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**Ports closed to cruise ships in the context of COVID-19**

**What choices are there for coastal States?**

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**Abstract**

In the COVID-19 context will coastal States open their ports to cruise ships to meet the needs of people in danger? Can they prefer a more self-centered approach to protect their territory and exercise their sovereignty? The purpose of this study is to analyze the legal framework for the management of health risk by coastal States in the context of the coronavirus threat on cruise ships. The lack of a clearly defined common management strategy in face of major health risk complicates the situation. Only cooperation between flag States and port States will make it possible to overcome any conflicts of implementation between the State sovereignty principle and assistance to persons in danger.

**Keywords**

Coronavirus-Covid-19, Coastal States, Cruise ships, shipping, law of the sea, maritime law

### **Short Author Bios:**

Anne Choquet and Awa Sam-Lefebvre are teachers and researchers in law. Their research activities focus on the Law of the Sea and Maritime Law. The legal risk management of tourism at sea is a privileged topic in their research. They focus their reflection on safety, security, and environmental aspects.

### **Statement of Contribution:**

#### **1- What is the contribution to knowledge, theory, policy or practice offered by the paper?**

This contribution offers a comprehensive and meticulous analysis of the issue of treatment of health risk at international level in the maritime sector from a legal point of view. There has been very little or no investment in research as an object of analysis because the situation of a pandemic of this magnitude is unprecedented. It made it possible to demonstrate the absence or non-existence of a risk management strategy poorly identified and for which each State provides a perfectible response.

This paper is likely to contribute, after the crisis, to enrich or review regulations in force. The difficulties experienced by States during the crisis should be analysed *a posteriori* to establish a future strategy more suited to managing major health crises.

#### **2- How does the paper offer a social science perspective / approach?**

This contribution provides a qualitative approach in the analysis of health risk management in the maritime sector and more specifically in the context of international passenger transport. The latter presents risks which are generally ignored as little known or investigated. When a Ship is not authorised to dock, it is a refusal to respond to a situation of distress, it is a withdrawal and the bonds of solidarity are destroyed.

This paper reveals that the absence or non-existence of a risk-management results in difficulties of positioning for States and the need to define a methodology that is adaptable at the international level, taking into account the human factor.

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### **What choices are there for coastal States?**

#### Abstract

In the COVID-19 context will coastal States open their ports to cruise ships to meet the needs of people in danger? Can they prefer a more self-centered approach to protect their territory and exercise their sovereignty? The purpose of this study is to analyze the legal framework for the management of health risk by coastal States in the context of the coronavirus threat on cruise ships. The lack of a clearly defined common management strategy in face of major health risk complicates the situation. Only cooperation between flag States and port States will make it possible to overcome any conflicts of implementation between the State sovereignty principle and assistance to persons in distress at sea.

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## INTRODUCTION

As with all sectors of economic activity, the maritime transport sector is very much affected by the rapid and sudden outbreak of the coronavirus disease (COVID-19). On December 31, 2019, the first outbreak of what has now become known globally as the novel coronavirus was reported in Wuhan City, China (World Health Organization, 2020). For several months now, the coronavirus has been a cause for concern. On March 31, 2020, the World Health Organization (WHO) characterized COVID-19 as a pandemic (WHO, 2020).

Holidays spent on passenger ships, traditionally a sign of relaxation, are now a source of stress with dramatic consequences for the people aboard. On board various vessels, passengers have shown viral symptoms and their conditions have led to positive tests, deaths have also been reported. Cruise ships have become hot spots for spreading the virus because people are in close quarters aboard ship. They “can be amplifiers of infectious diseases because of the close human proximity of the semiclosed ship environments” (Hill, 2019, p.378). The outbreak of COVID-19 on the *Diamond Princess* has, for example, shown that “the cruise ship conditions clearly amplified an already highly transmissible disease” (Rocklöv, Sjödin, Wilder-Smith, 2020). Some ships have been significant locations of viral infection. Due to the number of cases aboard, two “international conveyances”: the *Diamond Princess* and the *MS Zaandam* have even been classified next to the States on the list of locations where the number of cases is counted (Worldometer, 2020).

Evacuations and quarantines have been carried out. The outbreak raised fears of contagion. For example, the first publicized case of a ship looking for a port was that *Westerdam*. This American cruise ship, on which 1,455 tourists had embarked for Japan, was banned from five Asian ports for fear of COVID-19. After eleven days of wandering at sea, the *Westerdam* was finally able to find in February of 2020 a port of refuge in Sihanoukville, Cambodia, where people were allowed to disembark. Unfortunately the case of the *Westerdam* is not an isolated one. Other ships have been turned back to New Caledonia, the Caribbean and South America. The *MS Zaandam* began its South American voyage from Buenos Aires, Argentina, on the 7<sup>th</sup> of March 2020. Tourist and crew members on the *MS Zaandam* reported symptoms of viral illness. Several South American ports refused to let her dock until the Panama Canal Authority decided, to grant the *MS Zaandam* to transit through the Panama Canal. The case of the *Diamond Princess* also deserves to be mentioned. After a blockade of several weeks in the Japanese port of Yokohama and various policies and decisions made by the Japanese government (quarantine, inspection...) (Nakazawa, Ino, Akabayashi, 2020) it was established that more than 600 people had been infected with the virus out of 3711 passengers and crew members (Mizumoto, Chowell, 2020). When it is not the coastal State that refuses access, the local populations are at times opposed to passengers’ disembarkation for fear of possible contamination and strongly show their opposition. This was the case, for example, in the French overseas territory of Reunion for the cruise ships *Azamara Quest* and *Sun Princess* (Henry, 2020).

The scale of the health risk feared by the States has led to measures that are as variable as they are exhausting for ship staff and passengers to accommodate. This situation is worrisome as it raises the question: can a coastal State prohibit a ship from entering its waters because some of its passengers are ill? Beyond the immediate answer it may elicit, the question raises another one, more global, relating to health risks management by a coastal State through the actions carried out within its maritime space.

This topic is little approached and almost unexplored at the academic level. On the issue itself, there is little reflection because the situation of a pandemic of this magnitude is

unprecedented. In the maritime literature, complex situations have occurred on board ships that have been managed with the help of a Port State. Today, however, we are dealing with an unprecedented situation as the caregiver himself is in difficulty because he is facing the pandemic on his own territory. The present contribution raises the question of health rules application to exceptional situations. Cruise lines had “only basic plans for acute gastroenteritis outbreaks, which do not meet the needs for managing infectious disease outbreaks” (Radic, et a., 2020, p.12). The current rules were originally designed to handle simple and conventional situations such as the evacuation of a sick or injured passenger, or the treatment of gastroenteritis on board ship. They were by no means designed for the context of a global health risk.

The present study relies on existing literature and reasoning by analogy. The question raised allows the mobilization of classical theories and reasonings of the Law of the Sea and Maritime Law. To this end, our legal research has been organized so as to explore how the law is applied in practice (Langbroek, van den Bos, Simon Thomas, Milo & van Rossum, 2017). This choice of research is justified by the fact that we seek to understand the contemporary legal framework for international transport by sea and cruise shipping regulatory system. “According to institutional theory, organizations are embedded in an institutional environment that guides their behavior and governance. Institutions establish boundaries that shape interactions among organizations, individuals, and other stakeholders for analyzing international legal commitments, compliance” (Cajaiba-Santana, Faury, Ramadan, 2020). As Frischmann explains, the dynamic institutional theory of international law “provides a powerful means for evaluating and comparing how international law evolves to address problems that arise in various issue-areas. In particular, it helps explain the strategic institutional decisions made by States to address noncompliance risks and increase the likelihood of stable cooperation in the face of dynamic change” (Frischmann, 2003).

The data were collected through different means. A literature review was first carried out in order to apprehend, in particular temporally, developments identified by doctrine regarding the need for and the way to regulate the cruise activity. Documentary analysis was conducted to collect legal data from regulations and strategies established not only by Nation States but also by international organizations (mainly the International Maritime Organization and the World Health Organization). Within this context, the texts of the main international treaties dealing with maritime activities (mainly the United Nations Law of the Sea Convention and the Maritime Labour Convention) and associated treaties and resolutions were analyzed. A special attention was paid to judicial decisions and the way legal problems were solved in practice. As “government agencies preferred to issue recommendations and advice on the appropriate social behavior rather than enact legislation or coercive regulations” (Capano, Howlett, Jarvis, Ramesh, & Goyal, 2020, 303), institutional sources were identified and publications issued by institutions in the public sector (ministries, national agencies). Their policy documents give some useful element for identifying national policies, strategies and plans of action. Institutional sources issued by the private sector (industry associations, unions, and professional associations...) were also studied. As the texts foresee the issue of health at sea, we have collected data on the practices of the maritime cruise companies in order to observe the methods mobilized by the actors in the field. For this, an extensive analysis was conducted of the various documents exchanged by the maritime cruise companies as well as the information contained on their commercial websites (press releases in particular). This enabled us to study some examples of ships and to base our reasoning on specific examples of the implementation of the rules by States and companies. We have also chosen to rely on these institutional documents to study the discourse held by the different actors to justify their actions and decisions. We have also relied on professional and thematic

literature insofar as they contain professional reasoning, experiences and analyzes of professional news.

Within its territory, a State exercises discretion, through its sovereignty, to manage public health issues of not only its nationals but also that of any person within its territory. In its approach to public health within its territory, however, the State must respect its humanitarian commitments and therefore assist ships that encounter difficulties at sea. The intent of this study is not to analyze the principle of State sovereignty itself, *per se*, but rather to initiate a reflection on the sovereignty implementation in the management of a pandemic risk arising from cruise ships and the protectionist practices of State activities designed to protect its borders.

The notion of a State as recognized in international law is employed throughout this analysis. According to Article 1 of the Convention on the Rights and Duties of States (Montevideo, 1933), “the State as a person of international law should possess the following qualifications; a. a permanent population, b. a defined territory, c. government and d. capacity to enter into relations with the other States”. The present study employs the notion of the State as a legal entity subject to international law with sovereign rights (including treaty making power) and obligations, in particular to respect rules contained in treaties freely subscribed to (international treaties) or customary rules recognized by international law. The purpose of this study is to analyze the legal framework for the health risk management by a coastal State within the context of coronavirus threats on cruise ships. Beyond the implementation of the rules on board ship, there is a question of the State response. The ship can be a vector of health risk for populations, especially coastal and port populations, hence this reflection on what the State's strategy will be in relation to this response. What is the “welcome” given to a ship in distress when the ship is a source of potential health risk? What balance should be struck between national public order and sovereignty? One must take into account the right of coastal States to regulate navigation in their marine territory. Moreover, ship accommodation in port is a necessity in the event that assistance is required for persons in distress as a way of complying with international texts.

## 1. THE RIGHT OF COASTAL STATES TO REGULATE NAVIGATION IN THEIR MARITIME TERRITORY

As a reminder, the United Nations Convention on the Law of the Sea, signed in 1982 in Montego Bay (Jamaica) (UNCLOS), defines maritime spaces and the rights and duties of States within those spaces. Although not all States have ratified this treaty, the United States being but one example, we should take into account that the convention is a codification treaty as shown in its Preamble: “the codification and progressive development of the law of the sea achieved in this convention” is recognized. The convention contains customary rules which must be respected by the States, even though they are Third States to the Convention, because they are not parties to the treaty. Article 38 of the Statute of the International Court of Justice identifies treaties and Customary Law as international sources of Law. Article 38 defines “international custom, as evidence of a general practice accepted as law”. The Montego Bay Convention therefore must be implemented either as a convention regulation (for States Parties) or as a customary rule (for Third States) except when the State has made persistent and consistent objections to some of its dispositions according to the persistent objector doctrine.

Universally applicable, the convention covers all marine spaces and their uses, including navigation and overflight, exploitation and exploration of resources, conservation of living resources, protection and preservation of the marine environment and scientific

research. The States Parties to the Montego Bay Convention have recognized “the desirability of establishing” through this Convention, with due regard for the sovereignty of all States, “a legal order” for the seas and oceans which will “facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment” (UNCLOS, Preamble). Due to the fact that a coastal State is sovereign within its waters but respectful to navigation, we need to study port access regulation with regard to the health risk presented by foreign vessels. Whether or not a State has ratified the Montego Bay Convention, States have demonstrated that they would rely on national regulations. In the end, in both cases, each State will draw on national provisions to establish a strategy of closing or not the ports.

#### 1.1. *The coastal State, sovereign in its waters but respectful to navigation rules*

The spaces linked to the notion of State Sovereignty refer here to the spaces immediately adjacent to its coasts. The rights of the coastal State over these areas that it “owns” and which are part of its “territory” are very significant: the State can apply its domestic legislation (customs, tax, health regulations, etc.). It also has the power to regulate maritime navigation in response to the specific dangers provided as long as the rules are not discriminatory. Similarly, it has the right to apply its police and security laws to foreign vessels. “The sovereignty of a coastal State extends, beyond its land territory and internal waters”, to an “adjacent belt of sea, described as the territorial sea” (UNCLOS, Article 2.1).

Within its internal waters, the State has unquestioned sovereignty. Included are coastal area marine spaces landward of the baselines. States can use the low-water line or straight baselines as a baseline for measuring the breadth of the territorial seas (UNCLOS, Article 5 for normal baseline and Article 7 for straight baselines). This assertion of State Sovereignty, which is consistent with the principles laid down in the Law of the sea through the Montego Bay Convention, may appear to contradict another principle linked to the continuity of the principle of freedom of the seas. This is not the case. Through respect for its sovereignty within its spaces, a State must also pay attention to the circulation of ships which enjoy the right of innocent passage. “Ships of all States, whether coastal or land-locked”, enjoy this right through the territorial seas (UNCLOS, Article 17). This allows vessels of one State to move safely and freely in the territorial seas of another State. These are areas which extend up to 12 nautical miles from the baselines established by the coastal State (UNCLOS, Article 3). The Foreign ships (both merchant and military), however, have a right of passage only for innocent passage.

This innocent passage can be suspended if there is a perceived threat to the security of the coastal State. For the Montego Bay Convention, “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State” (UNCLOS, Article 19). In the Corfu Channel Case, the International Court of Justice (International Court of Justice, 1949) established that “it is the character of the passage and not the character of the vessel that determines whether the passage is innocent” (Deddis, 1979, p.84). The Montego Bay Convention contains examples of activities which would “be considered to be prejudicial to the peace, good order or security of the coastal State”. From this perspective, some activities should be noted: “the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State” (UNCLOS, Article 19.2.g). As long as there would be no loading or unloading of people infected or susceptible to be infected with the novel coronavirus, we could assume that the State would not consider as prejudicial (i.e. not innocent) if it would be “any other activity not having a direct bearing on passage” (UNCLOS, Article 2. 1.). If a coastal State was able to establish that the passage would not be an innocent passage, then it could act. This would be



the case, if, for example, the State would consider that the ship did not respect its domestic sanitary laws.

### *1.2. Port access regulation with regard to the health risk presented by foreign vessels*

State Sovereignty extends to inland waters which cover waters in the immediate vicinity of the territory over which the State exercises its sovereignty. These waters include those of ports, and also bays and estuaries (Ortolland, 2017, p.3). The port facilities of a State are subject to its sovereignty and “it seems accepted that there is no general right to access to ports of Third States under international law” (Gautier, 2018).

Ports are real trading places for ships that can embark and/or disembark passengers and goods. Through dynamic policies, States are now seeking to make their ports more attractive and thus increase their economic impact. These places of life have today been weakened by a health risk coming from the sea. The ports, which are essentially opened to the world, have their access restricted by the States owning them.

“It is an important corollary to the international legal principle that a host State has authority over foreign vessels voluntarily in port that a port State can prohibit the entry into port of any vessel” (McDorman, 2000, p.218). In the Island of Palmas Case (or Miangas) Award (1928), Max Huber, the arbitrator of the Tribunal of Arbitration, stated that “sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State” (Tribunal of Arbitration, 1928, p.838). Thus, within its territory, a State can adopt whatever measures it wishes. Nevertheless, it must not disregard neighbouring States Sovereignty as well as the international treaties to which it is a party. The freedom of navigation, inherent in the maritime space, must therefore be protected without contradicting the need for the protection of the States and their population (Pancraccio, 2010, p.65).

With the virus outbreak, a coastal State applying the precautionary principle may either decide to block access to a port or to disembark passengers without the assurance of zero risk on board. This situation illustrates all of the relevance of Gidel's remarks, which emphasized that “in reality freedom of the road never entailed the right to enter the hostel against the wishes of the innkeeper (...), freedom of the sea is independent of access to ports” (Gidel, 1932, p.51).

Proof of this was shown with different ships after people aboard started reporting coronavirus symptoms, some ships were stuck off ports with people and crew members on board pending the results of tests conducted by local authorities or following statements made by the onboard authorities. Some ships were in search of a port where they could dock, sometimes during a long period as shown in Table 1. This situation, it should be stressed, did not take any form of discrimination against foreign vessels since the reason for access prohibition or the ships quarantine stems from an objective situation of State vital interests strategy which does not want to see an external vector of risk enter its territory. In the past, national regulations establishing quarantine measures had been adopted in the face of epidemics. This is the case, for example, in 1896 for the Hawaiian Islands (Mills and Dole, 1896, p.634) or in 1906 at the port of Newchwang (China) (China, 1906). Fixed at forty days in time of plague, the “quarantine” was taken in its literal sense. But its true duration will vary appreciably according to the pathologies and the times (Fabre, 1998, p.133).

Table 1: Some examples of port authorities' decisions (February-April 2020)

| Cruise ship             | Flag/operator/people onboard              | Departure and stopovers   | Port state decision   |
|-------------------------|---|---|---|
| <i>Costa deliziosa</i>  | Italy/Costa cruises line/2729             | 5 January : departure from venice<br>With stopovers :<br>March 4 : Sydney<br>March 16 March : Fremantle (Australia) | April 17 : Refusal access in France<br><br>April 20 : disembarkation of passengers in Barcelona   |
| <i>Diamond Princess</i> | UK/Princess Cruises/3711                  | Departure from Yokohama ( January 20)<br><br>Stopover in Hong Kong ( January 25)                                    | February 1: quarantine in Naha (island of Okinawa)<br><br>February 5 : confinement on board the ship<br><br>February 15 : disembarkation of passengers in Yokoha (Japan)  |
| <i>Grand Princess</i>   | Bermuda/Princess Cruises/3533             | Departure from Mexico (Mexico)  | March: Ship immobilized off the coast of San Francisco (US)<br><br>March : disembarkation of passengers in Oakland (US)   |
| <i>MS Zaandam</i>       | The Netherlands/Holland America Line/1829 | March 7 : Buenos Aires (Argentina)  | 27 march : Refusal access of the Canal of Panama<br><br>2 April : Access port Everglades( USA) permitted only for Florida residents   |
| <i>Westerdam</i>        | The Netherlands/Holland America Line/2257 | February 1 : Hong kong  | Several refusals of port access :<br><br>February 6 : Japanese authorities<br><br>February 7: Guam (Micronesia, USA)<br><br>February 11 : Laem Chabang (Bangkok, Thailand)<br><br>February 14 : disembarkation of passengers in Sihanoukville (Cambodgia) |

Sources: table made up of data collected by the authors

The criterion for exclusion or acceptance in port remains the non-existence or not of COVID-19 on board ships, regardless of their flag. In France, for example, the authority in charge is the Prefect who, on proposal from the Director-General of the Regional Health

Agency, carries out the quarantine of persons likely to be infected with the novel coronavirus (Paragraph 2, of Article R.3115-3-1 of the French Public Health Code). Quarantine placement takes place either at the person's home or in a suitable location. In the same manner, the ship master arriving in a U.S. port has to immediately report any death or illness aboard (Paragraph 71, 42 U.S. Code Title 42-The public Health and welfare). The situation undoubtedly seems to be discriminatory, but it is in no way discriminatory. In the developmental situation of the novel coronavirus, health issues as well as the health preservation of the health of citizens resident in the territory have been given priority over shipping. We are faced with an overall situation with differential-treatment depending on the perception and/or approach specific to each State. The health risk experienced by a State in the reception of a ship in its waters can militate for a safe withdrawal from and a refusal of reception into its waters and *a fortiori* into one of its ports. This attitude, however, cannot be maintained in the event of a situation where the organization of assistance for people in distress is necessary.

## 2. RECEPTION IN PORT, A NECESSITY IN THE EVENT OF ASSISTANCE TO PERSONS IN DISTRESS, AS A WAY OF COMPLIANCE WITH INTERNATIONAL AGREEMENTS

“The existence of sovereignty over internal waters and the absence of any general right of innocent passage through them logically implies the absence of any right in customary international law for foreign ships to enter a State's port” (Churchill, Lowe, 1988, p.52). But there is an exception to the absence of an obligation to welcome a ship in its ports. A ship in distress is granted a right of port access. The reception of people in distress is a port imperative. The establishment of cooperation is, therefore, an international imperative in the face of major risks.

### 2.1. *The reception of people in distress, a port imperative*

Navigation at sea is most relevant when the human life safeguard is ensured. One no longer travels “at one's own risk”. As such, a ship should be able to react and decide the best measures to be taken in a special situation. Thus, the State may take the measures it deems appropriate in a given situation. COVID-19 infections on board ships have led States to take measures for ships flying their flag. The United States and France have, for example, published documents for shipping companies. They specify preventive measures to put in place in the exposed areas and the measures to be taken in the event of infection suspicion by the novel coronavirus on board a vessel under their flag (Centers for Disease Control and Prevention, 2020a, Ministère de la Transition écologique et Solidaire, 2020). Various recommendations have therefore been established as such, especially those for the prevention of infection on board ships during a stopover in one of the States where the virus circulates and recommendations on what to do in the event of a suspected patient on board.

In jurisprudence, there are examples of cases which put forward States behaviors in favour of ships reception. A right of port access was recognized in the *Creole* Case in 1853. “The right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country” must “be respected by all nations” (Commission established under the Convention concluded between the United States of America and Great Britain, 1853, p.53). In the *Rebecca* Case (1929), it was established that “recognition has also been given perhaps it may

be said in a more concrete and emphatic manner to the immunity of a ship whose presence in territorial waters is due to a superior force” (Hoff, 1929, p.447).

The exception to welcoming a ship in its port is a derogation which presupposes “that there is a threat to the lives of the persons on board the ship (e.g. a threatening storm or an urgent need for medical assistance)” (Gautier, 2018). The concept of distress is defined as “a threat of serious and imminent danger which requires immediate assistance to the ship and to the people on board” (Galy, 2019, p.177).

In the case of the repatriation of persons rescued at sea, non-governmental organizations have also faced the same difficulties as those experienced by passenger ships. The question also arises in the face of migration resurgence by sea in the Mediterranean Sea. Non-governmental organizations (NGOs), in their working dynamics, face difficulties when assisting migrants. Following a measure imposed by the Italian authorities, the crews of the *Sea-Watch 3* and the *Ocean Viking* were confined on board in front of the Sicilian ports of Messina and Pozzallo. In February of 2020, the two vessels disembarked survivors rescued during separate operations and were immediately placed in quarantine (Cogné, 2020). The *Ocean Viking* took over from the *Aquarius* which had “become a symbol of the so-called “migration crisis” of 2015, revealing above all a political crisis of reception in Europe” (Jolys-Shimells, 2020, p.136). These restrictions on the exercise of Humanitarian Law at sea also make fear on the part of NGOs, such as the European NGO “SOS Méditerranée”, of “a new episode of unjustified anxiety among the public concerning the people rescued at sea” and even that the epidemic serves “as a pretext to prevent the *Ocean Viking* from resuming its rescue mission in the central Mediterranean”. This is the case mainly due to the fact that the International Maritime Organization (IMO) recommended avoiding restrictions or delays on the ships, people and goods movement, especially in the event of distress (Britz, 2020).

Ultimately, how can a humanitarian obligation of assistance to people in distress be reconciled with the State’s obligation to preserve the health and safety of its population? At this level, it is advisable to dissociate the various possibilities and observed practices: the States which proceed, as a precautionary measure, quarantining vessels and the others which enact formal prohibitions to berth, thus imposing a kind of ban on ships by reason of public order. For example, “at the time of the Diamond Princess outbreak, it became apparent that passengers disembarking from cruise ships could be a source of community transmission”, this has justified “aggressive efforts to contain transmission on board and prevent further transmission upon disembarkation and repatriation were instituted” (Moriarty et al, 2020).

This latter attitude especially comes into play when the need for help and assistance is expressed by people on board a ship whose home-port refuses to welcome them home. To what extent can effective protection of the health and safety of seafarers be considered a priority? This obligation is reflected in the terms of the Maritime Labour Convention adopted by the International Labour Organization (ILO) in 2006. This convention provides that flag States ensure all seafarers working on vessels flying their flag are covered by appropriate measures to protect their health and have access to prompt and adequate medical care for the duration of their service. “Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection” (Maritime Labour Convention, Article 4.4). The Convention also requires port States to ensure that seafarers working on ships in their territory have access to their medical facilities ashore if they require immediate medical attention (IMO, 2020 a). Due to refusal of access by crew members ashore, a special discussion has been open within the Special Tripartite Committee of the Maritime Labour Convention. With the wish to improve seafarers' rights, they have been recognized, in July 2020, as “key workers” (IMO, 2020c).

These issues help explaining the situational dilemma faced by States engaged in the decision-making process of opening or closing their ports during a pandemic. “Despite the guidelines in place to standardize responses in the event of public health emergencies, the jurisdictional gap between the Coastal States and the Flag States », Ladeinde-Babalola notices a “subjectivity with which each coastal state chose to handle the situation (Ladeinde-Babalola, 2020). Under these circumstances, further international cooperation may also be envisaged as an imperative.

## *2.2. The establishment of cooperation, an international requirement in the context of major risk*

All international law is imbued with an imperative for cooperation, which is, by necessity, an operational obligation. Indeed, no State can claim to be self-sufficient in terms of resources in the face of the harmful consequences of a health pandemic such as the one caused by the COVID19. There is both a universal (U.N. Security Council) and a regional tendency to bring epidemics and pandemics into the logic of collective security, considering them as threats to international or regional peace and security (De Pooter, 2019, p.237).

Under the Montego Bay Convention there is a duty to provide assistance. A State “shall require the master of a ship flying its flag” not only “to render assistance to any person found at sea in danger of being lost” but also “to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him”. This is a duty “in so far as he can do so without serious danger to the ship, the crew or the passengers” (UNCLOS, Article 98.1, a and b). Moreover, ship masters must respond to distress messages from any source. State parties to the International Convention for the Safety of Life at Sea (SOLAS) have recognized their obligation to ensure that ship masters provide assistance. When they are “in a position to be able to provide such assistance on receiving information from any source that persons are in distress at sea”, they are “bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so”. The SOLAS Convention adds also that this obligation to provide assistance “applies regardless of the nationality or status of such persons or the circumstances in which they are found” (SOLAS Convention, Regulation 33.1).

Common sense and the principle of reality naturally lead to this cooperation if we reasonably wish to maintain maritime activities while ensuring the safety and health of those involved in transport and their users. This cooperation can be born from either a national initiative or an international organization initiative.

In France, for example, the maritime affairs department in charge of this issue has published two fact sheets produced with the Maritime Medical Consultation Centre (CCMM). The first is a list of practical recommendations for crews faced with the novel coronavirus and the second indicates the course of action to be taken in the event of suspicion. As they are made available to all maritime stakeholders concerned by the issue (Centre de Consultation Médicale Maritime, 2020), these fact sheets, published at the national level, reflect a spirit of collaboration. This spirit is shared also by the United States (Centers for Disease Control and Prevention, 2020 b).

As any United Nations specialized agency, the IMO is part of this dynamic by bringing into synergy the various relevant conventions on the subject and the cooperation of States on the COVID-19 issue. The IMO General Secretary recalled that: “Flag State authorities, port State authorities and control regimes, companies and shipmasters should cooperate, in the current context of the outbreak”. The Secretary insists, this should be done “to ensure that, where appropriate, passengers can be embarked and disembarked, cargo

operations can occur, ships can enter and depart shipyards for repair and survey, stores and supplies can be loaded, certificates can be issued and crews can be exchanged” (IMO, 2020a). This circular letter was not only addressed to all IMO Member States but also to the United Nations and specialized agencies, intergovernmental organizations, and non-governmental organizations in consultative status with the IMO. To this end, and on the basis of recommendations developed by the WHO, the IMO issued information and guidance on precautions to be taken to minimize the risks that seafarers, passengers and others on board ships could face as a result of the new coronavirus (IMO, 2020a). In a similar approach, the WHO Director-General, considering the COVID-19 epidemic as a public health emergency of international concern, has issued a series of temporary recommendations that are intended to be improved following the evolution of the situation. The WHO and IMO “call upon all States to respect the requirements of ‘free pratique’ for ships” and “the principles of proper care for all travelers and the prevention of unnecessary delays to ships and to persons and property on board, while recognizing the need to prevent the introduction or spread of disease” (WHO and IMO, 2020).

In June 2007, the International Health Regulations (2005) (IHR, 2005) entered into force (World Health Organization, 2016). Their purpose and scope are “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade” (IHR, 2005, Article 2). The Regulations established new certification procedures for ships: the ship Sanitation Control Exemption Certificate and the ship Sanitation Control Certificate (“Ship Sanitation Certificates” or “SSC”). A ship health control exemption certificate is issued in the absence of any risk of disease international spread noted during the visit. A ship health control certificate is issued when a risk(s) of disease international spread of disease is(are) noted. State Parties shall ensure that Ship Sanitation Control Exemption Certificates and Ship Sanitation Control Certificates are issued in accordance with the requirements of the IHR 2005 (Article 39 and the model provided in Annex 3 of the IHR, 2005). These certificates are valid for 6 months. They are issued following a visit to the ship by the health authorities. A one-month extension of the existing certificate may be requested if it is impossible to carry out a visit (IHR, 2005, Article 39). These certificates allow a ship to move freely and to call at international ports. They are issued following an inspection which consists of ensuring the ship safety by persons or national authorities. The Ship Sanitation Certificates are administrated by national authorities.

With a Circular Letter established on March 17, 2020, dealing with “Coronavirus (COVID-19) – Guidance relating to the certification of seafarers”, the IMO encourages Port State control authorities “to take a pragmatic and practical approach in relation to these certificate and endorsement extensions”. The IMO also invites Member States “to communicate to the Organization general information on the practices adopted by the issuing Administrations and port State control authorities” (IMO, 2020b).

At the European Union (E.U.) level, it is both surprising and not surprising that there has not been a single response to the development of the global health crisis. The European health policy is not a common policy of solely E.U. administrative competence. The Treaty on the Functioning of the European Union lists among the areas where there is shared competence between the Union and the Member States “the common safety concerns in public health matters” (Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Article 4.2.k).

“At the heart of global pandemic governance” is the WHO IHR “which sets out key principles to guide national preparedness and response. At the European regional level, E.U. Decision 1082/13 is the key legal instrument for cross border threats to health” (Speakman, Burris & Cokerac, 2017, p.1021). For the European Parliament and the Council, the Member States “have a responsibility to manage public health crises at the national level”. They add also “measures taken by individual Member States could damage the interests of other Member States if they are inconsistent with one another or based on diverging risk assessments”. Therefore, they consider the response at the Union level should “seek to ensure, inter alia, that measures taken at the national level are proportionate and limited to public health risks related to serious cross-border threats to health, and do not conflict with obligations and rights laid down in the TFEU” (European Parliament and The Council, point 21). E.U. Member States are encouraged to plan for pandemics within a national legal framework, “while this allows for flexibility in governance, which is culturally and politically sensible, it risks a loss of coherence with neighbouring States and the international response system” (Speakman, Burris & Cokerac, 2017, p.1022).

There has also not been real European cooperation regarding the problem of the free movement of people during the crisis. The Schengen Borders Code introduced the possibility of border controls “in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control”. This is the case to “prevent any threat to the Member States’ internal security, public policy, public health and international relations” (Schengen Borders Code, Preamble, point 6). The Code introduced also the possible reintroduction of internal border control. “In the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control” (Schengen Borders Code, article 25). According to the Schengen Borders Code a “threat to public health” means “any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States” (Schengen Borders Code, Article 2. 21). Most Member States have applied the safeguard clause provided for in Article 25 of the Schengen Borders Code to respond to a global health crisis (Blanc, 2020).

It is certain that the crisis we are going experiencing was unanticipated. Who could have imagined only a few months ago that ports in various regions of the world would be shut down simultaneously due to a virus? Europe was not prepared for such an assumption; this explains perhaps why nothing has been done. This may also explain why there has been no cooperation among States concerning border controls, each one being attached to its sovereignty even in time of an unprecedented crisis. “The legal provisions and regulatory standards should be progressively improved to establish a coordinated and integrated management system for cruise ships and a joint law enforcement mechanism” (Liu, Chang, 2020).

## CONCLUSION

States react differently to the health risk we must face with COVID-19. They have adopted unilateral measures to stop the coronavirus outbreak and imposed quarantine and other restrictions to slow down the epidemic. They also have reduced economic activities.

States hesitate, observe and take certain initiatives in response to other States behavior. Their focus on sovereignty is clear here. Even if they are members of international organizations, States assert their sovereign rights and take little or no account of their position relative to other Member States. The same is true of Humanitarian Law, which is also largely forgotten. The issue of health at sea is foreseen by international agreements which place obligations on States and shipowners. But they have not previously had the opportunity to respond to such a global and complex health risk. A strong international law frame in place, which anticipates action by different actors (flag States, port States, companies) to manage the protection of public health, but “systemic weaknesses risk limiting responses to the current crisis” (Klein, 2020). The question, therefore, is not one of whether the agreements are being respected or not, nor whether they are being misapplied on board ships, the real question addresses a level of international cooperation which is a novel as the novel coronavirus itself.

Legal rules are drawn from social and societal issues. In the present circumstances, they are built in response to the expectations and needs of the players in the cruise tourism industry (i.e. companies in the cruise tourism sector, shipowners, customers/passengers, States, international organizations, and NGOs). Those issues and needs do not evolve at the same pace as regulation. When the response of the Law to a societal issue is not proactive enough, as is the case with the COVID-19 pandemic, the answers are less than obvious to a State that has to deal with a situation where interests may seem contradictory.

As such, there is a great diversity of States behaviors in the face of high-risk situations, situations which they consider to be sanitary or geopolitical in nature. When faced with such fear, not all States manage the crisis in the same way: some States will close their borders while others will partially open them. Their decisions are based not only on the idea of preserving overall passenger safety in general (Sam Lefebvre, 2011), but also on the impact of the range of geopolitical, health and other issues related to border access.

Notice of closure or opening of ports to cruise ships will have varying impacts depending on the issues and interests favored by the State and the perceptions of them. From the point of view of the local population, the State that closes its ports is reassuring because it has adopted a protective approach, an approach that may even have been requested by the people themselves. On board ship, the situation may engender mixed reaction with people readily tolerating it, while others, much less so. The State’s decision to close the port may be considered not understandable due to the fact the perception of risk on board a ship is different from that on land. People, whether sick or not, may accept to wait at sea and/or express the desire to leave the ship. Despite the legal provisions of the coastal States which were imposed on shipowners and despite the measures taken by the companies in application of the measures adopted by the States, some passengers did not feel sufficiently protected. A collective of 850 French passengers has, for example, decided to open an action against Costa Cruises due to negligence and various faults during their trip on the Costa Magica (De Paola, 2020). Media coverage of cruise passengers evacuated by their respective national governments may induce an enduring risk-avoidance consumer trend (Ioannides, Gyimóthy, 2020).

Externally it is possible that the State will be perceived as an unwelcoming State. It may be criticized for not meeting its obligations, because, in essence, the State is leaving the ships to their own fate. In this sense, there is a real potential for the disengagement of the State in critical situations. This reality may even lead shipowners to redefine or re-think their destination strategies. In choosing a destination, shipowners hope to work with relationships based on trust. They will therefore think twice about going to a State whose doors would be



closed to the slightest difficulty. As “travelers are likely to remember the images of passengers quarantined over weeks, and ports unwilling to let them disembark” (Gössling, Scott, Hall, 2020) and insofar as the risk perception is of significance in travelers’ international destination choice behaviors (Han, et al., 2020, 5), cruise companies will have to reclaim a clientele and cruise companies will have to win back their customers and establish a new climate of trust.

Globally, the COVID-19 epidemic has strongly reduced economic development activities with an accompanying decrease in the number of and/or cancellation of cruises. The European Maritime Safety Agency has shown a decrease of the number of Persons on Board (PoB) on cruise ships and reports that every major cruise line in the world suspended departures in mid-March as the coronavirus outbreak grew (European Maritime Safety Agency, 2020). This decrease is also explained by the positions of the States and international organizations as well as by the general fears of potential tourists. Health risk generates a great concern among international tourists (Reisinger, Mavondo, 2006, p.14). So as to reanimate the industry, travel insurance would be on the list of must-haves from now on, “tourism companies that would include this option in their travel packages for free or at small prices would be preferred” (Uğur, Akbiyik, 2019).

“Health-related crises could influence perceptions of tourism risk, resulting in a sudden decline in tourism demand, with significant socio-economic impacts, particularly in countries dependent on tourism” (Novelli, Burgess, Jones & Ritchie, 2018, p.85). “Infectious disease outbreaks, including coronavirus, greatly jeopardize the tourism industry given its reliance on human mobility” (Yang, Zhang & Chen, 2020). It is probably too early to try assessing the economic impacts of the COVID-19 crisis, but due to its global nature, it is certain that they will be heavy and unprecedented. While some economic aids have been distributed to companies in distress, the enormity of crisis might necessitate additional assistance in order to keep certain segments of the industry from collapse (Sharma, Nicolau, 2020). “The impact of COVID-19 on the cruise industry will be much stronger than any of the past difficulties. However, the cruise industry will grow again with a new supply-driven strategy as overcoming difficulties in the past” (Ito, Hanaoka, Kawasaki, 2020). In the past, events such as Ebola and other infectious diseases have had negative impacts on traveler health, tourism industry and their destinations (Wang, Liu-Lastres, Ritchie & Mills, 2019, p. 1). The same applies to economic activities linked to tourism indirectly. For shipowners, the financial impact of port closures is real. In part, this impact is due to the lengthening of the voyage as the ship may be obliged to sail back to sea in search of another port accepting her. Additional financial expenditure may also come from the transfer of passengers to another vessel in order to limit the viral spread risk on board the vessel. In this unfortunate scenario the same number of customers now occupy not one ship but two, which significantly increases the costs associated with the cruise.

Ultimately, the need to preserve the safety of transport at sea has led to disparate State behaviors but, the central point in common remains the need for asserting National Sovereignty. In a manner similar to the poorly anticipated and poorly managed shipping industry response to the major crises of marine pollution, the COVID-19 crisis once again brings to the fore the difficult demands of exceptional situations that arise outside of established international cooperation protocols. But this crisis has also made perceptible the resilience of tourism stakeholders who are willing to organize themselves to maintain the sector dynamic.

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