

NOTES AND COMMENTS

Human rights at sea: Analyzing states' responses to cruise ships during the COVID-19 pandemic

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Abstract

In the early stages of the COVID-19 pandemic, the treatment of cruise ships by coastal states was inconsistent, with some ships being allowed to dock while others were not. To that end, this Note focuses on the obligations that a coastal state owes to the individuals onboard the cruise ships in the context of the COVID-19 pandemic, including the rights to life and health. It further considers whether and how such rights are to be balanced with other countervailing considerations of such states, such as the risk of transmission to the local communities. This author concludes with the view that individuals onboard the cruise ships can, and should, consider turning to international human rights law for guidance and recourse. After all, the human rights regime is most suited for and accustomed to governing the relationship between individuals and a state, as compared to between states.

Keywords: human rights; law of the sea; extraterritorial jurisdiction; right to life; right to health

The existing literature on the topic of states' treatment of cruise ships during the COVID-19 pandemic has concluded that the existing regimes under the law of the sea and international health law are either unhelpful in that they do not provide clear guidance as to the states' rights and responsibilities, or unduly state-centric, in that these regimes can be interpreted as providing states with broad discretion in handling cruise ships that request assistance.¹

This Note suggests that passengers onboard cruise ships could consider turning to international human rights law, which is better suited to deal with relations between states and individuals.

As a preliminary matter, this Note will focus on the human rights obligations owed by the *coastal state* to the individuals onboard the ship, instead of that of the *flag state*. Practically, and intuitively, cruise ships will likely be far away from the flag state when the outbreak strikes, and it is unlikely that the flag state will be able to render much meaningful assistance (not to mention the fact that many cruise ships are registered under "flags of convenience" which have little nexus to the ship itself). It is the coastal state, that is to say, the waters of which the cruise ship is located, which is of proximity and in a better position to render immediate assistance.

¹ Justin OKERMAN and Barbara Von TIGERSTROM, "Any Port in a Pandemic: International Law and Restrictions on Maritime Traffic during the COVID-19 Pandemic" (2021) 58 *The Canadian Yearbook of International Law* 194 at 196; Andrew TIRRELL and Elizabeth MENDENHALL, "Cruise Ships, COVID-19, and Port/Flag State Obligations" (2021) 52(3) *Ocean Development & International Law* 225 at 233–234.

I. The question of jurisdiction under international human rights law

There is an interesting and difficult preliminary question of whether the coastal state owes human rights obligations to the individuals onboard a foreign-flagged vessel in its waters. In this regard, state orthodox human rights analysis is made more complicated owing to its interface with the rules of the law of the sea.

Ordinarily, as a matter of human rights law, a state owes human rights obligations to people within its “territory” and/or “jurisdiction”.² A question then arises as to whether, or when, a cruise ship carrying COVID-19 patients can be said to be within the coastal state’s “territory” and/or “jurisdiction”.

For present purposes, we are invariably looking at a situation where the cruise ship is near the port and seeking permission from the coastal state to allow it to dock. The ship would thus presumably be in the *territorial sea*. Since the territorial sea is treated as the coastal state’s sovereign territory, there is a *prima facie* argument that the cruise ship is within the coastal state’s “territory” for the purposes of imposing human rights obligations.

However, this *prima facie* position is complicated by the freedom of movement in the territorial sea, in particular, the principle of *innocent passage*. This principle limits a state’s territorial sovereignty and its ability to regulate foreign vessels in its coastal waters.³ In particular, Article 21(1) of the United Nations Convention on the Law of the Sea (UNCLOS) provides an exhaustive list of the subject matters for which the coastal state is permitted to regulate vessels engaged in innocent passage,⁴ which necessarily means that the coastal state’s legislative and enforcement jurisdiction over such vessels is limited.

This limitation on the coastal state’s legislative and enforcement jurisdiction on the foreign-flagged vessel presents a challenging dilemma. Conceptually, a state’s human rights obligations to individuals in its territory have been justified as an incidence of the state’s *power* over these individuals.⁵ This idea of power can be found in Milanovic’s writing, who argues that a state’s human rights “jurisdiction” is premised on the power that it exercises over the relevant individuals.⁶ Whether the state has power is a question of fact, and of actual authority and control.⁷ It is also this idea of power that underlies the test of “effective control” that grounds extraterritorial jurisdiction, as explained by the Human Rights Committee (HRC) in General Comment No. 31.⁸

To that end, the coastal state’s limited ability to assert its jurisdiction over a foreign-flagged vessel owing to the right of innocent passage entails a significant restriction on the state’s power over such vessel. That lack of power could conceivably prove fatal to any finding of human rights obligations. It is helpful to draw an analogy to the situation where a state under military occupation, which did not exercise control over its entire territory,

² See for instance, *European Convention of Human Rights*, 4 November 1950, 213 U.N.T.S. 222, 5 I.L.M. 166 (entered into force 3 September 1953) [ECHR], art. 4; see also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR], art. 2(1).

³ J.H. BEALE, “The Jurisdiction of a Sovereign State” (1923) 36 *Harvard Law Review* 241 at 259–260; Bevan MARTEN, “Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation” in Henrik RINGBOM, ed., *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill, 2015), 105 at 110; Francis NGANTCHA, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (London; New York: Pinter Publishers, 1990) at 38.

⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994) [UNCLOS], art. 21(1); Marten, *supra* note 3 at 110.

⁵ Marko MILANOVIĆ, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: Oxford University Press, 2011) at 53.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee (HRC), U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 10.

was not required by the HRC to ensure the application of the International Covenant on Civil and Political Rights (ICCPR)⁹ in the areas under foreign occupation.¹⁰ In that situation, it is again the state's lack of power over the occupied territory that precludes the finding of any human rights obligations.

Beyond the conceptual difficulty, there is also a very practical concern: to require the coastal state to protect the rights of individuals onboard all ships moving in its territorial waters may be too onerous a burden to impose.¹¹

Nonetheless, I argue that under unique circumstances such as the present, a coastal state could, and should, be found to have human rights jurisdiction over individuals onboard vessels in the territorial sea. In this regard, while the coastal state may be precluded from asserting its *power* due to the limitations imposed by the right to innocent passage under the law of the sea regime, it should stand to reason that if this restriction on the coastal state's power is somehow lifted, then human rights obligations should follow as a matter of course.

In our case, it is important to note that the cruise ships with COVID-19 patients are *requesting assistance* from the coastal state. Put differently, these cruise ships have expressly *subjected themselves* to the authority of the coastal state. The invitation of foreign vessels for coastal states to exercise their authority should, in my view, be sufficient to trigger the coastal state's human rights obligations. By inviting assistance, the cruise ship must be treated as *consenting* to the coastal state's power. A similar idea exists in private international law, where *consent* is consistently, and uncontroversially, a valid basis for a court's jurisdiction over a particular dispute.¹² Another example is the law of state immunity, where a state's *consent* to be bound is a valid basis for the waiving of immunity.¹³ For completeness, this position should not affect the orthodox position that the coastal state generally owes no obligations to foreign-flagged vessels within its territorial waters. If the foreign vessel does not request any assistance, the orthodox position under the law of the sea should apply and coastal states should not be allowed to exercise its jurisdiction over these vessels (except to the extent permissible under the UNCLOS) on the pretext that they are merely seeking to discharge the human rights obligations that they owe to the individuals onboard the vessel.

I note that the above analysis directly applies to human rights treaties which expressly state that state parties owe human rights obligations to people within their "territory" and/or "jurisdiction".¹⁴ I further argue that the above analysis would also apply to human rights treaties *without* any textual limits on the scope of a state party's human rights obligations, the most well-known example being the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵ The fact remains that all human rights treaties, whether they contain textual limits on the scope of human rights obligations, would interact with, and be limited by, the law of the sea. The right to innocent passage prevents coastal states from asserting authority over foreign-flagged vessels, and would likewise relieve, if not forbid, coastal states from discharging any human rights obligations they may owe to the individuals aboard these vessels. However, as a matter of textual analysis, the scope of

⁹ ICCPR, *supra* note 2.

¹⁰ Karen DA COSTA, *The Extraterritorial Applications of Selected Human Rights Treaties* (Leiden; Boston: Martinus Nijhoff Publishers, 2013) at 58.

¹¹ Urfan KHALIQ, "Jurisdiction, Ships and Human Rights Treaties" in Henrik RINGBOM, ed., *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill, 2015), 324 at 351.

¹² Adrian BRIGGS, *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at 2.58–2.60.

¹³ Peter-Tobias STOLL, "State Immunity" in Rüdiger WOLFRUM, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at 24.

¹⁴ ICCPR, *supra* note 2, art. 2; ECHR, *supra* note 2, art. 4.

¹⁵ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR].

human rights obligations under treaties like the ICESCR that are without any express limits ought to be *broader* than the scope of human rights obligations under treaties with such express limits.¹⁶ Therefore, the above analysis as to the circumstances under which the coastal state may owe human rights obligations to foreign-flagged vessels within its territorial waters would equally if not more so apply to human rights treaties such as the ICESCR.

II. Examining the substantive human rights

Of all the human rights obligations that the coastal states may owe to individuals aboard the vessel, the most relevant rights are the right to life and the right to health.

A. The right to life

The HRC recognises that the right to life not only signifies the individual's entitlement not to be arbitrarily deprived of his or her life (i.e. a negative obligation on the state), it also provides that the state has a duty to take positive measures to protect the right to life.¹⁷ As there is no arbitrary deprivation of the lives of the individuals onboard the cruise ships, this Note is only concerned with the *positive* steps that coastal states are obliged to take in dealing with cruise ships in their territorial seas.

Specifically in the context of healthcare, where it is shown that the authorities of a 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, there is a violation of the individual's right to life.¹⁸

The state's positive obligation to protect the right to life is qualified. In particular, the HRC has clarified in General Comment No. 36 that states are only under a *due diligence obligation* to undertake reasonable positive measures, to the extent that these measures do not impose on them disproportionate burdens.¹⁹ Such words, "which do not impose on them disproportionate burdens", are based on Inter-American and European jurisprudence.²⁰ In particular, as further explained by the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Community v Paraguay*, judgment of 29 March 2006 (which was cited in the footnotes of General Comment No. 36), in order for such positive obligation to arise, the state must know or should have known about the existence of a situation posing an immediate and certain risk to the lives of individuals, and whether necessary measures were adopted that could be reasonably expected to prevent or avoid such risk.²¹

In our case, the authorities would likely have been aware of the status of the individuals onboard the cruise ships (i.e. whether they were infected) before the ship arrived at the port, depending on the port regulations of the state.²² It is therefore likely that at the moment when the cruise ships with infected passengers had requested to dock at the ports, the authorities knew or should have known about the existence of

¹⁶ Olivier DE SCHUTTER *et al.*, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (2012) 34 Human Rights Quarterly 1084 at 1102.

¹⁷ *General Comment No. 36: Right to Life*, Human Rights Committee (HRC), U.N. Doc. CCPR/C/GC/36 (2019), para. 21.

¹⁸ *Case of Hristozov and Others v Bulgaria*, App. Nos. 47,039/11 and 358/12, Decision of 13 November 2012 at 106.

¹⁹ *General Comment No. 36*, *supra* note 17 at para. 21.

²⁰ *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations and Costs, Judgment of 29 March 2006, Inter-Am. Ct. H.R. (ser. C) No. 146 at para. 155; *Kiliç v Turkey*, App. No. 22,492/93, Decision of 28 March 2000, paras. 62–63.

²¹ *Sawhoyamaxa Indigenous Community v Paraguay*, *supra* note 20 at para. 155.

²² This would depend on each coastal state's regulations, which were strengthened upon the outbreak of the pandemic. See for instance the United States, where according to federal regulations, the Center for Disease

a situation posing an immediate and certain risk to the life of the individuals. The question is then one of reasonableness – whether based on the state’s “priorities and resources available”, the state had adopted “public policies and the operative choices” that could be reasonably expected to prevent or avoid the risk to lives of individuals onboard the cruise ships, without placing an impossible or disproportionate burden on the authorities.²³

Given some factual similarities, the HRC’s case of *Nell Toussaint v Canada*²⁴ may be helpful to our present analysis. In that case, the author successfully claimed a violation of her right to life when, as someone diagnosed with a pulmonary embolism, poorly controlled diabetes, and other conditions, she was denied coverage under the Federal Government’s programme of healthcare for immigrants (IFHP). She did not fit into any of the four categories of immigrants eligible, as she had lawfully entered Canada as a visitor from Grenada and worked in Canada from 1999 to 2008 but without obtaining residency status or permission to work. Her already critical health deteriorated to life-threatening status in 2009. Amongst others, the author argued that the state failed to fulfil its positive obligation to protect her right to life by denying her access to the IFHP.²⁵ As also noted by the Committee, the author did not claim a right to health, which was understandably so given that the right to health is not protected under the ICCPR.²⁶

The Committee found a violation of Article 6 of the ICCPR, even though the author was able to receive publicly funded medical care and was not prevented from obtaining primary health care from various community organisations.²⁷ This finding was in light of the serious implications of the denial of the IFHP health care coverage to the author’s health from July 2009 to April 2013, as evidenced by her communications before the Committee and the fact that the domestic courts also agreed that her life and health had been put at significant risk by denying her access to the IFHP scheme.²⁸ The Committee further noted that:²⁹

as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

Whilst not expressly articulated by the Committee, it appears that the Committee found that the right to life was violated because: (i) it was reasonably foreseeable considering the author’s circumstances that severe negative health consequences would result from being denied the IFHP (and such consequences did follow); (ii) the IFHP, which would otherwise

Control and Prevention requires the master of a ship arriving from a non-US port destined for a US port to immediately report any death or illnesses of public health concern among the ship’s passengers or crew: Center for Disease Control and Prevention, “Guidance for Maritime Vessels on the Mitigation and Management of COVID-19”, 3 November 2022, online: CDC www.cdc.gov/quarantine/maritime/covid-19-ship-guidance.html.

²³ There have yet to be cases, whether under the ICCPR or the regional human rights treaties, where the court is asked to consider an individual’s right to life alongside another individual’s right to health. That said, I am of the view that the framework under General Comment No. 36 is adequate, given that the question of disproportionality takes into account the coastal state’s public policy considerations, which could encompass the risks of transmission to the local communities and/or the need to properly allocate scarce medical resources, amongst others.

²⁴ Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2348/2014, Human Rights Committee (HRC), U.N. Doc. CCPR/C/123/D/2348/2014 (2018).

²⁵ *Ibid.*, at 10.9.

²⁶ *Ibid.*

²⁷ *Nell Toussaint v Canada*, *supra* note 24 at paras. 11.3–11.5.

²⁸ *Ibid.*, at paras. 11.3–11.4.

²⁹ *Ibid.*, at para. 11.3.

have been reasonably available and accessible, was denied only because of her status in the country; (iii) if the author was granted access to the IFHP and its corresponding healthcare services, there was nothing on the facts to show that there would have been any impossible or disproportionate burden placed on the state. Therefore, by failing to take such positive measures, the state violated the author's right to life.

For completeness, it is noteworthy that the Committee also found a violation of Article 26 of the ICCPR on the right to non-discrimination.³⁰ The Committee considered that given that the exclusion of the author from the IFHP care could result in the author's loss of life or the irreversible negative consequences for the author's health, the distinction drawn by the state, for the purpose of admission to IFHP, between those having legal status in the country and those who have not been fully admitted to Canada, "was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26".³¹

In the case of COVID-19, the states' justifications for denying cruise ships access to the port and/or for refusing to allow individuals to disembark were mainly twofold: (i) that the state lacked the medical facilities and resources to attend to these individuals; and/or (ii) the state was concerned about the risk of the infectious disease spreading to the nearby local communities if these individuals were allowed to disembark.³²

However, on a cruise ship, it could be expected that there would be a sizeable number of individuals onboard who are vulnerable persons. For instance, the average age amongst the passengers on the Diamond Princess ship was 66.0 years old.³³ When certain vulnerable groups of people, such as those aged 60 years and over, pregnant people, and those with underlying medical problems, are infected with COVID-19, they are at higher risks of suffering from pneumonia, organ failure, and death.³⁴ Following the case of *Nell Toussaint v Canada*, and considering that it is reasonably foreseeable that severe health consequences may follow if vulnerable persons are denied healthcare services, a blanket ban to disallow the cruise ship from docking and/or for individuals to disembark may amount to a violation of the right to life of such persons.³⁵

Further, states are obligated to ensure that the right to life is respected and ensured without any distinction of any kind, whether as to national origin, age, gender, or any other status.³⁶ The fact that the individuals onboard the ships are of different nationalities also should not affect whether the coastal state owes such individuals an obligation to respect and ensure their right to life.³⁷ This was made clear by the HRC in its General Comment No. 36.³⁸ This approach is also in line with the HRC's decision in *Nell Toussaint v Canada* as discussed above, where the denial of the IFHP health care coverage amounted to the violation of a right to non-discrimination under the ICCPR. If healthcare services are reasonably available and accessible to those on land, then the same

³⁰ *Ibid.*, at paras. 11.7–11.8.

³¹ *Ibid.*, at para. 11.8.

³² Shigenori MATSUI, "Pandemic: COVID-19 and the Public Health Emergency" (2021) 38(2) *Arizona Journal of International and Comparative Law* 139 at 159–161; Zhengliang HU and Wenwen LI, "Global Health Governance on Cruise Tourism: A Lesson Learned From COVID-19" (2022) 9 *Frontiers in Marine Science Article* 818140 at 6.

³³ Hanako JIMI and Gaku HASHIMOTO, "Challenges of COVID-19 Outbreak on the Cruise Ship Diamond Princess Docked at Yokohama, Japan: A Real-world Story" (2020) 2(2) *J-Stage Global Health & Medicine* 63.

³⁴ World Health Organization, "COVID-19: symptoms and severity", 18 April 2022, online: WHO www.who.int/westernpacific/emergencies/covid-19/information/asymptomatic-covid-19.

³⁵ It is not the author's case that it is reasonably foreseeable that *all* individuals onboard the ships could risk a loss of life, given that COVID-19 only presents mild to moderate symptoms for the majority of the infected individuals: "Coronavirus disease (COVID-19)", online: WHO www.who.int/health-topics/coronavirus#tab=tab_1.

³⁶ General Comment No. 36, *supra* note 17 at para. 61.

³⁷ *Ibid.*, at para. 61.

³⁸ General Comment No. 36, *supra* note 17 at para. 63.

level of health care ought to be offered to individuals onboard the cruise ships, without discrimination.

Finally, whilst COVID-19 is transmissible by airborne particles and droplets, the virus can be properly contained or managed if suitable precautionary measures are taken.³⁹ Thus, the state's concerns over the possible risk of transmission to the local communities cannot justify a blanket ban, especially considering the reasonably foreseeable risk of loss of lives of those vulnerable.

Accordingly, where a coastal state does not allow a ship in its territorial sea to dock at its port and/or for their individuals to disembark, thereby denying those *vulnerable* access to health care services, it could be argued that the state has violated the right to life of these individuals. This is so unless the state can cite specific concerns that could demonstrate that to provide such medical attention to these *vulnerable* individuals would impose disproportionate burdens on the state.

1. The right to health

The right to health entails an entitlement to enjoyment of a variety of facilities, goods, services, and conditions necessary for the realisation of the “highest attainable standard of health”.⁴⁰ States have “immediate obligations” to guarantee that the right will be exercised without discrimination of any kind (under Article 2(2) of the ICESCR) and to take steps towards the full realisation of Article 12 (under Article 2(1) of the ICESCR).⁴¹

In addition, the ICESCR imposes on states a set of minimum core obligations that the state must satisfy.⁴² In particular, as part of its minimal core obligations, states are obliged to “ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”.⁴³ Although it is not part of the core obligations but has been classified as an obligation of “comparable priority”, states are also to “take measures to prevent, treat and control epidemic and endemic diseases”.⁴⁴

In the context of the COVID-19 pandemic, the scope of obligation imposed on states is no different.⁴⁵ The Inter-American Commission on Human Rights (IACHR) has, for instance, stated that the right to health requires state parties to the American Convention on Human Rights to “provide timely, appropriate health care and treatment” during the current pandemic.⁴⁶

In our case, there are two ways to conceptualise the potential “interference”. First, the right to health as understood across international instruments establishes negative duties for states, and government policies that impede access to health care to which individuals

³⁹ World Health Organization, “COVID-19 Overview and Infection Prevention and Control Priorities in non-U.S. Healthcare Settings”, 6 December 2021, online: WHO www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/overview/index.html; Rahmet GÜNER *et. al.*, “COVID-19: Prevention and control measures in community” (2020) 50(3) Turkish Journal of Medical Sciences 571.

⁴⁰ *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, Committee on Economic, Social and Cultural Rights (CESCR), U.N. Doc. E/C.12/2000/4 (2000), paras. 8–9.

⁴¹ *Ibid.*, at para. 30.

⁴² *Ibid.*, at para. 43.

⁴³ *Ibid.*, at para. 43(a).

⁴⁴ *Ibid.*, at para. 44(c).

⁴⁵ *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, Committee on Economic, Social and Cultural Rights (CESCR), U.N. Doc. E/C.12/2020/1 (2020) at para. 12.

⁴⁶ Organization of American States, “IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic”, 20 March 2020, online: OAS www.oas.org/en/iachr/media_center/preleases/2020/060.asp.

are entitled can violate this right.⁴⁷ By *refusing* to allow cruise ships to dock or the individuals to disembark (to receive medical services), a state could be said to have *impeded* access to health care and thus failed to perform its duties. Second, the state's *failure to provide* equal and timely access to health services and drugs to these individuals can be construed as an *omission or failure* to take necessary measures. Such omissions or failures would also amount to an interference with the individuals' right to health.⁴⁸

Nonetheless, it is acknowledged that states have the prerogative to restrict an individual's right to health.⁴⁹ The crucial question then is whether such a restriction is justified. Under Article 4 of the ICESCR, such restrictions must be in accordance with law, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.⁵⁰ In line with Article 5(1) of the ICESCR, such limitations must also be proportional, that is, the least restrictive limitation must be adopted where several types of limitations are available.⁵¹ I make a few observations in relation to these requirements under Articles 4 and 5(1).

First, it is likely that the state's restrictive measures were in accordance with law, especially since it is within the state's sovereign powers to impose regulations restricting its port usage and/or decide how to allocate its medical resources.

Second, these restrictive measures were likely to be pursuant to legitimate aims, given that they were meant to protect public health. The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 14 has observed that issues of public health have indeed been used by states as a ground for limiting the exercise of rights.⁵² In the present case, the possibility that the individuals onboard the cruise ships may infect the local communities with COVID-19 could constitute such public health concern, thereby serving as a legitimate aim pursuant to which the restriction is enacted. This is also aligned with the position under the International Health Regulations (IHR), which allows states to take into account specific public health risks or emergencies when deciding whether to grant *free pratique* to ships.⁵³

However, the analysis becomes more difficult when assessing whether the state's measure is strictly necessary for the purpose of promoting the general welfare in a democratic society, and if such measure is proportionate. The burden of justifying the restriction ultimately lies on the state.⁵⁴ In this regard, a state may seek to rely on the fact that the realisation of the notion of "highest attainable standard of health" ought to take into account the state's available resources,⁵⁵ in order to justify its restrictions. However, this argument is weak and must be seen in light of the state's obligation to ensure that such health facilities, goods, and services are accessible to everyone who is within the jurisdiction of the state party, *without discrimination*.⁵⁶ Given that the obligation to "ensure the right

⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at 191–192.

⁴⁸ General Comment No. 14, *supra* note 40 at para. 49.

⁴⁹ *Ibid.*, at para. 28.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ The IHR has the concept of *free pratique*, which it defines under Article 1(1) as the "permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores". This concept of *free pratique* is thus broader than the concept of innocent passage under the UNCLOS, as the latter only allows entry into the territorial sea, but not the port. More significantly, the general rule under Article 28(2) of the IHR is that "ships or aircraft shall not be refused *free pratique* by States Parties for public health reasons".

⁵⁴ General Comment No. 14, *supra* note 40 at para. 28.

⁵⁵ *Ibid.*, at para. 9.

⁵⁶ *Ibid.*, at para. 12(b).

of access to health facilities, goods and services on a non-discriminatory basis” is a core one,⁵⁷ it would likely be difficult for the state to justify its refusal to assist those onboard the cruise ships, especially if those on land are able to get access to medical facilities.

Indeed, in their 20 March 2020 Joint Statement released during the COVID-19 pandemic, the IACHR and its Office of the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights⁵⁸ specifically emphasised that in relation to healthcare-related measures, states “must guarantee the right to health for all people within their jurisdictions, without any form of discrimination”.⁵⁹ In its 17 April 2020 statement, the CESCR also reiterated its guidance from General Comment No. 14 that state parties should “make all efforts to mobilize the necessary resources to combat COVID-19 in the most equitable manner”.⁶⁰ In other words, the state is obliged to provide the same standard of healthcare to all people within their jurisdictions, whether they are on land or within the state’s territorial seas.

Further, similar to the above analysis on right to life, extra care should be afforded to the vulnerable groups onboard the cruise ships. The CESCR expressly states at multiple instances in its General Comment No. 14 that priority must be given to “vulnerable or marginalised groups”, who ought to be protected even in times of severe resource constraints.⁶¹ In the context of the pandemic, the CESCR also recently called for states to pay particular attention to marginalised and vulnerable groups, who are likely to suffer disproportionately from the negative effects of the pandemic.⁶²

Accordingly, all individuals onboard the cruise ships, especially those vulnerable, may have an arguable case that the coastal state violated their right to health.

III. Conclusion

The above analysis demonstrates that international human rights may provide an avenue for recourse where the law of the sea and IHR fail to do so. More importantly, there are meaningful strategic advantages to pursuing a claim using international human rights law.⁶³ The most obvious point is that the law of the sea governs horizontal relations between states. To that end, even if a violation of the rules of the law of the sea by the coastal state can be established, it will be up to the *flag state* to initiate proceedings. It is difficult to envisage the flag state having the political will to do so. First, the individuals on the vessel may not be from the flag state. Second, the flag state may itself have decided to close off its own ports from foreign vessels with suspected COVID-19 outbreaks or adopted other restrictions of a similar nature. Third, inter-state proceedings are costly and time-consuming. In contrast, international human rights law governs vertical relations between states and individuals. To that end, individuals can initiate proceedings against coastal states for violation of their human rights, as long as such individuals are subject to the coastal states’ “jurisdiction”.

Of course, the potency of international human rights law should not be exaggerated. It is acknowledged that in order for any human rights claim to be pursued, the coastal state must be a signatory to one of the human rights treaties and subject to their corresponding complaint mechanisms. Further, as illustrated above, the question of establishing that the

⁵⁷ *Ibid.*, at para. 43(a).

⁵⁸ The Office of the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights is an autonomous office of the IACHR, specially created to support the IACHR in fulfilling its mandate to promote and protect economic, social, cultural, and environmental rights.

⁵⁹ Organization of American States, *supra* note 46.

⁶⁰ CESCR, *supra* note 45 at para. 14.

⁶¹ General Comment No. 14, *supra* note 40 at paras. 12(b), 18, 40, 62, 65.

⁶² CESCR, *supra* note 45.

⁶³ Benoit MAYER, *International Law Obligations on Climate Change Mitigation* (Oxford: Oxford Academic, 2022) at 143–147.

coastal state had jurisdiction over the individuals onboard the cruise ship in its territorial seas (thereby owing human rights obligations) is also not a straightforward one, and has yet to be tested before the various human rights courts or addressed by the HRC.

Additionally, it is unlikely that individuals can rely on international human rights law to *compel* coastal states to open their ports or render assistance. Nevertheless, international human rights law may be able to provide these individuals a remedy after the event, which is undoubtedly preferable to no remedy at all. It is also hoped that the possibility of liability for violation of human rights will induce *ex ante* changes in behaviour from coastal states.

Finally, there is an interesting question as to whether the flag state or the coastal state bears *primary* responsibility for the human rights of the individuals on board. Under Article 94 of the UNCLOS, the flag state has duties to ships flying its flag, with particular reference to its “jurisdiction and control in administrative, technical and social matters” and to ensure “safety at sea”.⁶⁴ On the other hand, the coastal state also owes duties to individuals onboard ships in their territorial sea, by virtue of the fact that it has complete sovereignty over that area, as elaborated above. In such a situation where both states have overlapping jurisdictions over the individuals onboard the ships, either state might seek to absolve itself of responsibility by expecting the other state to act.⁶⁵ While this Note has been concerned with the coastal states’ obligations primarily because they are closer in proximity to render assistance, it may be worthwhile to consider whether flag states also owe human rights obligations to individuals onboard the ships and the scope of such obligations in comparison to that of the coastal states.⁶⁶

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⁶⁴ UNCLOS, *supra* note 4, art. 94.

⁶⁵ Natalie KLEIN, “International Law Perspectives on Cruise Ships and COVID-19” (2020) 11 *Journal of International Humanitarian Legal Studies* 282 at 292.

⁶⁶ There have been a few articles discussing flag States’ responsibilities during the COVID-19 pandemic, see for instance, Tirrell and Mendenhall, *supra* note 1 at 225–238; LIU Chenhong, “Public Health and International Obligations of States: The Case of COVID-19 on Cruise Ships” (2021) 13 *Sustainability* 11604.

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