medical treatment.” Article 43 also requires that such measures not be “more restrictive of international traffic” or “more invasive or intrusive to persons than reasonably available alternatives” that would have the same effect.

Where additional health restrictions are implemented by a state, any such controls are to be implemented: (1) in accordance with scientific principles; (2) in response to evidence or available information of a risk to human health; and (3) in accordance with guidance or advice from the WHO. These three requirements must also be met for additional measures taken under Article 27(1). Any additional measures that result in refusal of entry or departure or delays of more than twenty-four hours, which are considered to be a significant interference with international traffic, must be reported and justified to the WHO and shared with other states.

Discussion: Implications and Concerns

Compliance with existing legal framework

Several questions could be raised about measures taken by states to limit access to their ports and to deal with affected vessels. Canada, and several other states have imposed broad restrictions on access to their ports or

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120 *IHR*, supra note 12, art 32.


124 Reporting requirements are contained in the *IHR*, *ibid.*, art 43(5); requirements for justification and sharing are contained in art 43(3).

125 Transport Canada, *supra* note 32, ss 3–4, enshrines a blanket provision prohibiting any passenger vessel from entering Canadian Arctic waters from any other open waters and prohibiting any passenger vessel certified to carry more than one hundred persons equipped with berths or cabins for overnight travel from navigating, mooring, anchoring, or berthing in Canadian non-Arctic waters.

126 Other states that have imposed similar bans include Australia (prohibition against any cruise ship capable of carrying more than one hundred passengers from operating in Australia; see Australian Border Force, News Release, “Cruise Ship Prohibition Extended” (22 May 2020), online: <https://newsroom.abf.gov.au/releases/cruise-ship-prohibition-extended>); New Zealand (ban on all foreign ships entering the country but permitting innocent passage pursuant to UNCLOS and allowing entry under several enshrined exceptions, including for loading and unloading of cargo and fishing vessels, for undergoing repairs or refitment, or if every person aboard a vessel is a citizen or otherwise permitted under section 14(1) of the *Immigration Act 2009*; see New Zealand Government Parliamentary Counsel Office, *COVID-19 Public Health Response (Maritime Border) Order 2020* (Wellington: New Zealand Government, 2020)); as well as a number of small island developing states. See Walter Leal Filho et al, “Coronavirus: COVID-19 Transmission in Any Port in a Pandemic” (May 2020), available at <https://www.cambridge.org/core/terms>.
internal waters by foreign vessels, in addition to denying entry to many or most foreign nationals.\(^{127}\) As discussed above, generally the right to control entry into their territory is claimed by states as an aspect of territorial sovereignty and, in customary international law, is understood only to have limited exceptions such as vessels in distress.\(^{128}\) The IHR and other instruments, however, impose some constraints on the situations in which, and the reasons for which, international traffic can be restricted for public health purposes. In the COVID-19 pandemic, both general restrictions on the entry of foreign nationals and more specific restrictions on access by foreign vessels would be considered "additional measures" under Article 43 of the IHR since they were not recommended by the WHO, nor are they authorized by any provision of the regulations. As such, the measures are required to be notified to the WHO, along with the health rationale for them,\(^{129}\) but compliance with this obligation has been poor.\(^{130}\)

Whether additional measures are justified depends, first, on whether they are "more restrictive of international traffic … than reasonably available alternatives that would achieve the appropriate level of protection."\(^{131}\) Denying entry to foreign vessels and nationals is the most restrictive measure that can be taken — subject to the breadth of any exceptions — and so would be justified only if other measures (for example, testing, quarantine) would not be reasonably available or provide sufficient protection. This is likely to be increasingly in question as the pandemic goes on and as new methods of testing and, eventually, vaccination become available. Given that other alternative measures would place a greater burden on the point of entry and its state, the meaning given to the phrase "reasonably available" could also be important. The scope of the order closing ports could also be an issue: it seems reasonable to refuse entry to a foreign vessel carrying

\(^{127}\) Note that this approach differs from prohibiting entry of a vessel to state waters for the purposes of *free pratique* or resupply after that vessel’s initial departure, as was seen with the MS *Zaandam*, which, as discussed in this article, was refused entry to ports for resupply and *free pratique* of passengers and crew after its departure from Buenos Aires by every state along its route up the west side of South and Central America.


\(^{129}\) *IHR, supra* note 12, arts 43(3), 43(5).

\(^{130}\) This obligation applies to measures that “significantly interfere with international traffic” — that is, refusal of entry or delay for more than twenty-four hours, which includes measures discussed here. According to Habibi et al, *supra* note 8 at 1–2, at least two-thirds of countries that imposed such measures did not report them to the WHO, as required by the *IHR, supra* note 12.

\(^{131}\) *IHR, supra* note 12, art 43(1).
passengers from another state who intend to disembark since those individuals would in most cases be denied entry (if foreign nationals) or required to quarantine (if nationals of the port state) in any case — that is, of course, assuming those restrictions on travellers are themselves justified. Denying entry to a foreign vessel in other circumstances might be more difficult to justify: although there is no general right of entry into maritime ports, when a state does restrict entry, it must do so in a way that respects its legal obligations, including under the IHR.\(^{132}\)

Decisions about imposing additional measures must also be based on scientific principles, scientific evidence or available information from the WHO or other relevant bodies, and guidance or advice from the WHO. Unlike some travel restrictions imposed in previous outbreaks,\(^{133}\) COVID-19 travel restrictions, including closing ports to some vessels for periods of time during the pandemic, do not seem to be entirely without a rational scientific basis, given what is known about the transmission of the virus, especially given the close proximity of older, at-risk populations aboard vessels such as cruise ships.\(^{134}\) Again, the scope of an order restricting access to ports could be relevant since it is the actual health situation on a ship or at least travel history (as a proxy for exposure and risk) that is relevant, not the nationality of the vessel or its passengers or crew.\(^{135}\)

As mentioned earlier, states have denied entry, or permission to disembark, to vessels already en route, usually because of confirmed or suspected cases on board. But states have also refused entry to all manner of ships, from cruise vessels, to cargo ships, to navy and government vessels, sometimes on nothing more than the suspicion of possible COVID-19 cases, likely reflecting the fact that they see themselves as having an entitlement to do so.

\(^{132}\) Lowe, *supra* note 35; de La Fayette, *supra* note 35.

\(^{133}\) See generally Ali Tejpar & Steven J Hoffman, “Canada’s Violation of International Law during the 2014–16 Ebola Outbreak” (2016) 54 Can YB Intl L 366, which highlights Canadian violations of international law in response to the Ebola outbreak, where the government imposed travel restrictions in a way that was viewed as a measure to placate the populace rather than materially protect Canadians from communicable disease. See also generally Wendy Rhymer & Rick Speare, “Countries’ Response to WHO’s Travel Recommendations during the 2013–2016 Ebola Outbreak” (2017) 95:1 Bull World Health Organization 10.


pursuant to their sovereign rights over their territory. This situation is also the subject of distinct obligations in the IHR, but it raises somewhat different issues from longer-term, blanket port closures. As explained above, the IHR confirm the right to free pratique and generally prohibit states from preventing a ship from calling at a port of entry for public health reasons. Although free pratique, of course, can be subject to necessary measures to prevent the spread of disease if a source of infection is found on board, denying the right to enter port at all may be difficult to justify.

Additional measures to be applied to an affected conveyance are subject to some of the same obligations as other additional measures under Article 43: they must be based on scientific principles, scientific evidence or information, and WHO guidance. It is also important to briefly acknowledge the requirements under the FAL Convention, the provisions of which broadly mirror the above requirements under the IHR and which therefore also call into question the legality of some measures states have taken to slow the spread of COVID-19. According to the FAL Convention, states must permit disembarkation of sick or injured crew or passengers for medical treatment, yet crew members who have tested positive for COVID-19 have been unable to disembark, and several have died. This specific obligation, applicable to parties to the FAL Convention, would supplement the provisions of the IHR, which are binding on all WHO member states. These provisions, in turn, would be reinforced and supplemented by a port state’s human rights obligations — notably, to respect and protect the rights to life and health, among others — and the customary law duties of humanitarian assistance, at least in the most serious cases. Even if there is some question as to the extent of the port state’s human rights obligations to foreign nationals in their ports, recall that WHO member states, as parties


137 FAL Convention 2016 Annex, supra note 74, s 6.10, stipulates that authorities shall not prevent discharging or loading cargo or supplies from ships not infected with a quarantinable disease except in “an emergency constituting a grave danger to public health,” similar to the IHR, supra note 12, art 43. FAL Convention 2016 Annex, supra note 74, s 2.20, compels states to allow disembarkation of medical emergencies. Pratique was originally referenced in sections 3.16.1 and 4.4 of the first draft of the FAL Convention, supra note 51; it was adapted and expanded under the IHR, supra note 12.

138 FAL Convention 2016 Annex, supra note 74, ss 2.20–2.27.


140 Galani, supra note 9; Klein, “International Law Perspectives,” supra note 10 at 292.

141 See notes 37–41 above.
to the IHR, are bound to show respect for travellers’ human rights when implementing any health measures.\textsuperscript{142} These provisions specifically apply to a port state implementing restrictions (for example, denying entry or disembarkation), although, of course, the effects of these restrictions, such as the conditions on board and the availability of medical assistance, are not the sole responsibility of the port state: the flag state, by virtue of its jurisdiction over the ship and people on it, as well as the state of nationality of passengers and crew, share these responsibilities.\textsuperscript{143}

Inconsistencies in the development of procedures, and a lack of foresight in their application, have manifested issues as seen on board the Diamond Princess. In this instance, the crew were not restricted to their cabins,\textsuperscript{144} and a study has found that transmission of COVID-19 was greater among the crew partly as a result of their inability to quarantine.\textsuperscript{145} This factor highlights a significant issue with “additional measures” under Article 43 of the IHR specifically pertaining to cruise ships. Enforcing isolation of a large number of people on board constitutes a delay in disembarkation under Article 43, which requires justification,\textsuperscript{146} but it is not a denial of entry to port, nor would it likely be considered unreasonable; quarantine of infected vessels while phased testing and risk assessment are performed is permitted as per WHO documentation.\textsuperscript{147} The procedures followed by the Japanese government in response to the Diamond Princess were not only in accordance with permitted procedures,\textsuperscript{148} but they have substantial historical precedent — the very term “quarantine” is derived from the middle ages when ships arriving in Venice from ports infected with plague were required to anchor for quaranta giorni (forty days).\textsuperscript{149}

The issue materializes when considering that, generally, cruise ships are not appropriate isolation vessels; cruise ship cabins are not equipped to be

\textsuperscript{142} IHR, supra note 12, art 32.


\textsuperscript{144} Moriarty, supra note 102 at 347.


\textsuperscript{146} IHR, supra note 12, art 43(3).

\textsuperscript{147} WHO, Handbook, supra note 104 at 2.

\textsuperscript{148} Yamahata & Shibata, supra note 111 at 2.

\textsuperscript{149} Centers for Disease Control and Prevention, History of Quarantine (20 July 2020), online: <www.cdc.gov/quarantine/historyquarantine.html#:~:text=The%20Middle%20Ages&text=Ships%20arriving%20in%20Venice%20from,giorni%20which%20mean%2040%20days>.
lived in around the clock, and this is further complicated when considering that quarantining crew is difficult, if not impossible, when the isolation of passengers on board a ship is mandated by a state’s government. A certain number of crew are required for the safe operation of a ship, the delivery of food, and the management of logistics. The nature of cruise ships makes it exceedingly likely that a certain threshold will be met where too many crew have been exposed to a confirmed case and require quarantine, necessitating sudden, rapid disembarkation for which the port may be inadequately prepared, as the vessel becomes unsafe or unfeasible to maintain with passengers aboard. At the very least, it is reasonable to require crew to undergo isolation just the same as passengers; however, this renders it impossible to also maintain passengers on board, as they rely on the crew to deliver food and other supplies. The health and safety of crew cannot be sacrificed to facilitate the isolation or quarantine of passengers — the rights of both groups are the responsibility of the flag state, and of the port state, with neither group having clear priority. This is especially vital considering the case of the Grand Princess, where crew became the vectors for transmission across several different voyages, introducing the virus to passengers and crew not just aboard the Grand Princess but also on board other cruise vessels.

When considering the justification of additional measures, such as refusal of entry to port, mandatory quarantine, or isolation of passengers from uninfected vessels, such measures are often presented by states as necessary to prevent the introduction or control spread of illness into the country. However, considering the Diamond Princess, the quarantine of thousands of passengers was disproportionate to the hundreds of thousands of tourists who travelled to Japan from various regions in China, including Hubei Province after the first cases in early December; at the time of the Diamond Princess incident, COVID-19 was already in Japan. Reasonable controls and due diligence are permissible under the IHR; inspection of vessels for determination of sources of infection is permissible under Article 27, and the performance of a medical examination of passengers to determine

152 Ibid, Sawano et al, supra note 150 at 309.
153 See notes 62, 119–20, and 140 above and accompanying text.
154 Moriarty, supra note 102 at 350.
155 Ladeinde-Babalola, supra note 45 at 1.
156 Sawano et al, supra note 150 at 309.
whether that passenger poses a risk to public health is permissible with conditions under Article 31.\textsuperscript{157} The isolation of passengers who test positive, the quarantine of close contacts pending test results of their close contacts, and the observation of passengers for justifiable protection against the spread of communicable disease are all permissible under Article 31.\textsuperscript{158} However, it is questionable whether the current international framework justifies flatly prohibiting the \textit{free pratique} of unaffected vessels out of fear, denying resupply, or isolating passengers in facilities inappropriate for that function and placing certain persons at greater risk of infection — additional measures that are claimed to be intended to prevent the introduction or spread of disease. As noted above, where such additional measures significantly interfere with international traffic and trade, states are bound to report them to the WHO, providing the public health rationale for the measures and relevant scientific information, but, in practice, many states do not comply with this obligation, making it even more difficult to determine whether measures are justified.\textsuperscript{159}

LIMITATIONS OF THE EXISTING LEGAL FRAMEWORK

The analysis and discussion thus far show that the international legal framework does address many of the issues that have arisen during the COVID-19 pandemic but not adequately. The current framework is fragmented and internally inconsistent, and it is not always clear which norm prevails. There is also the concern regarding the lack of effective enforcement mechanisms — a recurrent theme of any discussion pertaining to the WHO and the \textit{IHR}.\textsuperscript{160} Issues of collective action, capacity, and economic factors are also inadequately addressed in the current framework. Finally, that framework does not directly reach some of the most powerful actors in this context: ship owners, cruise ship lines, and their industry associations.

As discussed in the previous section, passenger rights, the rights of crew, and the operation of ships are all at stake when measures are imposed by port states and, thus, are all affected by the inconsistency between these international frameworks. The \textit{FAL Convention} prohibits authorities from

\textsuperscript{157} \textit{IHR, supra note 12.}
\textsuperscript{158} \textit{Ibid.}
\textsuperscript{159} \textit{Ibid, art 43(3), (5). See note 130 above.}
preventing uninfected ships from discharging or loading cargo or supplies except in “an emergency constituting a grave danger to public health.”

Under the IHR, vessels cannot be barred from calling at any port of entry or free pratique for public health reasons unless an additional health measure can be justified under Article 43. What is unclear is how these different frameworks mesh together. For example, when deciding whether a vessel should be allowed to call at port or take on supplies, the qualifier of a “grave danger to public health” under the FAL Convention seems to set a high threshold for refusal. What happens if a state can therefore justify an additional health measure under the IHR, but the vessel claims that a “grave danger” is not present? The current text of the IHR exacerbates these difficulties. Article 43 allows states to take additional measures subject to certain specific requirements, but it is also subject to the qualification that states’ health measures must be “in accordance with their ... obligations under international law.” Article 57(1) also explicitly states that the IHR’s provisions “shall not affect the rights or obligations of any State Party deriving from other international agreements.”

While these provisions aim to prevent conflicts between states’ legal obligations, they could increase the potential for fragmentation and uncertainty in this context. Nor do provisions in other instruments necessarily settle questions of priority — for example, Article 311 of UNCLOS provides that it does not alter rights and obligations in other agreements that are “compatible with this Convention” and does not affect states parties’ enjoyment of rights and performance of obligations under the convention, but the implications of this are unclear given that UNCLOS itself is silent on key questions such as access to maritime ports and speaks only indirectly to control over internal waters.

If there is a disagreement, it is also unclear under which legal instrument it should be resolved. Under the IHR, a state affected by “additional health measures” imposed by another state party can request consultations with

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161 FAL Convention 2016 Annex, supra note 74, s 6.10.
162 IHR, supra note 12, art 28(1).
163 Ibid, art 28(2).
164 Ibid.
165 FAL Convention 2016 Annex, supra note 74, s 6.10.
166 Ibid.
167 IHR, supra note 12, art 43(1).
it; a dispute between states parties pertaining to interpretation or application should be settled by negotiation or other peaceful means and, if unresolved, can be referred to the WHO director-general or go to arbitration, while disputes between states parties and the WHO would go before the World Health Assembly. For the settlement of disputes concerning the interpretation or application of UNCLOS, parties to the convention have a choice between the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice, or an arbitral tribunal in accordance with Annex VII. It has been noted that the way a case is formulated can be critical to “whether a court or tribunal constituted under the Convention has jurisdiction." The FAL Convention contains no provisions on dispute resolution.

Dispute settlement and enforcement could be a factor in the historically poor compliance with international law mechanisms such as the IHR. This is not a new issue; during the Ebola outbreak in West Africa, and the H1N1 pandemic, countries ignored the IHR and advice of the WHO and imposed travel restrictions. During the COVID-19 pandemic, states have again ignored the IHR and the WHO, imposing travel restrictions on international travel by air, by sea, and by land, despite a multitude of concerns raised by the legal and scholarly communities. One likely reason for this is the lack

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170 IHR, supra note 12, art 43(7).
171 IHR, supra note 12, art 56. On the possibility of International Court of Justice jurisdiction over violations of IHR obligations, see Mark Videler, “ICJ Jurisdiction over Obligations to Share Information with the WHO,” EJIL: Talk! (21 January 2021), online: <www.ejiltalk.org/icj-jurisdiction-over-obligations-to-share-information-with-who/>.
172 UNCLOS, supra note 51, art 287.
174 Article 33 of the Charter of the United Nations, 26 June 1945, 1 UNTS 15 (entered into force 24 October 1945) could apply, requiring parties to seek resolution by peaceful means, if the situation were sufficiently serious that continuance of the dispute were “likely to endanger the maintenance of international peace and security.”
176 UNWTO, supra note 6.
177 See generally Habibi et al, supra note 8, Benjamin Mason Meier, “Travel Restrictions Violate International Law” (2020) 367:6485 Science 1436 at 1436, argues, in relation to travel restrictions, that “necessity and benefits of this public health response are outweighed by its violation of international law.” Yair Daon, “Estimating COVID-19 Outbreak Risk through Air Travel” (2020) 27:5 J Travel Medicine 3, states it is often the case that airports that pose the greatest risk for the spread of communicable disease are those within a country. Chinazzi et al, supra note 8 at 3, considers international travel restrictions and
The minimal effect they have on the reduction of disease spread: “[E]ven in the case of 90% travel reductions, if transmissibility is not reduced, the epidemic in Mainland China is delayed for no more than 2 weeks.” Initially, introductions of new cases are reduced, but this tapers off and eventually is nullified. Eskild Petersen et al, “COVID-19 Travel Restrictions and the International Health Regulations: Call for an Open Debate on Easing of Travel Restrictions” (2020) 94 Intl J Infectious Diseases 88 at 88, highlights the adverse impacts of restrictions, stating that “[t]ravel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but have a significant economic and social impact.”

Burci, supra note 160 at 3, suggests that the WHO historically has preferred to rely on voluntary recommendations, undercutting the authority of the IHR. See also generally Steven Hoffman, “Making the International Health Regulations Matter: Promoting Compliance through Effective Dispute Resolution” in Simon Rushton & Jeremy Youde, eds, Routledge Handbook of Global Health Security (Abingdon, UK: Routledge, 2015) 239. See also Stephen Buranyi, “The WHO v Coronavirus: Why It Can’t Handle the Pandemic,” The Guardian (10 April 2020), online: <www.theguardian.com/news/2020/apr/10/world-health-organization-who-v-coronavirus-why-it-cant-handle-pandemic> (highlighting that generally, the WHO has little power with no ability to compel its members to act; it is less like an authority and “more like an underpaid sports coach” “who can only get their way by charming, grovelling, cajoling and occasionally pleading with players to do as they say”).

Robin Churchill, “The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use” (2017) 48 Ocean Development & Intl L 216 at 230–31. Note also that the International Tribunal for the Law of the Sea has found ways to promote compliance — for example, in cases where provisional measures are sought, even in the absence of specific enforcement provisions (Klein, Dispute Settlement, supra note 173 at 79, 81) and that special provisions for prompt release of detained vessels have allowed alleged non-compliance with relevant obligations to be dealt with efficiently (at 85ff).


We are grateful to an anonymous reviewer for raising the possibility of using port state control memoranda of understanding to address challenges in this context.
The COVID-19 pandemic, given its exceptional severity and global reach, has also tested the adequacy of the legal framework in other ways. As one expert has explained, “whilst the closure of ports and harbours is not exceptional, especially during severe weather or wars, the pandemic has seen the near simultaneous closure of ports and harbours at the same time meaning that in a number of instances cruise ships had nowhere to dock.”

A framework that allows individual states to close or restrict access to their ports, and to require a ship to proceed to another suitable point of entry if a port is not equipped to apply necessary health measures, may work under normal conditions. In a pandemic, however, each individual port might be justified in refusing access on public health grounds or because it lacks the adequate capacity to deal with an affected ship, but, collectively, the action of multiple ports doing so can create a serious problem, such as in the case of the MS Zaandam. Some port must eventually give access, if only on humanitarian grounds, taking into account obligations of humanitarian assistance to vessels or persons in distress at sea, once the situation becomes urgent — but which one? It appears to be only once the situation becomes sufficiently serious, perhaps once loss of life has already resulted, that the nearest port must offer refuge regardless of its capacity, which is not an ideal outcome. Furthermore, the disembarkation and repatriation of passengers and crew is then only possible through international cooperation. The overlapping jurisdiction and obligations of the flag state, port state, and states of nationality can also compound these difficulties. Although, in theory, it could be an advantage to have multiple states with responsibility for the welfare of passengers and crew, in practice, this can lead to uncertainty and inaction, as each might expect the others to take responsibility.

As Natalie Klein notes, “[t]here are no specific rules that explain which of the flag State or port State has primary responsibility for the human rights of individuals on board vessels in port.”

This collective action problem is exacerbated by widespread limitations on capacity, both at points of entry and in public health systems more generally. Even countries like Australia struggled to cope with the impact of large

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183 See notes 37–39 above.

184 Miron, “Port Denials and Restrictions,” supra note 135.


numbers of cases arriving in its ports;¹⁸⁷ those challenges would only be greater for smaller countries with more limited resources, like many small island states that are common cruise ship destinations. Japan struggled to provide an adequate level of care during the Diamond Princess outbreak.¹⁸⁸ If it had happened aboard a ship calling at, for example, the small Caribbean island of Tortola (a popular cruise destination¹⁸⁹), which has just two hospitals with a combined fifty-two beds¹⁹⁰ servicing the entirety of fifty islands comprising the British Virgin Islands, the result could have been catastrophic. Managing an affected vessel could also impose significant economic costs on a state that allows access to its port, given that the IHR limit the state’s ability to charge fees to recover the costs of quarantine, testing, or other necessary measures.¹⁹¹

Capacity is accounted for, to some extent, in the IHR. First, as previously noted, it imposes obligations to develop and maintain capacity, including at points of entry, but many states still lack the requisite capacities.¹⁹² Local capacity could be considered indirectly in the Article 43 obligation to use health measures that are no more restrictive than “reasonably available alternatives,” but, again, this would depend on the interpretation of this provision. These issues could then be raised when states report their additional measures to the WHO as part of the justification for measures taken. These provisions, however, do not adequately address the problems created by widespread limitations on capacity in a severe global pandemic.

There are also broader economic impacts to consider. The current international framework fails to account for the disparate bargaining power between cruise ship lines and states, and the resulting impacts on economies. The legal framework cannot protect against cruise lines forcing the hand of states, despite their legal authority to take action under international law to protect their citizens.¹⁹³ This is a concern particularly with the

¹⁸⁷ Ibid.
¹⁸⁸ Yamahata & Shibata, supra note 111 at 6.
¹⁹¹ IHR, supra note 12, arts 40–41. See also Klein, “International Law Perspectives,” supra note 10 at 288.
¹⁹² Renda & Castro, supra note 92 at 275.
¹⁹³ In theory, at least, this might be mitigated to some extent by flag states’ exercise of jurisdiction to regulate ships’ operation, but it is not clear how far those obligations extend.
cruise industry and small island states in the Caribbean or South Pacific. Cruise companies operate on a budget greater than the gross domestic product (GDP) of many of these small states. Consider, for example, the Carnival Corporation. In 2019, its total revenue was US $20.8 billion.194 This is greater than the 2019 GDP of at least twelve states in the Caribbean.195 Where states’ economic well-being relies on tourism, including the docking of cruise ships, and cruise companies threaten to remove ports of call from their itineraries, those companies effectively are engaging in economic hostage taking, forcing affected states to allow disembarkation regardless of whether they may be able to justify limits under international law. The Carnival Cruise Line has done just this: in March 2020, it threatened to cease doing business with Jamaica, the Cayman Islands, and Turks and Caicos, where it controls half the market share and where tourism is a substantial source of income and economic viability.196 Similar accusations predate the COVID-19 pandemic,197 but they have been brought under a brighter light when states attempting to implement controls to protect the health of their citizens have been prevented through economic coercion from applying measures that may be permitted under international law, with no recourse for their own protection or the protection of their citizens. Conversely, one might question whether a larger, more economically powerful state with greater capacity would be justified in denying port access in order to protect its local population, despite having reaped the economic benefits of cruise ship traffic and related tourism for many years.

Finally, as is typical of public international law, the rights and obligations in the sources considered in this article are addressed to states and do not

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For example, individual cruise ship lines made decisions about who to allow on board, some of which would not have passed basic standards of scientific justification.\textsuperscript{199} The main cruise ship industry association, Cruising Lines International Association, made decisions about when to suspend or resume operations.\textsuperscript{200} Although there has been some cooperation between industry associations and international organizations regarding travel during the COVID-19 pandemic,\textsuperscript{201} most of these decisions are beyond the direct reach of international norms or enforcement mechanisms. Mechanisms that may be available in domestic law are likely to be difficult for individuals to use, given the multiple jurisdictions that are often involved, and would not provide meaningful remedies to affected states.

**Conclusion**

The COVID-19 pandemic has served to illustrate the inadequacy of the current international framework purporting to regulate and control the spread of communicable disease, specifically insofar as that framework pertains to maritime traffic. This framework is fragmented, internally inconsistent, and lacks adequate enforcement mechanisms. As a result, some states arguably have overstepped in their actions to control the spread of the pandemic, as seen with the MS Zaandam, and others have failed to implement adequate controls, resulting in the spread of disease and unnecessary deaths, as seen with the Ruby Princess. Neither of these approaches is

\textsuperscript{198} The possibility that relevant principles of customary international law could be relied on to pursue remedies against non-state actors in domestic courts might help to address this gap in some cases. See *Nevsun Resources Ltd v Araya*, 2020 SCC 5.


acceptable. Even with better compliance, the existing framework does not appear adequate to address the challenges of a widespread emergency. A mechanism to clarify and coordinate the overlapping responsibilities in this context may be needed. The ultimate victims of these shortcomings are the persons who utilize these vessels as well as the economies and residents of the countries in which they dock. The need for a robust, consistent, and enforceable international framework is needed now more than ever, as international travel, including cruising, begins to resume.