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Port Denials: What are States' International Obligations?



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BY ALINA MIRON ([HTTPS://MARITIME-EXECUTIVE.COM/AUTHOR/ALINA-MIRON](https://maritime-executive.com/author/alina-miron)) 04-12-2020 06:42:28

It's a truism to say that COVID-19 has taken the whole world aback. Two months and a fortnight after the World Health Organization (WHO) declared the spread of the virus to be a public health emergency of international concern (or PHEIC), the maritime world is still at particular dismay, as it has to face a large array of port restrictions and denials (<https://www.wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map/>) of disembarkation and embarkation. These restrictions apply to cruise ships, but also to the merchant fleet more generally. In some cases, even the Navy or ships on government service were denied docking, on account of suspected cases of COVID on board. These measures put a heavy burden on shipowners and ship operators, but also on the crew, doomed to remain on board way beyond the maximum duration of service periods, with no clear perspective of repatriation. In the medium term, it is international trade, 90 percent of which is maritime, which will be dramatically disrupted. Yet, the continuity of maritime logistics is essential to most countries supply, including for essential commodities (energy, chemicals, food, consumables including health products).

Free pratique, non-discrimination and distress in the time of COVID

By virtue of their territorial sovereignty, States may freely regulate access to their ports (Article 25.2 of the United Nations Convention on the Law of the Sea (https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)). Yet, this principle must be interpreted in light of several international obligations.

The International Health Regulations (<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=83E13C6F772BB868B6405FB1E53C8132?sequ>) (IHR 2005) are the legal instrument adopted to provide a public health response to the international spread of disease. IHR are binding upon all the 194 States member of the WHO. Their purpose is to respond to sanitary emergencies "*in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic*" (Art. 2 of

the IHR). In relation to maritime transport, the principle adopted by this text is that of *free pratique*, meaning the “*permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores*” (Art. 1 of the IHR). Furthermore, Article 28.1 states that “*a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry*”. Article 28.2 specifies that a ship shall not be denied the embarkation and disembarkation of passengers either.

Even if they have no general obligation to open their ports to foreign ships, States parties to the 1923 Convention on the International Regime of Maritime Ports (<http://www.worldlii.org/int/other/treaties/LNTSer/1926/335.html>) have also undertaken to treat equally the ships of all States, including their own (art.2). It is true that the 1923 Convention has not been widely ratified, but the principle of non-discrimination is equally recalled by the 1965 IMO Convention on Facilitation of International Maritime Traffic, specifically in relation to sanitary measures and health formalities (Art. 4.7 of the Annex to the FAL Convention (<https://cil.nus.edu.sg/wp-content/uploads/2019/02/1965-Convention-on-Facilitation-of-International-Maritime-Traffic.pdf>); also Art. 42 of the IHR).

States must allow disembarkation in the event of a medical emergency on board (Art. 2.17-2.24 of the Annex to the FAL Convention (<https://cil.nus.edu.sg/wp-content/uploads/2019/02/1965-Convention-on-Facilitation-of-International-Maritime-Traffic.pdf>)). If humanitarian evacuation is not granted, shipmasters may invoke distress as the *ultima ratio* to get permission to dock (Art. 28.6 of the IHR (<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=83E13C6F772BB868B6405FB1E53C8132?sequ>)). However, even if distress may be a credible legal justification, it is far from ensuring an automatic right of entry. States can still appreciate which are the most appropriate means, short of access to ports, to respond to the medical emergency.

Maritime transport freedoms and public health protection – which balance?

All these international regulations allow States to adopt more restrictive measures in case of an epidemic outburst. For instance, Article 43 of the IHR provides that, in cases of PHEIC, States can go beyond the recommendations adopted by the relevant international organizations. But even then, States do not enjoy unfettered discretion and must comply with three requirements. *Firstly*, such measures “*shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives*” (Art 43.1). This is the principle of reasonableness. *Secondly*, States must rely on scientific studies or WHO recommendations to justify these measures (Art.43.2). This is the principle of objective necessity and proportionality. *Thirdly*, they must convey these justifications to the WHO (Art 43.3). This is a corollary of the obligation of international cooperation, based on

notification and sharing of information. The organization may hence request its members to “*reconsider the application of the measures*” (Art. 43.4).

To say that States do not really comply with these requirements would be an euphemism. In practice, they have adopted variously restrictive measures which range from: - indiscriminate prohibitions on access to ports (hardly compatible with the principles of reasonableness and necessity); - to measures discriminating between ships on account of their nationality (which is not permissible); - and to more detailed bans, based on objective considerations, like previous calls in infected areas. A more appropriate approach is specifically based on the health situation on the ship, assessed after appropriate testing. But very few States adopted it.

Yet, relevant international organizations have adopted recommendations to cope with the crisis. On February 13, 2020, the [IMO and WHO](http://www.imo.org/en/MediaCentre/HotTopics/Documents/Joint%20Statement_COVID-19.pdf) (http://www.imo.org/en/MediaCentre/HotTopics/Documents/Joint%20Statement_COVID-19.pdf) adopted a joint statement insisting on the necessity to avoid severe disruption of maritime traffic. Since then, the IMO published several [circular letters](http://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx) (<http://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx>), providing guidance for States to reconcile public health concerns and the continuation of maritime activities. They call for cooperation between [flag State authorities, port State authorities and control regimes, companies and shipmasters](http://www.imo.org/en/MediaCentre/HotTopics/Documents/CL.4204-Add.1%20English.pdf) (<http://www.imo.org/en/MediaCentre/HotTopics/Documents/CL.4204-Add.1%20English.pdf>) in order to guarantee the rights for everyone in this health crisis. In the event that the port State denies access, other interested parties, including the flag State, should be approached. They may be called upon to provide [medical equipment and prompt medical care on board the ship](http://www.imo.org/en/MediaCentre/HotTopics/Documents/CL.4204-Add.1%20English.pdf) (<http://www.imo.org/en/MediaCentre/HotTopics/Documents/CL.4204-Add.1%20English.pdf>). Some States have made efforts to repatriate their nationals stuck on board of infected ships (mainly passengers coming from wealthy countries).

Seafarers, the forgotten essential workers

If the repatriation of tourists is well-advanced, the situation of the seafarers (who in their great majority come from developing countries) has hardly begun to be addressed. Yet, under the 2006 [Maritime Labour Convention](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/normativeinstrument/wcms_090250.pdf) (https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/normativeinstrument/wcms_090250.pdf) (Rule 2.5), seafarers have a right to repatriation or to be granted a safe stay in the country of disembarkation. It is the obligation of the shipowners to cover the related expenses. But it is the responsibility of the flag State to ensure that seafarers rights are respected. Unfortunately, the flag States, especially the flags of [convenience](https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience) (<https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience>), demonstrate a guilty passivity. Facing unprecedented restrictions from port States, deprived of the protection of the flag

state and that of their national State, many seafarers are simply blocked at sea. Seafarers' unions have sounded the alarm. On March 17, the International Transport Workers' Federation thus pointed out (<https://www.itfglobal.org/en/news/flag-states-must-protect-seafarers-and-passengers-health-during-coronavirus-crisis>) the failure of flag states to protect seafarers' and passenger's health during this humanitarian crisis" (<https://www.itfglobal.org/en/news/flag-states-must-protect-seafarers-and-passengers-health-during-coronavirus-crisis>).

On March 31, the ILO also expressed its grave concern (https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_740307/lang--en/index.htm) with the effects of these measures on seafarers and international trade. IMO also urged States (<http://www.imo.org/en/MediaCentre/HotTopics/Documents/Circular%20Letter%20No.4204Add.6%20%20Coronavirus%20Covid-19%20Preliminary%20List%20Of%20Recommendations.pdf>) to ensure access to ports for disembarkation, crew changeovers, resupply, repairs, but also to take measures to ensure health protection in ports. Adequate testing, medical assistance and quarantine facilities are essential to the continuation of maritime activities. So far, little echo has been given to these recommendations.

Wanted: international cooperation in the context of an exceptional crisis

Some shy signs of hope seem to take shape in the European Union. On April 8, 2020, the European Commission adopted Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships (<https://ec.europa.eu/transport/sites/transport/files/legislation/c20203100.pdf>). They aim at ensuring the continuity of maritime transport, while providing principles and mechanisms to respond to the humanitarian and sanitary crises. The creation of a network of designated ports in which embarkation and disembarkation are made possible and safe is central to the EC's proposals. It remains to be seen whether there will be a follow-up from Member States.

Multilateral cooperation has been most mistreated and yet is desperately needed in this crisis. The common answer is the only sustainable answer to it. When a pessimist says "things cannot get worse", the optimist answers "yes, they can." In the face of COVID-19, let's be pessimistic for once!

[Alina Miron is a professor of international law at the University of Angers. She has acted as counsel and advocate in inter-state litigation, including before the ICJ and ITLOS. This contribution benefited from researches made by Marie Boucher, Justine Guillemot and Ysam Soualhi, Master's degree students at the University of Angers. Their blog post on this topic can be found at: <https://zomad.eu/fr/2020/04/10/a-wave-of-port-denials-in-the-face->

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