

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

JUSTIN OKERMAN AND BARBARA VON TIGERSTROM

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-

Justin Okerman, Juris Doctor (2021), University of Saskatchewan College of Law, Canada (justin.okerman@gmail.com).

Barbara von Tigerstrom, Professor, University of Saskatchewan College of Law, Canada (barbara.vontigerstrom@usask.ca).

The authors gratefully acknowledge the valuable comments received from anonymous reviewers and from Robin Hansen (University of Saskatchewan College of Law). Funding support for this research was provided by the Canadian Institutes of Health Research (Canadian 2019 Novel Coronavirus (2019-nCoV) Rapid Research, Grant no. NFRF-2019-00013).

significant global economic impact; therefore, appropriate, enforceable international regulation is necessary to ensure the adequate control of future communicable disease outbreaks.

tant; par conséquent, une réglementation internationale appropriée et susceptible d'être appliquée est nécessaire pour garantir un contrôle adéquat de futures flambées de maladies transmissibles.

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

¹ World Health Organization (WHO), *Novel Coronavirus (2019-nCoV) Situation Report — 1* (21 January 2020) at 1, online: <www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4>.

² *Ibid.*

³ *Ibid.*

⁴ Chad O'Carroll & Nils Weisensee, "Tourism to North Korea Suspended amid China Coronavirus Concerns: Operator," *NK News* (21 January 2020), online: <www.nknews.org/2020/01/tourism-suspended-to-north-korea-amid-china-coronavirus-concerns-ypt/?t=1579741235759>.

⁵ Samantha Kiernan & Madeleine DeVita, "Travel Restrictions on China Due to COVID-19," *Think Global Health* (6 April 2020), online: <www.thinkglobalhealth.org/article/travel-restrictions-china-due-covid-19>; WHO, "Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)" (30 January 2020), online: <[www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](http://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))>.

border crossings.⁶ 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.⁷ Much literature has been published on international travel restrictions, particularly in regard to flights.⁸ 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.”⁹

It has been suggested that there is a “strong international law frame in place” to regulate and protect public health on ships.¹⁰ However, though there are numerous, diverse relevant sources of law, including international conventions and customary law,¹¹ 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.¹² 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.

⁶ United Nations World Tourism Organization (UNWTO), “100% of Global Destinations Now Have COVID-19 Travel Restrictions, UNWTO Reports” (20 April 2020), online: <www.unwto.org/news/covid-19-travel-restrictions>.

⁷ *Ibid.*

⁸ See generally Matteo Chinazzi et al., “Effect of Travel Restrictions on the Spread of COVID-19 Outbreak” (2020) 368:6489 *Science* 395; Roojin Habibi et al., “Do Not Violate the IHR during the COVID-19 Outbreak” (2020) 395:10225 *Lancet* 664.

⁹ Sofia Galani, “Persons at Sea, International Law and Covid-19,” *EJIL Talk!* (24 November 2020), online: <www.ejiltalk.org/persons-at-sea-international-law-and-covid-19/>.

¹⁰ Natalie Klein, “International Law Perspectives on Cruise Ships and COVID-19” (2020) 11 *J Intl Humanitarian Leg Studies* 282 at 283 [Klein, “International Law Perspectives”].

¹¹ 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.

¹² *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.¹³ When the *Diamond Princess* reached the port of Yokohama, it was refused disembarkation by the Japanese government, and quarantine was mandated.¹⁴

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.¹⁵ 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.¹⁶ In the weeks following this incident, twenty-eight passengers of the *Ruby Princess* died of COVID-19.¹⁷ 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*.¹⁸ 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.¹⁹ The ship was initially denied passage through the Panama Canal, due to "sanitary reasons," while COVID-19 ran rampant

¹³ Hanako Jimi & Gaku Hashimoto, "Challenges of COVID-19 Outbreak on the Cruise Ship *Diamond Princess* Docked at Yokohama, Japan: A Real-world Story" (2020) 2:2 J-Stage Global Health & Medicine 63 at 63.

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.

¹⁹ Morgan Hines, "Exclusive: *Zaandam* Cruise Passengers' Suit Calls on Holland America, Carnival Corp. to Reform," *USA Today* (24 June 2020), online: <www.usatoday.com/story/travel/cruises/2020/06/24/holland-america-passengers-ms-zaandam-sue-bring-reform/3251851001/>.

through the ship, ultimately resulting in the deaths of three passengers.²⁰ Forty-eight hours later, passage through the canal was granted,²¹ and, three days later, passengers were finally permitted to begin disembarkation in Florida, twenty-five days after the ship's departure from Buenos Aires²² and after it was resupplied at sea by another of Holland America's ships.²³

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,²⁴ 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.²⁵ 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;²⁶ preventing the embarkation²⁷ and disembarkation of crew²⁸ and passengers;²⁹ preventing

²⁰ Elida Moreno, "Help Us': After Deaths on Coronavirus Hit Ship, Guests Clamor to Leave," *Reuters* (27 March 2020), online: <www.reuters.com/article/us-health-coronavirus-cruise-zaandam/help-us-after-deaths-on-coronavirus-hit-ship-guests-clamor-to-leave-idUSKBN21E37C>.

²¹ Michael Smith et al, "The Pariah Ship," *Bloomberg Businessweek* (11 June 2020), online: <www.bloomberg.com/features/2020-zaandam-pariah-ship/>.

²² *Ibid.*

²³ Hines, *supra* note 19.

²⁴ Rachel Humphreys et al, "Stranded at Sea: The Crew Members Trapped on Cruise Ships," *The Guardian* (18 June 2020), online: <www.theguardian.com/news/audio/2020/jun/18/stranded-at-sea-crew-members-trapped-on-cruise-ships>.

²⁵ Anish Arvind Hebbbar & Nitin Mukesh, "COVID-19 and Seafarers' Rights to Shore Leave, Repatriation and Medical Assistance: A Pilot Study" (2020) 71 *Intl Maritime Health* 217.

²⁶ *Wilhelmsen* reports that Vietnam requires that all vessels be inspected at anchorage before berthing is permitted, regardless of any prior ports of call. See Ships Agency, "COVID-19 Global Port Restrictions Map," *Wilhelmsen*, online: <<https://wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map/>>.

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;³⁰ imposing a mandatory quarantine;³¹ and flatly refusing ships permission to enter port.³² The impacts of these imposed restrictions have been significant.³³

INTERNATIONAL LAW RELEVANT TO MARITIME TRAFFIC AND PANDEMICS

“International law and self-regulation largely govern the cruise industry.”³⁴ 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.³⁵ The right of states to regulate or restrict entry into internal waters and ports is considered to be an aspect of territorial sovereignty.³⁶ A limited right of entry or access to places of refuge for a vessel in distress has long been recognized,³⁷ 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/news101/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.

³³ International Chamber of Shipping, *Coronavirus (COVID-19) Guidance for Ship Operators for the Protection of the Health of Seafarers* (2020) at 6.

³⁴ Sarah J Tomlinson, “Smooth Sailing: Navigating the Sea of Law Applicable to the Cruise Line Industry” (2020) 14:1 Jeffrey S Moorad Sports LJ 127 at 134.

³⁵ AV Lowe, “The Right of Entry into Maritime Ports in International Law” (1977) 14 San Diego L Rev 597; Louise de La Fayette, “Access to Ports in International Law” (1996) 11:1 IntlJ Marine & Coastal L 1; Anthony P Morrison, *Places of Refuge for Ships in Distress* (Leiden: Martinus Nijhoff, 2012).

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, [1986] ICJ Rep 14 at paras 212–13.

³⁷ Klein, “International Law Perspectives,” *supra* note 10 at 284; Karen Scott, “NZ Ban on Foreign Vessels within International Law Bounds, But Balance Essential” (2020), online: *Australian National University (ANU) College of Law* <<https://law.anu.edu.au/research/essay/covid-19-and-international-law/nz-ban-foreign-vessels-within-international-law-bounds>>; David Letts, “Can the Law of the Sea Remain Afloat during COVID-19?” (2020),

life,³⁸ although the scope and limits of this right are contentious.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

online: ANU College of Law <<https://law.anu.edu.au/research/essay/covid-19-and-international-law/can-law-sea-remain-afloat-during-covid-19>>.

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.

⁴⁰ *Corfu Channel Case (United Kingdom v Albania)*, Merits, [1949] ICJ Rep 4 at 22; *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea)*, Judgment, [1999] ITLOS Rep 10 at para 155. For discussion of this norm or principle and the history of its treatment in other cases, see Matthew Zagor, “Elementary Considerations of Humanity” in Karinne Bannelier, Theodore Christakis & Sarah Heathcote, eds, *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (London: Routledge, 2011) 264 (in relation to the law of the sea, specifically, at 287); Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford: Oxford University Press, 2018) at 162–66.

⁴¹ Papanicolopulu, *supra* note 40 at 187–88; Sophie Cacciaguidi-Fahy, “The Law of the Sea and Human Rights” (2007) 19:1 Sri Lanka J Intl L 85 at 88, 90. See also Bernard H Oxman, “Human Rights and the United Nations Convention on the Law of the Sea” (1998) 36 Colum J Transnatl L 399 at 415, describing a “universal duty to rescue at sea” as existing “since time immemorial” and finding “new support in modern international law in the increasing acceptance of the humanitarian norms in state practice and conventional law.” On the duty to rescue and the obligation to respect and ensure the right to life, see e.g. Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol Concerning Communication No 3042/2017*, UN Doc CCPR/C/130/D/3042/2017 (2021).

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 J 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 Ghráinne, “COVID-19, Border Closures, and International Law” (4 May 2020), online: <www.dokumenty-iir.cz/Publikace/Reflections/reflection_Br%C3%ADN%C3%AD_04_2020_covid-19_DEF.pdf>.

⁴⁵ International Maritime Organization (IMO), *Circular Letter No 4203: Novel Coronavirus (2019-nCoV)* (31 January 2020). See Oladunni Ladeinde-Babalola, *Coronavirus onboard Cruise Ships* (Lagos: University of Lagos Faculty of Law, 2020) at 3, online: <<https://dx.doi.org/10.2139/ssrn.3587533>>.

⁴⁶ IMO, “Coronavirus Disease (COVID-19) Pandemic,” *Media Centre*, online: <www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx>.

⁴⁷ IMO, *Coronavirus (COVID-19): Guidance on the Gradual and Safe Resumption of Operations of Cruise Ships in the European Union in Relation to the COVID-19 Pandemic*, Circular Letter No 4204/Add. 26 (London: IMO, 2020).

⁴⁸ IMO, *Coronavirus (COVID 19): Personal Protective Equipment*, Circular Letter No 4204/Add. 15 (London: IMO, 2020).

⁴⁹ IMO, *Coronavirus (COVID-19): Singapore Crew Change Guidebook*, Circular Letter No 4204/Add.22 (London: IMO, 2020).

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)*.⁵¹ 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.⁵² 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.”⁵³ 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.⁵⁴ Passage is defined as including stopping and anchoring, where such action is “rendered necessary by *force majeure*.”⁵⁵ 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.⁵⁶ 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,

⁵¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*]; *International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 277 (entered into force 25 May 1980) [*SOLAS Convention*]; *Convention on Facilitation of International Maritime Traffic*, 9 April 1965, 591 UNTS 265 (entered into force 5 March 1967) [*FAL Convention*]; *Convention and Statute on the International Regime of Maritime Ports*, 9 December 1923, 58 LNTS 285 (entered into force 26 July 1926) [*Geneva Convention and Statute*]. Regional instruments may also be relevant, but this article will focus on international instruments of general application.

⁵² Dorota Pyć, “The Role of the Law of the Sea in Marine Spatial Planning” in Jackek Zaucha & Kira Gee, eds, *Maritime Spatial Planning* (Cham, Switzerland: Palgrave Macmillan, 2019) 375 at 376.

⁵³ United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *United Nations Convention on the Law of the Sea: Overview and Full Text (2020)*; online: <www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>.

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).

⁵⁵ *Ibid*, art 18.

⁵⁶ *Ibid*, art 98.

territorial seas, internal waters, or archipelagic waters.⁵⁷ Ergo, even if a ship requires assistance, say due to the outbreak of communicable disease, there is no duty imposed on states under *UNCLOS* to render assistance unless that ship is located on the high seas.⁵⁸ This article echoes a general theme of *UNCLOS*—namely, that coastal states maintain sovereignty and jurisdiction to regulate and enforce their laws in their own waters.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.”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.”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.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 states⁶³ are party to *UNCLOS*, this number is twenty-five states short of the 193 current United Nations (UN) member states.⁶⁴ One notable state that is not party to *UNCLOS* is

⁵⁷ *Ibid*, art 86.

⁵⁸ Note that the *International Convention on Maritime Search and Rescue*, 27 April 1979, 1405 UNTS 118 (entered into force 22 June 1985) [*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 *UNCLOS* provision. See note 41 above and accompanying text.

⁵⁹ Ladeinde-Babalola, *supra* note 45 at 1.

⁶⁰ *UNCLOS*, *supra* note 51, art 94(1).

⁶¹ *Ibid*, art 94(3)(b).

⁶² Klein, “International Law Perspectives,” *supra* note 10 at 292; Papanicolopulu, *supra* note 40 at 132, 150; Galani, *supra* note 9.

⁶³ United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements* (2020), online: <www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea>.

⁶⁴ United Nations General Assembly, *Member States* (2020), online: <www.un.org/about-us/member-states>.

the United States, despite the United States playing a significant role in the treaty's development⁶⁵ and, on some occasions, attempting to rely on certain provisions contained within it.⁶⁶ To the extent that the substantive content of *UNCLOS* is also part of customary international law,⁶⁷ 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*.⁶⁸

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*.⁶⁹ 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 life⁷⁰ and where the situation “could give rise to loss of the vessel or an environmental or navigational hazard.”⁷¹ 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.⁷² 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.⁷³

⁶⁵ Tomlinson, *supra* note 34 at 137–38.

⁶⁶ James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 30.

⁶⁷ On which parts of *UNCLOS* are considered to be part of customary international law, see generally J Ashley Roach, “Today's Customary International Law of the Sea” (2014) 45 *Ocean Dev & Intl L* 239. The United States and several other coastal states also remain party to the 1958 *Geneva Conventions* on the law of the sea, which contain some of the same provisions. See Roach, *ibid* at 252, n 4. *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

⁶⁸ Papanicolopulu, *supra* note 40 at 96, 131.

⁶⁹ IMO, *Guidelines on Places of Refuge for Ships in Need of Assistance*, Resolution A.949 (23) (5 December 2003) [*IMO Guidelines*].

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 passengers⁷⁶ 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,

⁷⁴ IMO, *Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic 1965*, Resolution FAL.12(40) (8 April 2016), s 6.1 (entered into force 1 January 2018) [*FAL Convention 2016 Annex*].

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 138.

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.⁸³ 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.⁸⁴ 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."⁸⁵ 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.⁸⁶

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."⁸⁷ 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.⁸⁸ All WHO member states are parties, subject to reservations or rejection by any particular state.⁸⁹

Under the *IHR*, states are required to develop and maintain certain core public health capacities.⁹⁰ These include specific capacities for points of entry, including ports.⁹¹ The COVID-19 pandemic demonstrates the importance of maintaining such capacities, but compliance with core capacity

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.

⁹⁰ *Ibid*, arts 5, 13, 19, Annex 1.

⁹¹ *Ibid*, arts 19, 20, Annex 1B.

obligations has historically been poor.⁹² Other *IHR* provisions deal with health measures that can be applied to travellers,⁹³ the treatment of travellers,⁹⁴ and health documents (for example, vaccination certificates, maritime declarations of health, and ship sanitation certificates).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.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.⁹⁷ As will be discussed further below, “additional measures” (not authorized by the *IHR*’s provisions or recommended by the WHO) may be taken by states if certain requirements are met under Article 43 of the *IHR*.

The *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.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.”⁹⁹ Ships in transit coming from an area unaffected by a disease shall not be prohibited from taking on fuel, food, water, or supplies.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 *IHR* and follow any

⁹² Andrea Renda & Rosa Castro, “Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic” (2020) 11:2 *European J Risk Regulation* 273 at 275; David P Fidler, “To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence” (2020) *Chinese J Intl L* at 5.

⁹³ *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).

⁹⁴ *Ibid*, art 32.

⁹⁵ *Ibid*, arts 35–39.

⁹⁶ *Ibid*, art 15.

⁹⁷ See generally Habibi et al, *supra* note 8; Barbara von Tigerstrom & Kumanan Wilson, “COVID-19 Travel Restrictions and the International Health Regulations (2005)” (2020) 5:5 *British Medical Journal Global Health* e002629.

⁹⁸ *IHR*, *supra* note 12, art 23.

⁹⁹ *Ibid*, art 25.

¹⁰⁰ *Ibid*, art 25(a).

available WHO advice.¹⁰¹ After the *Diamond Princess* outbreak on 7 February 2020,¹⁰² the WHO released a document entitled *Operational Considerations for Managing COVID-19 Cases and Outbreaks on Board Ships*.¹⁰³ 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 2016.¹⁰⁴ 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.¹⁰⁵ It is important to note that Article 27, like section 6.10 of the *FAL Convention*,¹⁰⁶ stipulates that “[a]ny such conveyance shall be permitted to take on ... fuel, water, food and supplies.”¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹ This recommendation tracks well with established science, which has found the removal of suspected cases can substantially reduce disease spread.¹¹⁰ 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.¹¹¹ It is

¹⁰¹ *Ibid*, art 27(1).

¹⁰² Leah F Moriarty et al, “Public Health Responses to COVID-19 Outbreaks on Cruise Ships: Worldwide, February–March 2020” (2020) 69:12 *Morbidity & Mortality Weekly Report* 347 at 347.

¹⁰³ WHO, *Operational Considerations for Managing COVID-19 Cases and Outbreaks on Board Ships*, Doc WHO/2019-nCoV/Ships/2020.2 (2020).

¹⁰⁴ WHO, *Handbook for Management of Public Health Events on Board Ships*, Doc WA 670 (2020) [WHO, *Handbook*].

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).

¹⁰⁸ WHO, *Handbook*, *supra* note 104 at 6.

¹⁰⁹ *Ibid* at 5.

¹¹⁰ Ladeinda-Babalola, *supra* note 45 at 5.

¹¹¹ *Ibid* at 3; Smriti Mallapaty, “What the Cruise-Ship Outbreaks Reveal about COVID-19” (2020) 580 *Nature* 18 at 18; Yoshihiro Yamahata & Ayako Shibata, “Preparation for

important to note that the WHO document does not differentiate between passengers and crew, suggesting that roles are irrelevant when isolation, quarantine, or contact tracing is required.

Regardless of whether there is a suspected or confirmed case of disease on board a ship, the concept of *free pratique* applies. According to the *IHR*, *free pratique* is the permission granted to enter a port and take actions such as embarkation, disembarkation, or the loading or unloading of cargo or stores.¹¹² Generally, under the *IHR*, vessels cannot be refused calling at any port of entry,¹¹³ or *free pratique*,¹¹⁴ for public health reasons. This basic right may be limited by either international agreements or by measures permitted under Article 43, although in situations of distress or imminent loss of life, at least, customary international law would further constrain states' right to exclude vessels.¹¹⁵ Further, *free pratique* may be granted subject to inspection and appropriate control measures due to infection or contamination found as a result of that inspection, but *free pratique* may not be flatly refused without justification.¹¹⁶ If a port lacks the capacity to apply necessary health measures, the ship may be required to proceed to the nearest suitable point of entry, unless an operational problem of the vessel would make this unsafe.¹¹⁷

As mentioned, the relevant parts of Articles 25 and 28 are subject to Article 43. The latter article allows states to implement additional health measures that achieve the same or a greater level of protection as the WHO's recommendations or are otherwise prohibited under specific *IHR* articles. These additional measures, however, must be taken in accordance with states' obligations under international law and be otherwise consistent with the *IHR*;¹¹⁸ the former would include, importantly, obligations under relevant human rights treaties,¹¹⁹ in addition to the obligation within the *IHR* themselves to treat travellers in a way that respects their human rights and

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).

¹¹⁹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

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.”¹²⁰ 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.¹²¹

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.¹²² These three requirements must also be met for additional measures taken under Article 27(1).¹²³ 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.¹²⁴

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,¹²⁵ and several other states,¹²⁶ have imposed broad restrictions on access to their ports or

¹²⁰ *IHR*, *supra* note 12, art 32.

¹²¹ *Ibid.*

¹²² *Ibid.*, art 43(2).

¹²³ *Ibid.*

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

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

Pacific Small Island Developing States” (2020) 17 *Intl J Environmental Research & Public Health* 5409.

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.

¹²⁸ Klein, “International Law Perspectives,” *supra* note 10; Scott, *supra* note 37. See notes 37–39 above and accompanying text.

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.

¹³⁴ Mallapaty, *supra* note 111 at 18. On the effectiveness of travel restrictions in controlling the spread of COVID-19 generally, see J Burns et al, “Travel-related Control Measures to Contain the COVID-19 Pandemic: A Rapid Review” (2020) 9 *Cochrane Database Systematic Reviews*, art no CD013717, online: <<https://doi.org/10.1002/14651858.CD013717>>.

¹³⁵ Alina Miron, “Port Denials and Restrictions in Times of Pandemic: Did International Law Lose Its North Star?” *EJIL: Talk!* (22 April 2020), online: <www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/> [Miron, “Port Denials and Restrictions”].

pursuant to their sovereign rights over their territory.¹³⁶ 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-19.¹³⁷ According to the *FAL Convention*, states must permit disembarkation of sick or injured crew or passengers for medical treatment,¹³⁸ yet crew members who have tested positive for COVID-19 have been unable to disembark, and several have died.¹³⁹ 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 others¹⁴⁰ — and the customary law duties of humanitarian assistance, at least in the most serious cases.¹⁴¹ 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

¹³⁶ Alina Miron, "Port Denials: What Are States' International Obligations?" *Maritime Executive* (12 April 2020), online: <www.maritime-executive.com/editorials/port-denials-what-are-states-international-obligations>.

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.

¹³⁹ Patrick Greenfield & Erin McCormick, "Cruise Companies Accused of Refusing to Let Stranded Crew Disembark Due to Cost," *The Guardian* (5 May 2020), online: <www.theguardian.com/environment/2020/may/05/cruise-companies-accused-of-refusing-to-let-stranded-crew-disembark-due-to-cost-coronavirus>.

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.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.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,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.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,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.¹⁴⁷ The procedures followed by the Japanese government in response to the *Diamond Princess* were not only in accordance with permitted procedures,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).¹⁴⁹

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

¹⁴² *IHR*, *supra* note 12, art 32.

¹⁴³ Guofu Liu, “COVID-19 and the Human Rights of Nationals Abroad” (2020) 114 *AJIL* Unbound 317 at 319–20; Frédéric Mégret, “Homeward Bound? Global Mobility and the Role of the State of Nationality during the Pandemic” (2020) 114 *AJIL* Unbound 322 at 324.

¹⁴⁴ Moriarty, *supra* note 102 at 347.

¹⁴⁵ Chris Baraniuk, “What the *Diamond Princess* Taught the World about Covid-19” (2020) 369 *British Medical J* 1. See also Eilif Dahl, “Coronavirus (Covid-19) Outbreak on the Cruise Ship *Diamond Princess*” (2020) *Intl Maritime Health* 5 at 7.

¹⁴⁶ *IHR*, *supra* note 12, art 43(3).

¹⁴⁷ WHO, *Handbook*, *supra* note 104 at 2.

¹⁴⁸ Yamahata & Shibata, *supra* note 111 at 2.

¹⁴⁹ Centers for Disease Control and Prevention, *History of Quarantine* (20 July 2020), online: <www.cdc.gov/quarantine/historyquarantine.html#:~:text=The%20Middle%20Ages%20practice%20of&text=Ships%20arriving%20in%20Venice%20from,giorni%20which%20mean%2040%20days>.

lived in around the clock,¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶ 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

¹⁵⁰ Yamahata & Shibata, *supra* note 111 at 4; Toyooki Sawano et al, “Limiting Spread of COVID-19 from Cruise Ships: Lessons to Be Learnt from Japan” (2020) 113:5 *QJM: Int J Medicine* 309 at 309–10.

¹⁵¹ Varvara A Mouchtouri et al, “Health Measures to Travellers and Cruise Ships in Response to COVID-19” (2020) 27:3 *J Travel Medicine* 1.

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 31.¹⁵⁷ 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 31.¹⁵⁸ However, it is questionable whether the current international framework justifies flatly prohibiting the *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.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 *IHR*.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 *FAL Convention* prohibits authorities from

¹⁵⁷ *IHR*, *supra* note 12.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, art 43(3), (5). See note 130 above.

¹⁶⁰ Gian Luca Burci, “The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?” *EJIL: Talk!* (27 February 2020) at 3, online: <www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>; Ria Vaidya et al., “Travel Restrictions and Infectious Disease Outbreaks” (2020) 27:3 *J Travel Medicine* 7; Kumanan Wilson, “Populism and Pandemics: The IHR Was Meant to Address Outbreaks Like COVID-19, but Nations Have Ignored It,” *CBC News* (18 March 2020), online: <www.cbc.ca/news/opinion/opinion-international-health-regulations-who-covid-1.5500166>.

preventing uninfected ships from discharging or loading cargo or supplies except in “an emergency constituting a grave danger to public health.”¹⁶¹ Under the *IHR*, vessels cannot be barred from calling at any port of entry¹⁶² or *free pratique*¹⁶³ for public health reasons unless an additional health measure can be justified under Article 43.¹⁶⁴ 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.¹⁶⁵ 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?¹⁶⁶ 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.”¹⁶⁷ 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,¹⁶⁸ 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.¹⁶⁹

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

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).

¹⁶⁸ See Barbara von Tigerstrom, “The Revised International Health Regulations and Restraint of National Health Measures” (2005) 13 Health LJ 35 at 53, 55–56.

¹⁶⁹ Donald R Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2016) at 55, 57; Morrison, *supra* note 35 at 55, 61–62; de La Fayette, *supra* note 35 at 3–4; Letts, *supra* note 37.

it,¹⁷⁰ 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.¹⁷¹ 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.¹⁷² 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.”¹⁷³ The *FAL Convention* contains no provisions on dispute resolution.¹⁷⁴

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.¹⁷⁵ 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,¹⁷⁶ despite a multitude of concerns raised by the legal and scholarly communities.¹⁷⁷ One likely reason for this is the lack

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.

¹⁷³ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2003) [Klein, *Dispute Settlement*] at 364, citing Alan E Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46 *ICLQ* 37 at 44–45.

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.”

¹⁷⁵ Tejpar & Hoffman, *supra* note 133; Lauren Tonti, “The International Health Regulations: The Past and the Present, but What Future?” (2020) *Harvard Intl LJ*, online: <<https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/>>.

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

of an enforcement mechanism in many international legal instruments. There is well-established literature on the lack of effective enforcement or dispute resolution in the *IHR*.¹⁷⁸ *UNCLOS* lacks provisions on enforcement, and though parties have followed its dispute resolution process, there have been problems with non-compliance at least in relation to certain types of matters, and the absence of an enforcement mechanism sets it apart from some other dispute settlement fora, at least in theory, bearing in mind that those have not always been used or effective in practical terms.¹⁷⁹ In addition, of course, as a treaty, *UNCLOS* is not binding on non-party states, although most coastal states are parties, and others are bound by whatever aspects of *UNCLOS* are also part of customary international law (though not by its provisions on dispute settlement). A system of port state control memoranda of understanding helps to compensate for gaps in capacity and enforcement on issues such as shipping safety or maritime pollution,¹⁸⁰ and could perhaps provide a model for the coordination of public health restrictions on maritime traffic.¹⁸¹

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.”

¹⁷⁸ 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”).

¹⁷⁹ 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).

¹⁸⁰ See e.g. Joseph E Vorbach, “The Vital Role of Non-Flag State Actors in the Pursuit of Safer Shipping” (2001) 32 *Ocean Development & Intl L* 27.

¹⁸¹ 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.”¹⁸² 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,¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ 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.”¹⁸⁶

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

¹⁸² Donald Rothwell, “International Law and Cruise Ships: Sailing into Stormy Waters” (2020), online: *ANU College of Law* <<https://law.anu.edu.au/research/essay/covid-19-and-international-law/international-law-and-cruise-ships-sailing-stormy>>.

¹⁸³ See notes 37–39 above.

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

¹⁸⁵ Others have made similar points in this context. See Galani, *supra* note 9; Klein, “International Law Perspectives,” *supra* note 10 at 292; Jaemin Lee, “IHR 2005 in the Coronavirus Pandemic: A Need for a New Instrument to Overcome Fragmentation?” (12 June 2020), online: *AJIL Insights* <www.asil.org/insights/volume/24/issue/16/ihr-2005-coronavirus-pandemic-need-new-instrument-overcome-fragmentation>.

¹⁸⁶ Klein, “International Law Perspectives,” *supra* note 10 at 292.

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.

¹⁸⁹ See generally “Cruise to Tortola, British Virgin Islands” (2020), online: *Royal Caribbean* <www.royalcaribbean.com/cruise-to/tortola-british-virgin-islands>; “Tortola, British Virgin Islands” (2020), online: *Carnival* <<https://www.carnival.com/cruise-to/caribbean-cruises/tortola-cruises.asp>>; “Cruises to Tortola, British Virgin Islands,” *Celebrity Cruises* (2020), online: <www.celebritycruises.com/ca/ports/british-virgin-islands>. All three lines make several stops at this island.

¹⁹⁰ Pan American Health Organization, *Health in the Americas: Countries*, vol 2, Scientific and Technical Publication No 622 (2007) at 162.

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

in this context or whether flag states would have the power to effectively exercise their jurisdiction in this respect, and, during the pandemic, key decisions about continuing or suspending operations were made by industry actors. See [note 200](#) below.

¹⁹⁴ Carnival Corporation & PLC, *2019 Annual Report* (2019) at 2, online: <www.carnivalcorp.com/static-files/gba84dfd-b96a-486f-8617-34e49820077a>.

¹⁹⁵ World Bank, *GDP (current US\$): Caribbean Small States* (2020), online: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=S3&most_recent_value_desc=false>.

¹⁹⁶ Alleen Brown, "The Cruise Industry Pressured Caribbean Islands to Allow Tourists onto Their Shores Despite Coronavirus Concerns," *The Intercept* (14 March 2020), online: <<https://theintercept.com/2020/03/14/coronavirus-cruise-ships-caribbean/>>; Christopher Seju & Carl Gilchrist, "CRUISE CLASH: Late-Night Talks Appear to Falter As Carnival Threatens to Pull Vessels over Coronavirus Protocols," *The Gleaner* (3 March 2020), online: <<http://jamaica-gleaner.com/article/lead-stories/20200303/cruise-clash-late-night-talks-appear-falter-carnival-threatens-pull>>.

¹⁹⁷ James Ellsmoor, "Call for Caribbean Destinations to Unite against 'Predatory' Cruise Lines," *Forbes* (28 August 2019), online: <www.forbes.com/sites/jamesellsmoor/2019/08/28/call-for-caribbean-destinations-to-unite-against-predatory-cruise-lines/#18dc508341e0>.

directly bind the non-state actors that play important roles in this context.¹⁹⁸ 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.¹⁹⁹ The main cruise ship industry association, Cruising Lines International Association, made decisions about when to suspend or resume operations.²⁰⁰ Although there has been some cooperation between industry associations and international organizations regarding travel during the COVID-19 pandemic,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

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.

¹⁹⁹ Royal Caribbean banned all Chinese nationals from all its cruise ships in February. See Kenya Evelyn, "Coronavirus: Royal Caribbean Bans All Chinese Nationals from Its Cruise Ships," *The Guardian* (7 February 2020), online: <www.theguardian.com/world/2020/feb/07/coronavirus-royal-caribbean-cruise-bans-chinese-nationals#:~:text=The%20US%20cruise%20ship%20company,centre%20of%20the%20coronavirus%20outbreak>.

²⁰⁰ Cruise Lines International Association, *CLIA Announces Voluntary Suspension of Cruise Operations from U.S. Ports* (19 June 2020) online: <<https://cruising.org/en/news-and-research/press-room/2020/june/clia-announces-voluntary-suspension-of-cruise-operations-from-us-ports>>.

²⁰¹ The UNWTO and the WHO called for coordination and cooperation to ensure minimal interference with international trade and traffic. See WHO, *A Joint Statement on Tourism and COVID-19: UNWTO and WHO Call for Responsibility and Coordination* (27 February 2020), online: <www.who.int/news-room/detail/27-02-2020-a-joint-statement-on-tourism-and-covid-19-unwto-and-who-call-for-responsibility-and-coordination>. The Tourism Industry Association of Canada has also launched a recovery campaign for the post-pandemic tourism industry in Canada and is working with partner associations. See Tourism Industry Association of Canada, *COVID-19 Impact on Tourism* (2020), online: <https://tiac-aitc.ca/Impact_on_Tourism.html>.

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.