

PORT CLOSURES AND PERSONS AT SEA IN INTERNATIONAL LAW

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Abstract The systematic protection of persons at sea remains flawed. This problem has become even more acute during the Covid-19 pandemic when port closures have caused an unprecedented humanitarian crisis at sea. This article looks at the impact of port closures on the rights of persons at sea and considers how international law can protect those rights. While persons at sea are afforded significant rights protections in international law, the rights and duties of States often clash, with the result that persons at sea can find themselves in something of a legal vacuum. In order to address this problem, this article argues that the various rights and duties of States must be interpreted and applied in a way that fully recognises the rights of persons at sea.

Keywords: human rights at sea, ports, health regulations, law of the sea, labour standards, EU, public health, pandemic, Covid-19.

I. INTRODUCTION

The protection of human rights at sea has only relatively recently begun to attract attention. This has not been because human rights violations do not occur at sea but because they tend to take place out of sight.¹ As more and more cases involving violations of the human rights of seafarers, fishers, criminal suspects, migrants, and other persons at sea continue to emerge, it has become evident that the protection of persons at sea cannot continue to be overlooked.² Accordingly, the recognition and enforcement of human rights at sea has been gaining momentum in both scholarly debate and in practice.³ A significant step

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¹ International Transport Workers Federation, ‘Out of Sight, Out of Mind – Seafarers, Fishers & Human Rights’ (27 February 2010) <<https://issuu.com/sdm2007/docs/humanrights>>.

² *ibid*; D Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59 *ICLQ* 140; A Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014); S Galani, ‘Somali Piracy and the Human Rights of Seafarers’ (2017) 34 *NQHR* 71; S Trevisanut, ‘Is There a Right to be Rescued at Sea? A Constructive View’ (2014) 4 *Questions of International Law, Zoom-in 3–15*; ILO, ‘Fishers First – Good Practices to End Labour Exploitation at Sea’ (2016) 11–17 <www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_515365.pdf>.

³ I Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press 2018); S Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its

towards raising awareness of the need to protect persons at sea was taken by the UN Secretary-General when he noted the importance of the human dimension at sea and said that ‘people at sea, whether employed or migrating, in particular those individuals who are not under the effective jurisdiction of States capable of protecting their basic human rights, often find themselves in a position of vulnerability and require protection against threats to such rights’.⁴ In 2019, the United Nations Office on Drugs and Crime (UNODC) included, for the first time, bespoke guidance on the protection of human rights at sea in their manual for criminal justice practitioners,⁵ while the UK-based charity Human Rights at Sea has joined forces with academics and practitioners with a view to drafting a declaration on human rights at sea.⁶

Yet despite the increasing acknowledgement of the importance of human rights at sea, the systematic protection of those at sea continues to be flawed. It has been suggested that this is not because international law fails to offer such protection but rather because persons at sea are protected under different legal regimes, such as that of the law of the sea, human rights law or labour law, which often intersect in ways that weaken their effectiveness in providing protection.⁷ Building upon these findings, this article considers how the varying regimes might clash, resulting in persons at sea being in something of a legal vacuum. A particular example of this—and on which this article focuses—concerns the effect of the closure of ports upon those at sea, which has become a prevalent practice during the Covid-19 pandemic.⁸

Port closures have been one of the many extraordinary measures that States have adopted to contain the spread of Covid-19. These have been considered essential for the protection of public health on land, but they have caused an unprecedented humanitarian crisis at sea. Cruise ships with large numbers of passengers and crew on board, such as the *Diamond Princess*, were soon

Member States in the Protection of Human Rights in the Maritime Domain’ (2020) 35 *International Journal of Marine and Coastal Law* 325; S Haines, ‘Developing Human Rights at Sea’ (2021) 35 *Ocean Yearbook* 1; UN Report of the Secretary-General, ‘Oceans and the Law of the Sea’ (11 September 2019) UN Doc A/74/350, paras 19–30.

⁴ UN Report of the Secretary-General (n 3) para 21.

⁵ UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (2nd edn, United Nations 2019) 69–82 <www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf>.

⁶ D Hammond et al, ‘The Geneva Declaration on Human Rights at Sea’ (Human Rights at Sea 10 December 2019) <www.humanrightsatsea.org/2019/12/09/geneva-declaration-on-human-rights-at-sea-on-line-platform-launched-on-world-human-rights-day/>.

⁷ For the need of an inter-regime approach, see Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 209–45. See also N Klein, ‘International Law Perspectives on Cruise Ships and Covid-19’ (2020) 11 *Journal of International Humanitarian Legal Studies* 283; Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’ (n 3) 331–46; UNODC (n 5) 75.

⁸ ‘WHO Timeline – COVID-19’ (*WHO*, 27 April 2020) <www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>; WHO Director-General, ‘Opening Remarks’ (Media Briefing on COVID-19, 11 March 2020) <www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

identified as being potentially highly contagious, raising novel questions concerning where such vessels could dock and whether passengers with or without symptoms could disembark.⁹ Warships were quickly added to the list of coronavirus-hit vessels whose crews were pleading for local medical help, in some instances to no avail, as in the case of the US aircraft carrier, *Theodore Roosevelt*.¹⁰

As the Covid-19 crisis deepened, dozens of accounts emerged of seafarers and fishers being in effect abandoned, having to stay on board vessels kept at sea for far longer than their contracted periods of employment, with no access to medical care or basic personal protective equipment (PPE), sparking an intense debate on how to offer them protection without encroaching on the sovereign interests of States to protect public health.¹¹ Unsurprisingly, countries with a high infection rate, such as Italy, rushed to close their ports to boats carrying migrants or refugees raising questions about their fate.¹² Port restrictions have severely affected, inter alia, their human rights, including the right to life, the right to freedom from torture or cruel, inhuman or degrading treatment, the right to repatriation and the right to medical care and PPE.

In the light of this grim reality, the protection of persons at sea has become more pressing than ever. By looking at the experience of port restrictions during the pandemic and their impact on the rights of persons who, as a result, have been stranded at sea, this article seeks to explore how international law can best protect such rights. Port closures imposed at the expense of rights are another illustration of the frequent clash between the rights and duties of States under the various legal regimes applicable to persons at sea. In order to help mitigate this problem, this article will argue that the right of States to close their ports for public health reasons and their duty to protect persons at sea need to be balanced, and only port restrictions that give due consideration to the duty of States to protect persons at sea should be considered lawful. Section II of this

⁹ M Belam, B Quinn and A Rourke, 'Cruise Ship Accounts for More Than Half of Virus Cases outside China – As It Happened' *The Guardian* (20 February 2020) <www.theguardian.com/world/live/2020/feb/20/coronavirus-live-updates-diamond-princess-cruise-ship-japan-deaths-latest-news-china-infections>.

¹⁰ 'Coronavirus: US Navy Captain Pleads for Help over Outbreak' (*BBC*, 31 March 2020) <www.bbc.com/news/world-us-canada-52110298>.

¹¹ E McCormick and P Greenfield, 'Revealed: 100,000 Crew Never Made It off Cruise Ships Amid Coronavirus Crisis' *The Guardian* (30 April 2020) <www.theguardian.com/environment/2020/apr/30/no-end-in-sight-100000-crew-on-cruise-ships-stranded-at-sea-coronavirus>; 'COVID-19: Master Takes Resolute Stand to Assure Crew's Safety and Welfare' (*Human Rights at Sea*, 5 April 2020) <www.humanrightsatsea.org/2020/04/05/covid-19-master-takes-resolute-stand-to-assure-crews-safety-and-welfare/>.

¹² UN, 'COVID-19 and Human Rights: We Are All in This Together' (April 2020) 11 <www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf>; AM Pelliconi, 'Covid-19: Italy Is Not a "Place of Safety" Anymore. Is the Decision to Close Italian Ports Compliant with Human Rights Obligations?' (*EJIL:Talk!*, 23 April 2020) <www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/>.

article will consider the sovereign right of States to close their ports and the impact that port closures have had on the rights of persons at sea. Section III will evaluate the obligations of States to protect the rights most affected by port closures under the International Health Regulations 2005 (IHR 2005), the law of the sea, international human rights law (IHRL), international labour law and EU law. It will be seen that the various legal regimes afford significant protection to persons at sea which should not be outweighed by the sovereign right of States to close their ports. The effective protection of the rights of persons at sea requires the various rights and duties of States under international law to be interpreted and applied in a balanced way that fully recognises the rights of persons at sea.

II. PORT CLOSURES IN INTERNATIONAL LAW AND THEIR IMPACT ON THE RIGHTS OF PERSONS AT SEA

The rapid spread of Covid-19 worldwide and the hurried responses of States took many by surprise. Hundreds of people were at sea for employment, recreational or other purposes and, once States started closing their borders, they found themselves unable to return to their home countries or even to disembark in another. The UN reported that some 167 countries closed their borders in response to Covid-19.¹³ Border closures included port closures or other port restrictions, such as delayed port clearance, preventing crew or passengers from embarking or disembarking (including for purposes of shore leave and crew changes), preventing the discharging or loading of cargo or stores, or taking on fuel, water, food and supplies, or imposition of quarantine.¹⁴ Such measures have had a tremendous impact on those on board vessels and it is thus important to understand the nature of the right of States to close their ports before considering whether its assertion has been lawful when, as a result, thousands of people have been left stranded at sea.

Port States have a sovereign right to control access to their ports. This includes their right to grant or deny access to foreign vessels, as well as to impose entry requirements. Ports are internal waters and form part of a State's territory over which it exercises sovereignty under international law. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v the United States of America)* the International Court of Justice noted that 'the basic legal concept of State sovereignty in customary international law expressed in, inter alia, Article 2 paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State ... It

¹³ UN, 'COVID-19 and Human Rights' (n 12) 11.

¹⁴ International Chamber of Shipping, 'Coronavirus (COVID-19): Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 September 2020) 6 <[www.ics-shipping.org/docs/default-source/resources/coronavirus-\(covid-19\)-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers.pdf?sfvrsn=6](http://www.ics-shipping.org/docs/default-source/resources/coronavirus-(covid-19)-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers.pdf?sfvrsn=6)>.

is also by virtue of its sovereignty that the coastal State may regulate access to its ports'.¹⁵

Article 8 of the 1982 United Nations Convention on the Law of the Sea (LOSC)¹⁶ states that 'waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State' which as a result recognises the sovereignty of the port State over the waters of its ports. Article 25 of the LOSC confirms the right of a coastal State to regulate access to its internal waters, including its ports. The provisions of LOSC on the protection of the marine environment give further powers to port States by permitting them to regulate the entry of vessels into their ports, inspect whether vessels comply with port entry requirements and deny access to vessels which fail to comply.¹⁷

Over the years, port States have assumed a greater responsibility for the enforcement of maritime security standards by exercising port State jurisdiction and port State control.¹⁸ In practice, States have closed their ports in order to protect public health and safety or to prevent ships carrying passengers with contagious diseases from reaching their shores.¹⁹ The right of States to regulate entry into their ports for public health reasons is confirmed in the International Health Regulations 2005 (IHR 2005), which had been updated in response to the outbreak of the SARS epidemic.²⁰ The IHR 2005 deal with public health risks posed by 'conveyances', a term which includes ships and passengers.²¹ According to the IHR 2005, port States can employ a range of public health measures in order to safeguard public health, including collection of information regarding travellers, non-invasive examination of travellers and inspections of containers, cargos and baggage.²² If sources of infection are found on board a ship, the competent authorities can take measures to disinfect the ship and require passengers to isolate, quarantine or remain under public health observation before entering the country.²³

Nonetheless, port closures in response to Covid-19 have been drastic, and as has been said, have had a severe impact on persons at sea. Seafarers and fishers

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 212–13.

¹⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

¹⁷ *ibid* arts 211 and 218.
¹⁸ S Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47 *Oceans Development & International Law* 89.

¹⁹ L de la Fayette, 'Access to Ports in International Law' (1996) 11 *International Journal of Marine and Coastal Law* 6.

²⁰ WHO, *International Health Regulations* (2005) (3rd edn, WHO 2016) <www.who.int/publications/i/item/9789241580496>; GL Burci, 'The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations' (2020) 11 *Journal of International Humanitarian Legal Studies* 204, 206–11.

²¹ Art 1 IHR 2005 defines a traveller as 'a natural person undertaking an international voyage' and 'crew' as 'persons on board a conveyance who are not passengers'.

²² Art 23 IHR 2005.

²³ Arts 27 and 31 IHR 2005.

are arguably those most affected by port closures. Following the *Diamond Princess* incident, in which Japan prevented the disembarkation of approximately 4,700 passengers and crew because some of them had been infected by the Covid-19 virus, the global cruise ship industry was suspended, leaving thousands of crew members on board ships and unable to leave.²⁴ Crew changes stopped, causing unprecedented challenges as seafarers and fishers were either forced to stay on board after their contract had ended or were left without food or water and in poor hygiene conditions which fall short of Covid-19 hygiene and social distancing protocols.²⁵ As a result of these extraordinary circumstances, seafarers and fishers have been unable to cope with the resulting fatigue, which is a significant cause of maritime accidents.²⁶ The lack of prospect of returning home and/or the inability to provide for themselves and their families, have caused severe anxiety and in some instances have led to suicide.²⁷ Many seafarers have had no access to PPE and have been deprived of medical care, even in life-threatening situations. Although women represent only two per cent of the maritime workforce, it is worth noting that port restrictions have aggravated the challenges female seafarers already face at sea, including longer periods of isolation, sexual harassment, lack of sanitary products or parental leave for pregnant women, and have undermined efforts to improve gender equality in the maritime workforce.²⁸

Military personnel have also faced risks to their life and mental health once the virus started spreading on board warships. Medical care was provided to the US aircraft carrier, *USS Theodore Roosevelt*, only after the Captain's emotional plea was leaked to the press, by which time 600 crew members had been

²⁴ 'Coronavirus: Passengers Leave Diamond Princess Amid Criticism of Japan' (*BBC*, 20 February 2020) <www.bbc.co.uk/news/world-asia-51555420>; T Armus, "'Held Hostage": Cruise Employees Were Stuck on a Ship and Forced to Work without Pay, Lawsuit Says' *The Washington Post* (6 August 2020) <www.washingtonpost.com/nation/2020/08/06/cruise-ship-workers-covid-lawsuit/>.

²⁵ WHO, 'Operational Considerations for Managing COVID-19 Cases or Outbreaks on Board Ships: Interim Guidance' (25 March 2020) <www.who.int/publications/i/item/operational-considerations-for-managing-covid-19-cases-outbreak-on-board-ships>.

²⁶ AD Couper et al, *Voyages of Abuse: Seafarers, Human Rights and International Shipping* (Pluto Press 1999) 29–32; FAO, 'How Is Covid-19 Outbreak Impacting the Fisheries and Aquaculture Food Systems and What Can FAO Do' (21 April 2020) 9 <www.fao.org/fileadmin/user_upload/faoweb/FI/COVID19/COVID19_Information_Paper.pdf>.

²⁷ K Oanh Ha and J Levin, 'Nightmare at Sea Ends in Death for Some Cruise Ship Workers' *Financial Post* (12 May 2020) <<https://financialpost.com/transportation/nightmare-at-sea-ends-in-death-for-some-cruise-ship-workers>>; NJ Bennett et al, 'The COVID-19 Pandemic, Small-Scale Fisheries and Coastal Fishing Communities' (2020) 48 *Coastal Management* 338.

²⁸ UN Report of the Secretary-General (n 3) paras 22–24; B Wagner et al, *Recruitment and Retention of Seafarers and the Promotion of Opportunities for Women Seafarers* (ILO 2019); 'Women Transport Workers' Rights and COVID-19' (*ITF*, 20 May 2020) <www.itfseafarers.org/en/news/women-transport-workers-rights-and-covid-19>; 'Pregnant and Stuck on a Ship in the Middle of the Virus Pandemic' *The Japan Times* (9 July 2020) <www.japantimes.co.jp/news/2020/07/09/world/pregnant-cruise-ship-pandemic/>.

infected and one had died.²⁹ The response was faster on board the French warship, *Charles de Gaulle*, where more than 1,000 sailors were tested positive for the virus, one of whom was taken into intensive care. The French authorities were heavily criticised for their lack of preparedness, given that the virus had already affected large cruise ships around the world.³⁰ Isolation has been the safest way to prevent an outbreak on board warships but this has been challenging for the mental health of the crews.³¹

Passengers on board cruise ships have faced similar challenges but, unlike seafarers, they lack experience in dealing with confinement on board vessels for prolonged periods of time. Port authorities responded to outbreaks of Covid-19 on board large cruise ships by imposing strict quarantine rules.³² The uncertainty of the time or place of disembarkation, the prolonged periods of quarantine and isolation as well as a lack of access to medical care, which in some instances resulted in the death of fellow passengers, have had an adverse impact on the well-being of passengers on cruise ships that were turned from places of leisure into virus hubs.

In addition, port closures in response to Covid-19 have put unknown numbers of migrants at risk. Fifty-seven out of 167 countries which closed their borders during the pandemic made no exceptions for those seeking asylum.³³ Thousands have been pushed back as a Covid-19 precaution.³⁴ Those migrating by sea were left stranded or survived in poor conditions on board NGO or private vessels which States used to quarantine those rescued.³⁵ Desperation and anxiety forced migrants to resort to hunger strikes or attempt suicides.³⁶

²⁹ M Gafni, 'Exclusive: Navy Report Details Final Days of Roosevelt Sailor Who Died from COVID Complications' *San Francisco Chronicle* (21 July 2020) <www.sfchronicle.com/bayarea/article/Exclusive-Navy-report-details-final-days-of-15421774.php>; 'Coronavirus: US Navy Removes Captain Brett Crozier Who Raised Alarm' (*BBC*, 30 April 2020) <www.bbc.com/news/world-us-canada-52145230>.

³⁰ A Breeden, 'How an Invisible Foe Slipped Aboard a French Navy Ship' *The New York Times* (19 April 2020) <www.nytimes.com/2020/04/19/world/europe/france-navy-ship-coronavirus.html>.

³¹ LC Baldor, 'Dodging COVID-19, Navy Ships Break Record for Staying at Sea' *Navy Times* (25 June 2020) <www.navytimes.com/news/your-navy/2020/06/25/dodging-covid-19-navy-ships-break-record-for-staying-at-sea/>.

³² B Essig et al, 'Top Japanese Government Adviser says Diamond Princess Quarantine was Flawed' (*CNN*, 27 February 2020) <<https://edition.cnn.com/2020/02/27/asia/japan-diamond-princess-quarantine-crew-intl-hnk/index.html>>; R McGuirk, 'Coronavirus Cruise Ship Finally Leaves Australian Port' *The Diplomat* (23 April 2020) <<https://thediplomat.com/2020/04/coronavirus-cruise-ship-finally-leaves-australian-port/>>.

³³ UN, 'COVID-19 and Human Rights' (n 12) 11.

³⁴ K Kallergis, 'Pushbacks: Migrants Accuse Greece of Sending Them Back Out to Sea' (*BBC*, 12 December 2020) <www.bbc.co.uk/news/world-europe-55231203>.

³⁵ 'Malta Shuts Its Ports to Asylum Seekers, Citing COVID-19 Pandemic' *Times of Malta* (9 April 2020) <<https://timesofmalta.com/articles/view/malta-says-it-cannot-guarantee-migrant-rescues.784571>>.

³⁶ 'Joint Civil Society Press Release: The Ill-Treatment Aboard the Captain Morgan Ships Must Be Stopped at Once!' (*Aditus*, 20 May 2020) <<https://aditus.org.mt/the-ill-treatment-aboard-the-captain-morgan-ships-must-be-stopped-at-once/#.XzEaeC2w38Q>>.

These examples illustrate the plight that persons at sea can face as a result of port restrictions. They also prompt the question of whether States can assert their sovereignty and close their ports in order to protect public health on land when this results in serious violations of the rights of persons at sea. To help answer this question, the duty of States to protect persons at sea under international law will now be considered.

III. THE OBLIGATION OF STATES TO PROTECT THE RIGHTS OF PERSONS AT SEA IN INTERNATIONAL LAW

The experiences of persons marooned at sea during the pandemic have highlighted the range of rights violations which have for many years been experienced by some persons at sea. This section sets out some of the key protections which do exist, but which are not systematically enjoyed in practice. It will become apparent that a key reason for this lies in the differing natures and focusses of the various legal regimes in question. It will also show that port closures for public health reasons are unlawful when imposed at the expense of the rights of persons at sea.

A. International Health Regulations 2005

As discussed earlier, States can adopt a range of measures to regulate entry into their ports for public health reasons under the IHR 2005 and some of these measures, such as the imposition of isolation, quarantine or observation have been widely used during the pandemic.³⁷ Nevertheless, the right of port States to implement port restrictions in order to safeguard public health comes with certain caveats. Article 32 of the IHR 2005 underlines the importance of treating travellers:

with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with [health] measures, including by:

- (a) treating all travellers with courtesy and respect;
- (b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; (c) and providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication, if possible, in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.

When doing so, it is essential that ships are permitted to take on fuel, water, food and supplies.³⁸ The requirement of treating travellers with respect as regards their human rights and allowing vessels to be refuelled and supplied with

³⁷ See the discussion in Section II.

³⁸ Arts 25 and 28 IHR 2005.

water, food and other basic necessities has not been strictly followed during Covid-19. Admittedly, port closures might be an easier and more cost-effective option for port States, especially if they have to deal with a large number of travellers, such as passengers on board cruise ships. The IHR 2005 clarify that travellers are not to face any charges for medical examinations or appropriate isolation or quarantine requirements, and this might result in significant costs for the local health systems.³⁹ To mitigate this problem, the IHR 2005 provide that if ‘[a] point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it’ which might be a different port or possibly a different port State.⁴⁰ A diversion request is not permitted if a ship ‘has an operational problem which would make this diversion unsafe’, a requirement that is in line with the duty of States to provide assistance to persons in distress.⁴¹ In addition, a ship cannot be denied *free pratique* for public health reasons, which includes embarkation or disembarkation, discharging or loading cargo or stores, or taking on fuel, water, food and supplies.⁴²

When there is a public health emergency of international concern, States can adopt measures which are more restrictive than the IHR 2005, but these measures should be no ‘more invasive or intrusive to persons than reasonably available alternatives’ and must be necessary and proportionate.⁴³ Despite these additional limitations upon travellers, a narrative nevertheless emerges from this, according to which port States, whilst retaining their right to control entry to their ports, should not impose port restrictions which violate the basic rights of persons at sea. In subsection D below, it will be seen that similar guarantees are in place for those employed at sea under international labour law.

B. The International Law of the Sea

Any discussion of activities at sea requires consideration of the LOSC. At first glance, the Convention has little to say about the protection of human rights at sea, but a closer examination of its various provisions shows that it does provide for the protection of persons through the various obligations it imposes on States Parties, and which could be of great relevance to the protection of persons at sea during the pandemic.⁴⁴

³⁹ Klein (n 7) 288.

⁴⁰ Art 28(1) IHR 2005.

⁴¹ *ibid.*

⁴² Arts 1 and 28(2) IHR 2005. See also the discussion in Section III(B).

⁴³ Art 43 IHR 2005. See also A Miron, ‘Port Denials and Restrictions in Times of Pandemic: Did International Law Lose Its North Star?’ (*EJIL:Talk!*, 22 April 2020) <www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/>.

⁴⁴ Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 174–6; BH Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 *Columbia Journal of Transnational Law* 399; T Treves, ‘Human Rights and Law of the Sea’ (2010) 28 *BerkJIntL* 1; S Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19

1. Safety of life at sea

A key provision of the LOSC is Article 94 which sets out the duties of flag States. According to this article, '[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. This aims to ensure safety at sea by requiring the flag State to take a range of measures relating to construction, equipment, manning and training standards. The explicit reference to 'the safety of life at sea' in Article 94(4) (c), as well as the standards required to be met, can be understood as relating to the protection of the right to life. Although LOSC Article 94 prescribes a generic obligation, the specific steps that States have to take to comply with that provision have been clarified in other law of the sea conventions and, in particular, by the IMO which has played an active role in safeguarding the interests of shipping and seafarers during the pandemic.⁴⁵ The International Convention for the Safety of Life at Sea (SOLAS),⁴⁶ the Convention on the International Regulations for Preventing Collisions at Sea (COLREG)⁴⁷ and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)⁴⁸ detail the practical steps that States need to take to ensure safety at sea. While it has been argued that '[t]he provisions of these treaties are in fact often so detailed that they leave little room for further action by States', which suggests that flag States have a clear idea of the safeguards they need to implement to protect the life of those on board, they have not always been complied with during the pandemic, as shown in this and in the following subsection.⁴⁹

When exercising their sovereign right to close their ports, some States ordered cruise ships to leave their ports after passengers had disembarked but while crew members were still unwell.⁵⁰ Before returning a vessel to sea, due consideration should be given to the safety of the vessel and its crew. If the crew are sick and unable to perform duties essential for the safety of a vessel, then a ship might refuse to leave a port. Similarly, the UN Food and Agriculture Organization (FAO) warned that the longer working periods that fishers were being forced to work because of port restrictions increased the chances of on-

Sri Lanka J Int'l L 85; I Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons' (2012) 27 International Journal of Marine and Coastal Law 867.

⁴⁵ IMO Secretary-General, 'Tackling COVID-19 – A Voyage Together' (IMO, 19 March 2020) <www.imo.org/en/MediaCentre/PressBriefings/Pages/08-IMO-SG-message.aspx>; C Doumbia-Henry, 'Shipping and COVID-19: Protecting Seafarers as Frontline Workers' (2020) 19 WMU Journal of Maritime Affairs 287.

⁴⁶ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 2 (SOLAS).

⁴⁷ Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16 (COLREG).

⁴⁸ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) 1361 UNTS 2 (STCW).

⁴⁹ Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 165.

⁵⁰ J Smyth, 'Australia Faces "Humanitarian Disaster" on Board Cruise Ships' *Financial Times* (2 April 2020) <www.ft.com/content/2096874c-8291-42eb-b6f9-5774a2c192e4>.

board accidents.⁵¹ Against this background, it becomes imperative that States consider not only their right to safeguard public health but also their obligation to protect safety of life at sea. Furthermore, returning sick crew to sea, or preventing them from disembarking and being replaced by healthy crew, is in breach of the obligations of States to verify the medical fitness of a ship's master and crew, which is essential for the safety of life at sea and which has to be medically certified.⁵² The challenges of renewing a medical certificate during the pandemic have been noted by the IMO, the WHO and the International Labour Organization (ILO), which have jointly stressed that competent authorities should take a flexible and pragmatic approach to expired medical certificates and should consider enabling physicians to board vessels in order to examine the crew in order to ensure that they are healthy and able to perform their duties.⁵³

2. *The duty to render assistance to persons in distress*

The duty of States to render assistance in order to save lives at sea is a customary law duty which has been codified in LOSC Article 98.⁵⁴ This duty is imposed on flag States as well as upon coastal States. Whilst the LOSC does not specify what needs to be done to give effect to Article 98, the International Convention on Maritime Search and Rescue (SAR Convention) and the SOLAS Regulations set out the practical steps that States are required to undertake to 'ensure that necessary arrangements are made for the provision of adequate search and rescue services for persons in distress at sea round their coasts'.⁵⁵

The duty to rescue persons in distress applies to all persons without discrimination, but some aspects of this duty remain unclear.⁵⁶ One of its weaknesses arises from the lack of a clearly defined and widely accepted definition of what is meant by 'distress'. The SAR Convention has defined the 'distress phase' as a 'situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger

⁵¹ FAO, 'How is Covid-19 Outbreak Impacting the Fisheries and Aquaculture Food Systems and What Can FAO Do' (n 26) 9 <www.fao.org/fileadmin/user_upload/faoweb/FI/COVID19/COVID19_Information_Paper.pdf>.

⁵² Resolution 9 STCW; Maritime Labour Convention, 2006 (adopted 23 February 2006, entered into force 20 August 2013) 2952 UNTS 3 (MLC, 2006) Reg 1.2; ILO Convention (No 188) Concerning Work in the Fishing Sector (adopted 14 June 2007, entered into force 16 November 2017) (ILO Work in Fishing Convention, 2007) arts 10–12.

⁵³ WHO, IMO and ILO, 'A Joint Statement on Medical Certificates of Seafarers, Ship Sanitation Certificates and Medical Care of Seafarers in the Context of the COVID-19 Pandemic' (Circular Letter No 4204/Add.10, 22 April 2020) 2 <[https://www.who.int/docs/default-source/coronaviruse/2020-04-22-ilo-who-imo-joint-statement-on-medical-certificates-of-seafarers-ship-sanitation-certificates-22-april-sg-\(003\).pdf?sfvrsn=6afdd464_2](https://www.who.int/docs/default-source/coronaviruse/2020-04-22-ilo-who-imo-joint-statement-on-medical-certificates-of-seafarers-ship-sanitation-certificates-22-april-sg-(003).pdf?sfvrsn=6afdd464_2)>.

⁵⁴ Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 187–9.

⁵⁵ Ch 2 of the International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 118 (SAR Convention).

⁵⁶ Ch 2.1.10 SAR Convention; SOLAS ch V, Regulation 33, para 1.

and requires immediate assistance'.⁵⁷ Some States have interpreted this provision quite narrowly in respect of boats carrying migrants, understanding it to mean that a State needs to render assistance only when a boat is sinking and not when it experiences other difficulties.⁵⁸ Such an approach would mean that States might refuse to rescue migrants who are not at risk of drowning but who are in need of urgent medical attention for other reasons, including Covid-19. Besides migrant boats, some States have taken a very strict stance regarding vessels carrying seafarers infected by the virus and have asked them to leave their ports. Klein has rightly pointed out that 'if the crew responsible for the actual running of the vessel are sick and unable to perform tasks essential for the safety of the vessel, a situation of distress may well arise'.⁵⁹ This means that a State could be in breach of its duty to render assistance to a vessel in distress when it closes its ports to vessels manned by sick seafarers.

More complications arise from the lack of clarity regarding disembarkation. Once rescued, survivors must be taken to a place of safety.⁶⁰ Certain States consider that persons rescued by commercial or NGO-run vessels are in a safe place and there is no need to allow them to disembark in one of their ports. These approaches have resulted in rescued migrants being stranded on board vessels for weeks. Following the *Tampa* affair, in which Australia prohibited the disembarkation in the Christmas Islands of refugees rescued by a Norwegian freighter, causing a humanitarian crisis on board the freighter whilst negotiations concerning disembarkation were taking place, efforts were made to clarify disembarkation duties under the SAR Convention and SOLAS.⁶¹ Revised IMO Guidelines now define a place of safety as 'a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and *medical needs*) can be met'.⁶²

The reference to medical needs is of great relevance to persons rescued at sea during the pandemic who might have been infected by the virus and, as such, may be in need of urgent medical assistance. The guidelines further clarify that 'an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship' as it 'may not have appropriate facilities and equipment to sustain additional

⁵⁷ J Coppens and E Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 *International Journal of Marine and Coastal Law* 377. ⁵⁸ Klein (n 7) 285.

⁵⁹ *ibid* 8.

⁶⁰ R Churchill and V Lowe, *The Law of the Sea* (Manchester University Press 1999) 63; M Ratcovich, 'The Concept of Place of Safety: Yet Another Self-Contained Maritime Rule or Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2015) 33 *AustYBIL* 81.

⁶¹ For a detailed account of the facts of the *Tampa* affair, see C Bailliet, 'The Tampa Case and its Impact on Burden Sharing at Sea' (2003) 25 *HumRtsQ* 742–4.

⁶² MSC Res 167(78) Annex 34: 'Guidelines on the Treatment of Persons Rescued at Sea' (20 May 2004) para 6.12 (emphasis added).

persons on board without endangering its own safety or to properly care for the survivors'.⁶³ Nonetheless, more recent incidents, such as the *Aquarius* affair, in which a rescue vessel operated by the German NGO SOS Méditerranée was ordered to stay away from Italy's territorial waters after it had rescued 629 migrants from overcrowded boats in the Central Mediterranean, underline the remaining weaknesses concerning the disembarkation of rescued persons.⁶⁴ Traditionally, this definitional loophole has been exploited for border security purposes but during the pandemic it acquired a new dimension being relied upon to protect public health.⁶⁵

With closed ports, it falls on the master of a rescue boat to provide for those rescued, treating them with humanity for a longer period of time than would normally be the case.⁶⁶ However, the capacity of commercial or NGO vessels to provide for rescued persons on board are inevitably limited and domestic lockdowns have created additional challenges. These include compliance with hygiene standards and social distancing rules, the provision of additional medical assistance, and limited ability to transport staff and equipment.⁶⁷ During the first peak of the pandemic in Europe, migration flows reduced, and NGO vessels suspended their rescue operations but, as migrant flows are now increasing again, rescue operations have resumed and States must accept responsibilities and allow exceptions to port closures for those in distress at sea.⁶⁸

The strength of this obligation has recently been reinforced by the views of the Human Rights Committee (HRC) in two cases concerning Malta and Italy.⁶⁹ According to the HRC, due diligence obligations apply in SAR zones.⁷⁰ This

⁶³ *ibid* para 6.13.

⁶⁴ For more information on the incident, see E Papastavridis, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?' (*EJIL:Talk!*, 27 June 2018) <www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/>.

⁶⁵ J van Berckel Smit, 'Taking Onboard the Issue of Disembarkation: The Mediterranean Need for Responsibility-Sharing after the Malta Declaration' (2020) 22 *European Journal of Migration and Law* 508–9; Médecins Sans Frontières, 'Search and Rescue in the Time of COVID-19: MSF Briefing Paper' (2020) 3 <www.msf.org/sites/msf.org/files/2020-08/SAR%20during%20COVID19%20-%20briefing%20paper%20and%20timeline.pdf>.

⁶⁶ SOLAS ch V, Reg 33, para 6.

⁶⁷ Médecins Sans Frontières (n 65) 3.

⁶⁸ 'Migration Flows Across West and Central Africa Nearly Halved by COVID-19; Mobile Populations Economically Impacted' (*IOM*, 16 June 2020) <www.iom.int/news/migration-flows-across-west-and-central-africa-nearly-halved-covid-19-mobile-populations>; G Orlandi and M Daventry, 'Migrant Rescue Ships Return to the Mediterranean after Lockdown' (*Euronews*, 23 June 2020) <www.euronews.com/2020/06/23/migrant-rescue-ships-return-to-the-mediterranean-after-lockdown>.

⁶⁹ *AS, DI, OI and GD v Malta*, CCPR/C/128/D/3043/2017 (27 January 2021), HRC, Comm No 3042/2017; *AS, DI, OI and GD v Italy*, CCPR/C/130/D/3042/2017 (27 January 2021), HRC, Comm No 3042/2017.

⁷⁰ *AS, DI, OI and GD v Malta* (n 69) para 6.7; *AS, DI, OI and GD v Italy* (n 69) para 8.5. See also V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21 *German Law Journal* 385, 407–8 and E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 *German Law Journal* 417, 433.

requires a State to take positive measures in response to reasonably foreseeable threats to life, either because it is primarily responsible for rescue operations within a SAR zone or because it exercises effective control over the persons in distress.⁷¹ In light of these views, it becomes even more difficult for a State to argue that its duties to rescue persons in distress are discharged once they have been rescued by a commercial or an NGO vessel and States will need to do more to protect persons in distress at sea, including the relaxation of port restrictions where necessary.⁷²

3. Considerations of humanity

The importance of the duties of States to protect the safety of life and to render assistance to those in distress at sea are no doubt significant but they are not enough by themselves to prevent violations of human rights at sea, including those resulting from measures taken in response to the Covid-19 pandemic. Nevertheless, the LOSC is a living instrument and, as such, it has been subject to evolutionary interpretation that reflects the need to protect human rights at sea. Judges of the International Tribunal for the Law of the Sea (ITLOS) as well as members of arbitral tribunals established under Annex VII of LOSC have played an active role. For example, the ‘consideration of humanity’ dictum pronounced in the *M/V Saiga* case has been expanded to indirectly give effect to human rights guarantees, such as the protection of human life against excessive force, due process rights, the right to liberty and the right not to be detained in potentially unacceptable conditions.⁷³ The increasing reference to humanitarian considerations in the ITLOS jurisprudence signals that law of the sea disputes can no longer be resolved without giving due consideration to human rights, further adding to the narrative of human rights at sea both within and beyond the pandemic context.⁷⁴

A weakness of the ‘considerations of humanity’ concept is that it cannot easily balance conflicting rights. As Papanicolopulu has argued, ‘the concept

⁷¹ See the discussion in Section III(C).

⁷² S Trevisanut, ‘The Recognition of a Right to be Rescued at Sea’ (*Oxford Podcasts*, 26 February 2021) <<http://podcasts.ox.ac.uk/recognition-right-be-rescued-sea>>.

⁷³ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, 10, para 155; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4, 22. See also Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 162–6; A Petrig and M Bo, ‘The International Tribunal for the Law of the Sea and Human Rights’ in M Scheinin (ed), *Human Rights Norms in ‘Other’ International Courts* (Cambridge University Press 2019); F Delfino, ‘“Considerations of Humanity” in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals’ in A Del Vecchio and R Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019).

⁷⁴ *The M/T ‘San Padre Pio’ Case (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 2019) ITLOS Case No 27, paras 129–130; *‘Enrica Lexie’ Incident (Italy v India)*, PCA Case No 2015–28, Order – Request for Prescription of Provisional Measures (29 April 2016) paras 106, 124, 132(a); *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russia)* (Provisional measures, Order of 25 May 2019) ITLOS Case No 26, para 112.

of “considerations of humanity” presents drawbacks when there are the rights of two opposing sides, each of which claims considerations of humanity, to consider and balance. In fact, [it] does not by itself alone allow the judge to operate a balancing of the different “humans” and their interests involved in the case’.⁷⁵ Its limitations may prove even more challenging when applied to the novel circumstances arising from the pandemic. On the one hand, in order to give effect to humanitarian considerations, States have to allow disembarkation. On the other hand, States have to protect their populations against an unprecedented health emergency. Seeking to balance conflicting rights on the basis of ‘considerations of humanity’ cannot be easily achieved, but its inclusion in the law of the sea jurisprudence leaves no doubt that port restrictions for the protection of public health must give due consideration to the human rights of those affected by those restrictions on board vessels which, as a result, are denied access.

C. International Human Rights Law

Before considering the duty of States to protect the human rights of persons affected by port closures under IHRL, it is important to clarify which State exercises jurisdiction over such persons for the purposes of human rights law. Determining jurisdiction over persons at sea comes with certain challenges. The jurisdiction that a State exercises over a person is determined by the vessel or maritime zone in which that person is located, as prescribed by the law of the sea, and the level of control exercised over that person as required by IHRL.⁷⁶ The effective protection of human rights at sea requires the combined exercise of jurisdiction under the law of the sea and IHRL.⁷⁷ There are instances, however, in which the jurisdiction that a State exercises under IHRL might be restricted by the jurisdiction prescribed by the international law of the sea.⁷⁸ It is this latter point that has sometimes weakened the applicability of human rights treaties at sea and, as result, the protection of human rights at sea.

⁷⁵ I Papanicolopulu, ‘Considerations of Humanity in the *Enrica Lexie* Case’ (2015) 22 *Questions of International Law*, Zoom-in 37.

⁷⁶ *JHA v Spain*, CAT/C/41/D/323/2007 (21 November 2008), UN Committee Against Torture (UNCAT) Communication No 323/2007; *Fatou Sonko v Spain*, CAT/C/47/D/368/2008 (25 November 2011); *Rigopoulos v Spain* App No 37388/97 (ECtHR, 12 January 1999); *AS, DI, OI and GD v Italy* (n 69); *AS, DI, OI and GD v Malta* (n 69); *Xhavera and Others v Italy and Albania* App No 39473/98 (ECtHR, 11 January 2001); *Women on Waves and Others v Portugal* App no 31276/05 (ECtHR, 13 January 2009); *Medvedyev and Others v France* App No 3394/03 (ECtHR, 23 February 2010); *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 February 2012); *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 14 October 2014); *The Haitian Centre for Human Rights et al v United States*, Case 10.675, Report No 51/96, Inter-Am Commission on Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev, at 550 (13 March 1997).

⁷⁷ Papanicolopulu, *International Law and the Protection of People at Sea* (n 3) 80–95; Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention Under the Law of the Sea Paradigm’ (n 70).

⁷⁸ Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’ (n 3) 336–46.

Once a vessel voluntarily enters a port, for example, it comes within the sovereignty of the port State and this means that it should be subject to the obligations of the port State under IHRL.⁷⁹ Similarly, it has been argued that ‘while a port State might not be able to exercise jurisdiction for violations of human rights committed when the vessel was on the high seas or within the jurisdiction of another coastal or port State, it should be able to exercise its jurisdiction over continuing abuses or abuses that started when the vessel entered its port’⁸⁰ What happens, however, when it is an act of a port State that severely affects the human rights of persons on board a vessel? In order to help answer this question, and as it is impossible to consider here the situation with regard to all human rights, the following subsections will focus on the protection of the right to life and the right to freedom from torture or cruel, inhuman or degrading treatment, which have been seriously affected by port restrictions.

1. *The right to life*

‘[E]very human being has the inherent right to life’ which is well protected under IHRL and is also applicable at sea.⁸¹ In light of the sharp rise in seaborne migration and border control operations, the application and protection of the right to life at sea has gained significant attention.⁸² In General Comment No 36, the HRC argued that States are required ‘to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea’.⁸³ In *AS, DI, OI and GD v Italy*, the HRC found that the existence of certain ‘factual elements’ might establish ‘a special relationship of dependency’ between the individuals on a vessel in distress and a State and, as a result, bring the individuals within the effective control of the State.⁸⁴ This ‘special relationship of dependency’ means that individuals on board the vessel in question are directly affected by the

⁷⁹ U Khaliq, ‘Jurisdiction, Ships and Human Rights Treaties’ in H Ringbom (ed), *Jurisdiction over Ships: Post-LOSC Developments in the Law of the Sea* (Brill 2015) 330.

⁸⁰ Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’ (n 3) 344.

⁸¹ Art 6 of the International Covenant on Civil and Political Rights.

⁸² At the time of writing, there are several pending cases before the ECtHR, such as *Safi and Others v Greece* App No 5418/15 (ECtHR, 21 January 2015); *SS and Others v Italy* App No 21660/18 (ECtHR, 3 May 2018) or being prepared for submission, such as *CO and AJ v Italy* App No 40396/18. See, Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention Under the Law of the Sea Paradigm’ (n 70) 417–18.

⁸³ UN Human Rights Committee, ‘General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/36 (General Comment No 36) para 63.

⁸⁴ *AS, DI, OI and GD v Italy* (n 69) para 7.8.

decisions of a State, imposing on the latter the duty to take positive measures to protect their lives from foreseeable threats.⁸⁵ The views of the HRC were accompanied by strong dissent from some members,⁸⁶ but, if its approach to effective control becomes widely accepted, it would mean that the failure of a State to rescue persons in distress, or to force them to remain stranded on board commercial or NGO vessels, because its ports are closed, when doing so knowingly exposes them to threats to life, could trigger the State's responsibility and potentially its liability for a violation of the right to life.⁸⁷ It is hard to contest that States should be aware of the threats to life faced by migrants abandoned on unseaworthy vessels. In the context of the pandemic, when migrants face additional health risks, a failure to take reasonable measures in response to known health threats, including the provision of health care, to those denied entry might similarly raise the prospect of liability.

The HRC has indicated that the duty to protect life requires States to take appropriate measures, including facilitating access to health care, to address the general conditions in society, such as the prevalence of epidemics or life-threatening diseases, that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.⁸⁸ The European Court of Human Rights (ECtHR) has held that 'an issue may arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of the health care which they have undertaken to make available to the population generally'.⁸⁹ The ECtHR has further stressed that although the right to health—recognised in numerous international instruments—is not as such among the rights guaranteed under the European Convention on Human Rights (ECHR) and its Protocols, Contracting Parties have to take appropriate steps to safeguard the lives of those within their jurisdiction when the right to life may be at stake because of health problems.⁹⁰ The Court has stressed that States enjoy a wide margin of appreciation when it comes to the allocation of public funds in the area of health care, especially when scarce resources are available and difficult choices have to be made.⁹¹ Nevertheless, the ECtHR has taken a

⁸⁵ *ibid.*

⁸⁶ See the Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting) Annex 1 (para 2 in particular), the Individual Opinion of Andreas Zimmermann (dissenting) Annex 2 and the Individual Opinion of David Moore (dissenting) Annex 3.

⁸⁷ *AS, DI, OI and GD v Italy* (n 69) para 7.5. See also P Mallia and FG Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part II' (*Opinio Juris*, 3 March 2021) <<http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-part-ii-committee/>>.

⁸⁸ UN Human Rights Committee, 'CCPR General Comment No 6: Article 6 (Right to Life)' (30 April 1982) para 5; General Comment No 36 (n 83) para 26.

⁸⁹ *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) para 219.

⁹⁰ *Vasileva v Bulgaria* App No 23796/10 (ECtHR, 17 March 2016) para 63.

⁹¹ *Lopes De Sousa Fernandes v Portugal* App no 56080/13 (ECtHR, 19 December 2017) para 175.

strict approach when ‘an individual patient’s life is knowingly put in danger by denial of access to life-saving emergency treatment’.⁹²

Applying these principles suggests that under IHRL the right to life of persons at sea includes the right to have access to urgent medical care. Flag States have a duty to make medical care readily available to those on board their vessels.⁹³ Providing specialised medical treatment might not always be possible in the middle of an ocean. This is why reaching a port has been of critical importance for saving lives during the pandemic. Once in port, a port State has a duty to provide medical care to persons on board a vessel in need of urgent help. This means that the blanket bans, introduced by some States and reported by the IMO, as a Covid-19 precaution, on doctors boarding vessels, sick passengers or crew members disembarking in order to receive urgent medical treatment or on vessels entering a port to receive medical supplies, simply because they had previously called at ports in areas affected by Covid-19, are incompatible with their positive obligation to protect the right to life.⁹⁴ Imposing a duty on port States to provide medical examination, observation or treatment to everyone arriving in their ports could be an unbearable burden and thus States should be allowed a margin of appreciation in the allocation of health funds, especially in countries with limited health resources. Port States, however, should be expected to set aside their port restrictions when life-saving treatment is urgently needed.

2. The prohibition and prevention of torture, cruel and inhuman treatment or punishment

The prohibition of torture, cruel and inhuman treatment or punishment is the subject of an absolute prohibition under IHRL, including at sea.⁹⁵ Article 5 (1)(a) of the United Nations Convention against Torture (UNCAT) imposes on States Parties a duty to establish jurisdiction over acts of torture committed on board vessels registered in that State.⁹⁶ Article 16 provides that ‘Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture ...’. In the context of Covid-19, the severity of the widespread

⁹² *ibid* para 191.

⁹³ See, for example, Reg 4.1 of the MLC, 2006 (n 52); arts 29 and 30 of the ILO Work in Fishing Convention, 2007 (n 52); and the requirements for cruise ships in Section III(E).

⁹⁴ ‘Supporting Seafarers on the Frontline of COVID-19’ (*IMO*) <www.imo.org/en/MediaCentre/HotTopics/Pages/Support-for-seafarers-during-COVID-19.aspx>; ILO, ‘Statement of the Officers of the STC on the Coronavirus Disease (COVID-19)’ 2 <www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/statement/wcms_740130.pdf>.

⁹⁵ I Papanicolopulu, ‘Protection from Torture and Inhuman and Degrading Treatment at Sea’ in L Boisson de Chazournes, E Doussis, G Andreone and A Zervaki (eds), *Droit International: Enjeux et Perspectives Droit de la Mer, Droits de l’Homme* (Pedone 2020).

⁹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).

practices of protracted isolation, the profound anxiety caused by the denial by port States of urgent medical care in life-threatening situations and poor onboard conditions of quarantine could potentially constitute such ill-treatment.

The application of the UNCAT on board a vessel was considered by the Committee against Torture (CAT) in *JHA v Spain*.⁹⁷ This case concerned migrants rescued by the Spanish coastguard, who had to remain on board the Spanish vessel, *Marine I*, in Mauritania while negotiations regarding their repatriation continued. The migrants complained that the poor conditions on board the vessel were inhuman and degrading. More specifically, they claimed that 369 persons had to stay on board *Marine I* ‘crammed together below deck, receiving food by means of ropes, and that no medical personnel was able to provide assistance or board the vessel to ascertain their state of health’.⁹⁸ The communication was unsuccessful before the CAT for procedural reasons. The CAT did, however, reject Spain’s claim that the migrants did not fall within Spain’s jurisdiction and found that as they were within the State’s constant control, Spain had a duty to ensure that the conditions of detention were not inhuman or degrading.⁹⁹ The facts of *JHA v Spain* resemble the situation that many rescued migrants and refugees face who, after their rescue, are held on board vessels, often in poor conditions, because of quarantine measures introduced in response to the Covid-19 pandemic. Both Italy and Malta, for example, have used passenger ships or cruise ferries to quarantine migrants. In the case of Malta, the use of private cruise ferries for the quarantine of rescued migrants was strongly criticised because the vessels had been designed for short leisure trips and not for accommodating persons for lengthy periods of time, also bearing in mind that migrants had to stay on board much longer than the required 14-day quarantine.¹⁰⁰

It is common, however, for States to deny port entry to rescue boats and a question arises concerning who is responsible for conditions on board a rescue boat. Until recently, it was hard to argue that a coastal State exercised effective control over those on board a vessel when ordering it to stay away from its ports. Some level of physical connectivity was required through agents intercepting, physically preventing or at least forcing a vessel to redirect its route.¹⁰¹ In light of the findings of the HRC in the *AS, DI, OI and GD v Italy* case, as well as the increasing ‘contactless control’ that coastal States exercise through Maritime Autonomous Vessels (MAVs), drones or other remote management techniques, there may be a need to revisit what is meant

⁹⁷ *JHA v Spain* (n 76).

⁹⁸ *ibid* para 5.2.

⁹⁹ *ibid* para 8.2.

¹⁰⁰ ‘Malta: Disembark Rescued People’ (*Human Rights Watch*, 22 May 2020) <www.hrw.org/news/2020/05/22/malta-disembark-rescued-people>.

¹⁰¹ See (n 94). See also Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention Under the Law of the Sea Paradigm’ (n 70) 424–6 and K Gombeer and M Fink, ‘Non-Governmental Organisations and Search and Rescue at Sea’ (2018) 4 *Maritime Safety and Security Law Journal* 1, 18–20.

by 'effective control' and coastal States might well find themselves liable in respect of the conditions on board vessels stranded at sea as a result of their orders and port closures.¹⁰² For the time being, flag States remain responsible for ensuring compliance with human rights obligations on board rescue boats and this can be extremely challenging when a boat is at sea for a considerable time. Those rescued by the Norwegian-flagged *Ocean Viking*, for example, remained under Norway's jurisdiction for more than a week because both Italy and Malta kept their ports closed.¹⁰³ As a result, Norway was responsible for ensuring that the conditions on board *Ocean Viking* did not contravene the prohibition on ill-treatment. In practice, however, it is often an NGO that runs the day-to-day activities on board many rescue vessels and they may have limited means to care for rescued persons for prolonged periods. This is why accessing a port and facilitating disembarkation is so essential.

One way to help prevent ill-treatment at sea could be by relying on monitoring mechanisms. For example, the mandate of the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the SPT) allows its independent experts to visit places where persons may be deprived of their liberty within the jurisdiction of States Parties to the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT).¹⁰⁴ The SPT works in close collaboration with National Preventive Mechanisms (NPMs) established at the domestic level and which also undertake such preventive visits within their own national jurisdictions. Vessels where migrants are kept are places where people are deprived of their liberty, placing them within the monitoring mandate of both the national NPMs and the international SPT.¹⁰⁵

However, it is the flag rather than the location of a vessel that determines which State has jurisdiction and control for monitoring purposes. In the case of the *Ocean Viking*, for example, it was Norway that had jurisdiction for monitoring purposes under the OPCAT whilst the vessel was at sea and, arguably, this remained so even when the vessel was in port in Sicily, thus placing it outside the jurisdictional reach of the Italian NPM. It is common for States, such as Italy and Malta, to keep rescued migrants and refugees on board NGO rescue boats while they process asylum applications, opening up another potential protection gap. As Covid-19 swept through places of

¹⁰² N Klein, 'Maritime Autonomous Vehicles and International Laws on Boat Migration: Lessons from the Use of Drones in the Mediterranean' (2021) 127 *Marine Policy* 1–10; Moreno-Lax (n 70).

¹⁰³ E Beswick, 'Ocean Viking: 180 Migrants Begin Disembarking Rescue Ship in Sicily' (*Euronews*, 7 July 2020) <www.euronews.com/2020/07/07/ocean-viking-180-migrants-begin-disembarking-rescue-ship-in-sicily>.

¹⁰⁴ Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT). See also R Murray, E Steinerte, M Evans, and A Hallo de Wolf, *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press 2011) 97–108.

¹⁰⁵ Arts 1 and 4 OPCAT.

detention, the SPT played an active role in advising States on the need to take urgent action to prevent a humanitarian crisis in places of detention, reinforcing the need of taking precautionary measures necessary to prevent the spread of infection and of implementing emergency measures to ensure detainees have access to health care.¹⁰⁶

The work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which operates in a similar way to the SPT, is equally relevant¹⁰⁷ and it too played an active role in advising States on the treatment of persons deprived of their liberty in the context of Covid-19. The CPT issued an urgent statement of principles concerning persons deprived of their liberty which apply to vessels where migrants are detained.¹⁰⁸ Much like the SPT, however, the access of the CPT to monitor the conditions of detention on board vessels is potentially limited by flag State jurisdiction, which in the case of the CPT would extend only to vessels flying the flag of one of the 47 Council of Europe States Parties.¹⁰⁹

Representatives from various human rights monitoring bodies, naval forces and academia have agreed that direct monitoring of vessels used for detention is essential for preventing ill-treatment at sea and have voiced their concerns about the legal and practical challenges, including jurisdiction restrictions, which inhibit effective monitoring.¹¹⁰ There is a clear consensus that enhanced levels of cooperation between monitoring bodies and States are needed to address the legal and practical challenges posed by the potential suffering of persons held on board vessels for prolonged periods because of port restrictions introduced in response to Covid-19.

Pushbacks and the collective expulsion of migrants are also incompatible with IHRL and might also amount to prohibited forms of ill-treatment. In the landmark case of *Hirsi Jamaa v Italy*, the ECtHR found that Italy had exercised jurisdiction over nationals of Somalia and Eritrea who had been intercepted in the Mediterranean and returned to Libya without their cases

¹⁰⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic' (adopted 25 March 2020) <www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>; 'COVID-19: Measures Needed to Protect People Deprived of Liberty, UN Torture Prevention Body Says' (OHCHR, 30 March 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25756>.

¹⁰⁷ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) 1561 UNTS 363.

¹⁰⁸ CPT, 'Statement of Principles Relating to the Treatment of Persons Deprived of Their Liberty in the Context of the Coronavirus Disease (COVID-19) Pandemic' (20 March 2020) CPT/Inf(2020)13.

¹⁰⁹ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 107) art 2 states that 'Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority'.

¹¹⁰ The discussions took place during a closed meeting on 'Torture Prevention at Sea' hosted by Professor Sir Malcolm Evans and the author in May 2020 with the support of the University of Bristol Law School.

being examined by Italian agents.¹¹¹ It found Italy in breach of its obligations under Article 3, Article 4 of Protocol No 4 and Article 13 of the ECHR. Across the Atlantic, the Inter-American Commission on Human Rights has likewise found that the interception of Haitian migrants by the US coastguard and their immediate return to Haiti without considering their asylum claims was a breach of their rights to life, liberty, security and equality before the law, as well as their right to have resort to the courts and to seek and receive asylum.¹¹²

Nevertheless, pushbacks were extensively used during the pandemic, allegedly, as a necessary Covid-19-related precaution. Reportedly, Greece, which implemented strict lockdown restrictions, systematically pushed back to Turkey migrants crossing the Aegean Sea, in an effort to contain the spread of the virus, in violation of IHRL.¹¹³ In March 2020, in an extraordinary move and following tensions at the Greek–Turkish border along the Evros, in Northern Greece, the Greek Government suspended all applications from asylum seekers entering Greece illegally for a month and announced that it would immediately return them, wherever possible, to the country from which they entered.¹¹⁴ These practices are incompatible with the human rights obligations of States and the right of States to close their ports should not outweigh their other obligations to persons under international law.

D. International Labour Law

Another legal regime applicable to persons at sea is labour law. While labour rights are not strictly speaking human rights as such, and only apply to those *employed* at sea, some labour rights are also recognised and protected by human rights treaties too.¹¹⁵ International labour standards are intended to protect the rights of those employed at sea. A definition which helps clarify who is covered by labour standards can be found in Article II(1)(f) of the Maritime Labour Convention, 2006 (MLC, 2006) which states that a seafarer is ‘any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies’.¹¹⁶ The definition of the term ‘seafarer’ covers the crew of commercial vessels and cruise ships and, by

¹¹¹ *Hirsi Jamaa v Italy* (n 76) para 81. See also *Sharifi and Others v Italy and Greece* (n 76).

¹¹² *The Haitian Centre for Human Rights et al v United States* (n 76).

¹¹³ ‘UNHCR Calls on Greece to Investigate Pushbacks at Sea and Land Borders with Turkey’ (UNHCR, 12 June 2020) <www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html>; ‘Greece: Investigate Pushbacks, Collective Expulsions’ (*Human Rights Watch*, 16 July 2020) <www.hrw.org/news/2020/07/16/greece-investigate-pushbacks-collective-expulsions>.

¹¹⁴ ‘Greece Freezes Asylum Applications from Illegally Entering Migrants’ (*eKathimerini*, 1 March 2020) <www.ekathimerini.com/250097/article/ekathimerini/news/greece-freezes-asylum-applications-from-illegally-entering-migrants>.

¹¹⁵ V Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 ELLJ 151; P Alston, ‘Labour Rights as Human Rights: The Not So Happy State of the Art’ in P Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005).

¹¹⁶ MLC, 2006 (n 52).

enforcing labour standards, greater protection can be afforded to the rights of those working at sea during the Covid-19 pandemic. In addition, fishers receive special protection under the ILO Work in Fishing Convention, 2007 (No 188), although the latter is not as widely ratified as the MLC, 2006.¹¹⁷

1. The right to be repatriated

Crew changes are vital for seafarers and fishers who need to disembark at the end of their contract and return home. The IMO reported that ‘on any given day, nearly one million seafarers are working on some 60,000 large cargo vessels worldwide’ on six to eight-month employment contracts.¹¹⁸ Once a contract expires, a crew change takes place in a port. This is the case for approximately 100,000 seafarers every month.¹¹⁹ Port closures have caused unforeseen challenges for thousands of seafarers who have been forced to stay on board a vessel after their contract has ended or who have been abandoned on board vessels without any salaries, food, accommodation, medical care or other basic necessities.¹²⁰ In December 2020, almost 400,000 seafarers were still in need of immediate repatriation.¹²¹ This is a clear violation of the duty of States to provide financial security in order to ensure that seafarers and fishers are duly repatriated, as required by Regulation 2.5 of the MLC, 2006 and Article 21 of the ILO Work in Fishing Convention, 2007.

In order to enable employees to enjoy their right to repatriation, the IMO and ILO urged States to designate all seafarers, marine personnel, fishing vessel personnel and offshore energy sector personnel as ‘key workers’ providing an essential service, grant them exemptions from any travel restrictions and enable them to join and leave ships and return home without impediments.¹²² Designating seafarers as key workers is considered the most effective way of facilitating crew changes and to ensure that seafarers can return home once their employment contract ends. To assist States and shipping companies with

¹¹⁷ ILO Work in Fishing Convention, 2007 (n 52).

¹¹⁸ ‘Crew Changes: A Humanitarian, Safety and Economic Crisis’ (IMO, 2021) <www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>.

¹¹⁹ ‘Coronavirus: Guidance on Repatriating Cruise Ship Passengers and Protecting Ship Crews’ (European Commission, 8 April 2020) <https://ec.europa.eu/transport/modes/maritime/news/2020-04-08-coronavirus-cruise-ships_en>.

¹²⁰ Regulation 2.5 – Repatriation, MLC, 2006 (n 52); ‘Seafarer Abandonment’ (IMO) <www.imo.org/en/OurWork/Legal/Pages/Seafarer-abandonment.aspx>.

¹²¹ ‘Supporting Seafarers on the Frontline of COVID-19’ (n 94).

¹²² IMO, ICAO and ILO, ‘Joint Statement IMO-ICAO-ILO on Designation of Seafarers, Marine Personnel, Fishing Vessel Personnel, Offshore Energy Sector Personnel, Aviation Personnel, Air Cargo Supply Chain Personnel and Service Provider Personnel at Airports and Ports as Key Workers, and on Facilitation of Crew Changes in Ports and Airports in the Context of the COVID-19 Pandemic’ (Circular Letter No 4204/Add.18, 26 May 2020) 2; ‘Statement of the Officers of the STC’ (n 94) 2.

the facilitation of crew changes, the IMO issued urgent guidance on safe crew changes and travel during Covid-19.¹²³ Nonetheless, by February 2021, only 55 countries had designated seafarers as key workers.¹²⁴ The Philippines and Indonesia, two of the largest supply countries for seafarers, are among the countries that did so, acknowledging the importance of crew changes for the well-being of seafarers. The majority of States, however, continue to refuse to grant exceptions to port restrictions in order to facilitate crew changes.

This abandonment of seafarers raises serious concerns. In some instances, Covid-19 was used as an excuse for failing to address the situation of crew abandoned before the start of the pandemic.¹²⁵ In June 2020, the International Transport Workers' Federation (ITF) and its affiliated seafarers' unions pledged their commitment to assisting hundreds of thousands of seafarers in exercising their right to stop working, leave ships and return home.¹²⁶ This unprecedented move came as a reaction to the failure of States to designate seafarers as key workers, leaving thousands of seafarers in limbo. Abandonment has had a tremendous impact on seafarers, leading many to suffer from anxiety, depression or even to become suicidal.¹²⁷ Whilst potentially highly disruptive to international trade, continuing to ignore the rising number of seafarers in need of repatriation means that States are continuing to overlook their obligations to seafarers when prioritising port restrictions. This author echoes Doumbia-Henry's view that 'while public health concerns may well be a reason to deny permission for seafarers to come ashore for shore leave, the refusal to allow seafarers to come ashore for purposes of transit and transfer, as well as for crew replacement, even in the context of the global pandemic, is inhumane and contrary to the letter and spirit of [ILO] instruments'.¹²⁸

2. *The right to medical care and PPE*

The provision of medical care and PPE proved vital for the protection of those working on board vessels during the pandemic. International labour standards

¹²³ IMO, 'Coronavirus (COVID-19) – Recommended Framework of Protocols for Ensuring Safe Ship Crew Changes and Travel During the Coronavirus (COVID-19) Pandemic' (Circular Letter No 4204/Add.35/Rev.4, 5 February 2021).

¹²⁴ IMO, 'Coronavirus (COVID-19) – Designation of Seafarers as Key Workers' (Circular Letter No 4204/Add.35/Rev.1, 23 December 2020).

¹²⁵ Human Rights at Sea, 'Seafarers' Challenges During the COVID-19 Pandemic – The Case of the Crew of MV GULF SKY' (May 2020) 2 <www.humanrightsatsea.org/wp-content/uploads/2020/06/20200527-Case_Study_Seafarers_Challenges_during_The_COVID-19_Pandemic_The_Case_of_the_Crew_of_MV_GULF_SKY_SP_LOCKED.pdf>.

¹²⁶ 'Enough is Enough: World's Seafarers Will Now Exercise Right to Leave Ships Amid Covid-19 Failures' (ITF, 15 June 2020) <www.itfseafarers.org/en/news/enough-enough-worlds-seafarers-will-now-exercise-right-leave-ships-amid-covid-19-failures>.

¹²⁷ Human Rights at Sea, 'Case Study: In Their Own Words – Eight Indian Seafarers Abandoned Off-Shore Walvis Bay, Namibia, Face Fatigue, Lack of Wages and Mental Health Issues' (January 2019) <www.humanrightsatsea.org/wp-content/uploads/2019/01/HRAS_Case_Study_Abandonment_Walvis_Bay_Namibia_29_Jan_19_single_pages_SECURED.pdf>.

¹²⁸ Doumbia-Henry (n 45) 281.

provide guarantees for the provision of both, but States continue to fail to comply with their duties, leaving seafarers exposed to serious risks to their life. Regulation 4.1 of the MLC, 2006 imposes on each Contracting Party a duty to ensure that all seafarers ‘on ships that fly its flag are covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board’. Each Contracting Party is also under a duty to ensure that all seafarers ‘on board ships in its territory who are in need of immediate medical care are given access to the Member’s medical facilities on shore’. Articles 29 and 30 of the ILO Work in Fishing Convention, 2007 place States under a duty to adopt laws and regulations that require fishing boats to carry appropriate medical equipment and medical supplies, as well as staff trained to provide medical care whenever needed. Under Article 29(e) of the ILO Work in Fishing Convention, 2007 ‘fishers have the right to medical treatment ashore and the right to be taken ashore in a timely manner for treatment in the event of serious injury or illness’.¹²⁹ Accordingly, cases in which seafarers or fishers have been denied urgent medical care by port authorities, as previously considered, are in breach of the duty of States to provide medical care in accordance with these international law standards, where applicable.¹³⁰

Both conventions provide for occupational safety and health. Regulation 4.3 of the MLC, 2006 requires each member State to ‘ensure that seafarers on ships that fly its flag are provided with occupational health protection and live, work and train on board ship in a safe and hygienic environment’. Article 32 of ILO Work in Fishing Convention, 2007 requires that all fishers on board fishing vessels of 24 metres in length and over, normally remaining at sea for more than three days, are provided with appropriate personal protective clothing and equipment. In the context of the pandemic, the provision of PPE, or the lack thereof, was a constant problem. The IMO issued urgent guidance clarifying that ‘the protection of seafarers would include the provision of alcohol-based hand rub and personal protection equipment, and the adoption of the necessary precautionary measures to prevent transmission of the virus during the interaction with people boarding ships for operational, inspection and other purposes’.¹³¹

The provision of PPE is necessary not only for protecting the crew but also for preventing the spread of the virus to passengers or port personnel. Accounts from seafarers revealed that not all seafarers had access to PPE and were often exposed to risks, especially when visiting ports in countries where the

¹²⁹ M Gavouneli, ‘Protecting Women Fishers: The Gender Parameters of Labour Rights at Sea’ in I Papanicolopulu (ed), *Gender and the Law of the Sea* (Brill 2019) 173–7.

¹³⁰ ‘Supporting Seafarers on the Frontline of COVID-19’ (n 94).

¹³¹ IMO, ‘Coronavirus (COVID 19) – Personal Protective Equipment’ (Circular Letter No 4204/Add.15, 6 May 2020) para 2.

virus was spreading in a seemingly uncontrollable fashion, such as Brazil.¹³² One of the main reasons why seafarers have not been supplied with PPE are port restrictions. There have been several cases reported in which port States prevented suppliers from boarding ships and supplying masks, overalls and other PPE to crew because of Covid-19 precautions preventing flag States from discharging their duty to enforce human and labour standards on board vessels, leaving crew members exposed to serious risks to their health.¹³³

This consideration of labour standards reinforces the point that international law does provide for the protection of persons at sea. The MLC, 2006 and the ILO Work in Fishing Convention, 2007 set out clear obligations on States Parties, including with regard to rights of repatriation, access to medical care and PPE. The enforcement of labour standards is down to flag States, while port States have enhanced powers to oversee the enforcement of labour standards on board vessels entering their ports.¹³⁴ This double layer of protection should translate into enhanced protection of labour standards on board vessels, but port closures have resulted in precisely the opposite. Once port States close their ports, they not only shy away from inspecting labour standards but also prevent flag States from discharging their duties.

E. EU Law

Another layer of protection for persons at sea, at least for those on EU-flagged vessels or within the waters of EU Member States, derives from EU law. The EU is the only international organisation that has undertaken obligations under LOSC, and it has devised its own sophisticated mechanisms to protect both human and labour rights. In the context of the Covid-19 pandemic, the application of EU law is of further interest because one of its core values is freedom of movement.¹³⁵ Reintroducing internal border controls between EU Member States is an extraordinary measure which can only be used as a last resort and has to be proportionate to the threat it aims to address.¹³⁶ The imposition of extensive internal border controls during the pandemic, including in ports, is an unprecedented situation in the EU. In order to mitigate the impact of these controls, including on those at sea, the EU introduced voluminous new

¹³² 'Greater Access to PPE Called for by Concerned Seafarers' (*Human Rights at Sea*, 13 April 2020) <www.humanrightsatsea.org/2020/04/13/greater-access-to-ppe-called-for-by-concerned-seafarers/>.

¹³³ 'Statement of the Officers of the STC' (n 94) 2.
¹³⁴ ILO, *Guidelines for Port State Control Officers Carrying out Inspections under the Maritime Labour Convention, 2006* (ILO 2009) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_101787.pdf>.

¹³⁵ Art 3(2) of the Treaty on European Union (TEU); art 21 of the Treaty on the Functioning of the European Union (TFEU); Titles IV and V TFEU; art 45 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

¹³⁶ Council Conclusions on Covid-19 [2020] OJ C57/04, para 15; European Commission, 'Proposal for a Council Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic' COM(2020) 499 final (4 September 2020) 3–4.

guidance and reminded Member States that they remain bound by their existing obligations under EU law during the pandemic.¹³⁷

With reference to cruise ships, the European Commission (EC) reiterated that EU-flagged ships should be able to access a port of the flag State and to allow the disembarkation of crew and passengers.¹³⁸ For cruise ships flying a third country flag, Member States were asked to accommodate them for ‘humanitarian reasons’.¹³⁹ In addition, the Member States were urged to provide medical care to persons on board vessels who were infected by Covid-19 or to allow them to disembark and to be transferred to hospitals with sufficient capacity.¹⁴⁰ The European Maritime Safety Agency (EMSA) published its own guidance on the gradual and safe resumption of cruise ship operations within the EU.¹⁴¹ In accordance with EU law and EC Covid-19 guidance, EMSA stressed the importance of the obligation of States and shipowners to implement a wide range of hygiene standards and to provide adequate PPE.¹⁴² Moreover, the guidance placed emphasis on the importance of having medical personnel, facilities, equipment, supplies and testing available on board vessels in order to provide fast and adequate care to those infected by the virus.¹⁴³ A large part of the guidance is focused on what port States are expected to do and how to cooperate with cruise ships in order, *inter alia*, to facilitate the disembarkation of persons in need of medical care.¹⁴⁴ It further underscores the duty of port States to facilitate crew changes and repatriation, as well as giving crew members access to medical care under all circumstances.¹⁴⁵

In order to ensure that maritime trade continued uninterrupted, the EC designated a list of ‘workers exercising critical occupations’ who should enjoy unhindered movement across borders and included in this list ‘maritime and inland navigation workers’.¹⁴⁶ In addition, the EC introduced transport corridors—the ‘Green Lanes’—in order to ensure that ‘all freight, including but not limited to essential goods such as food and medical supplies, gets quickly to its destination without any delays’.¹⁴⁷ All workers involved in international transport, including seafarers, enjoy free movement

¹³⁷ ‘Covid-19’ (*EurLex*) <<https://eur-lex.europa.eu/content/news/Covid19.html>>.

¹³⁸ European Commission, ‘Covid-19 Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services’ C(2020) 1753 final (16 March 2020) para 6. ¹³⁹ *ibid* para 8. ¹⁴⁰ *ibid* para 9.

¹⁴¹ EMSA, ‘Guidance on the Gradual and Safe Resumption of Operations of Cruise Ships in the European Union in Relation to the COVID-19 Pandemic’ (27 July 2020). ¹⁴² *ibid* 7–11.

¹⁴³ *ibid* 6. ¹⁴⁴ *ibid* 15–32. ¹⁴⁵ *ibid* 21.

¹⁴⁶ Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03) [2020] OJ C102 I/12, paras 1–2.

¹⁴⁷ European Commission, ‘Communication from the Commission on the Implementation of the Green Lanes under the Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services’ C(2020) 1897 final (23 March 2020) 1.

within the EU.¹⁴⁸ The EC guidance was explicit in that ‘travel restrictions and mandatory quarantine of transport workers not displaying symptoms, should be waived, without prejudice for competent authorities to take proportionate and specifically adapted measures to minimise the risk of contagion’.¹⁴⁹ The implementation of Green Lanes was aimed, inter alia, at facilitating cross border transit of seafarers to enable them to take up their duties on board cargo vessels and return home at the end of their contracts.¹⁵⁰ This measure was considered necessary to facilitate crew changes in EU ports, not only for the 600,000 seafarers of all nationalities serving on board ships of EU flag States worldwide but also for seafarers on board vessels flying flags of third States.¹⁵¹

The EC also took advantage of the unfortunate opportunity provided by the pandemic to remind Member States of their obligations under EU law to provide for a healthy and safe working environment. Article 31(1) of the EU Charter on Fundamental Rights provides that ‘every worker has the right to working conditions which respect his or her health, safety and dignity’.¹⁵² This author has argued elsewhere that the EU Charter on Fundamental Rights binds the EU institutions and its Member States when they ‘exercise jurisdiction within European waters – ports and territorial seas – and on EU-flagged vessels and have to comply with the EU Charter’.¹⁵³ In line with this argument, it is now further suggested that the EU and its Member States have to provide for a healthy and safe working environment on board vessels. In doing so, they must comply with EU legislation concerning health and safety at work. For example, according to the Council Directive of 12 June 1989, national legislation should oblige employers to provide their workers with PPE, as well as training on how to use it, and to introduce hygiene measures at work.¹⁵⁴ These obligations acquired distinct importance during the pandemic and further guidance was issued reiterating that Member States should provide PPE to those working on board vessels.¹⁵⁵ With regard to hygiene standards, the EU issued specific guidance for the workplace which is also applicable on board vessels.¹⁵⁶

¹⁴⁸ European Commission, ‘Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services’ (n 138) 1, 4. ¹⁴⁹ *ibid* 4.

¹⁵⁰ *ibid* 2.

¹⁵¹ European Commission, ‘Communication from the Commission, Guidelines on Protection of Health, Repatriation and Travel Arrangements for Seafarers, Passengers and Other Persons on Board Ships’ C(2020) 3100 final (8 April 2020) 1.

¹⁵² Charter of Fundamental Rights of the European Union (n 135).

¹⁵³ Galani, ‘Assessing Maritime Security and Human Rights: The Role of the EU and Its Member States in the Protection of Human Rights in the Maritime Domain’ (n 3) 336.

¹⁵⁴ Council Directive 89/391/EC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

¹⁵⁵ European Commission, ‘Communication from the Commission, Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships’ (n 151) 19.

¹⁵⁶ ‘COVID-19: Guidance for the Workplace’ (EU-OSHA, 6 April 2020) <<https://osha.europa.eu/en/highlights/covid-19-guidance-workplace>>.

The approach of the EU to maritime trade and cruise ship operations represents a good example of an effort to balance the protection of persons on board vessels and the rights of Member States to take action to prevent the spread of Covid-19. While certain port restrictions are inevitable, the EU has given due consideration to their impact on persons on board vessels and has underlined that Member States remain bound by their human and labour duties under EU law.¹⁵⁷ This is particularly so as regards port restrictions concerning migrant vessels, which the EU has so far failed to address and, as a result, has helped facilitate practices incompatible with human rights obligations, such as those adopted by Italy, Malta and Greece, as previously considered.

IV. CONCLUSION

This article has focused on the impact of port closures, made in response to the Covid-19 pandemic, on persons at sea. It has been shown that such port closures have caused a humanitarian crisis at sea, severely affecting the rights of those at sea at the time of the pandemic, be it for purposes of employment, recreation, military purposes or migration. This is not so much a result of a lack of relevant obligations under international law. It is now well accepted that human rights and labour standards apply at sea and there are significant protections under various legal regimes that have been touched upon. The rights and duties that derive from these regimes, however, are often difficult to reconcile and can result in persons at sea finding themselves in a form of legal limbo.

This is exemplified by the impact of port closures that have left unknown numbers of people stranded at sea. It is true that States have a sovereign right to control access to their ports, including for reasons of public health, but port closures have had serious repercussions for those at sea and have called into question the extent to which they are able to enjoy their fundamental rights, which have been severely restricted, including in cases engaging the right to life, the prevention of ill-treatment, the right to repatriation, the right to medical care, PPE and much else besides. Such rights are afforded significant protection in international law, as shown in this article, and States should not overlook their duty to respect them. Accordingly, it is argued that the assertion of the right of States to close their ports can be considered lawful only when due consideration is given to the rights of persons at sea. This requires a more balanced approach which can be realised if the rights and duties of States are interpreted and applied in a mutually reinforcing manner that does not sideline the rights of persons at sea—both during the Covid-19 pandemic, and more generally.

¹⁵⁷ F Berrod and P Bruyas, 'European Union: Are Borders the Antidote to the Covid-19 Pandemic?' (*The Conversation*, 17 April 2020) <<https://theconversation.com/european-union-are-borders-the-antidote-to-the-covid-19-pandemic-136643>>.