

Port states' responses to foreign cruise ships with COVID-19 or other epidemic risks: the principles, obligations and rights

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Abstract: The experience of various port states' responses to more than 40 foreign cruise ships during the pandemic of COVID-19 exposes seriously arguable issues of the obligations and rights of a port state. Based upon such experience, the public health theory and the features of cruise ships, the authors put forward the principles to be followed in determining the obligations and rights of a port state in public health response to foreign cruise ships infected or suspected of being infected with COVID or similar epidemic virus, i.e. the principles of state sovereignty, international protection of human rights, international cooperation, beneficiary pays and reasonable administration, and analyses the conflict between the principle of state sovereignty and that of international human rights protection and how to coordinate them. The authors expound in detail the obligations of a port state including allowing free pratique to foreign cruise ships, and implementing surveillance, notification & verification and health measures. Also expounded are the rights of a port state, i.e. implement public health measures on arrival and departure, requesting assistance and collaboration, and claiming compensation from shipowners and their liability insurers. Suggestions are put forward on improving IHR.

Keywords: Cruise ship; COVID-19; Port state; Response; Obligations and rights

1. Introduction

On 30 January 2020, Dr. Tedros Adhanom Ghebreyesus, Director-General of World Health Organization (WHO) declared COVID-19 constituted a public health emergency of international concern (PHEIC). On 11 March 2020, he further declared COVID-19 constituted a pandemic. During the outbreak and spread of COVID-19, stricter border controls including those on foreign cruise ships were applied in many countries in order to prevent or control its spread in their territory. Various port states' responses to foreign cruise ships applying for calling at ports may be summarized as the following five types:²

(i) Port states allowed foreign cruise ships to call at ports and promptly implemented public health measures. For instance, the Italian-flagged Costa Serena was allowed to call at Tianjin in China on 24 January and the Italian-flagged Costa Venezia was allowed to call at Shenzhen in China on 26 January 2020. All the passengers and crewmembers onboard (collectively as "persons") were allowed to disembark after going through health inspection by China Entry-Exit Inspection and Quarantine Bureau, but the passengers with flu-like symptoms were allowed to disembark only after COVID-19 testing result indicated negative and those passengers who had a history of Wuhan exposure were placed in hotel rooms for further observation.

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² In this paper, the term "port state" means a country which allows or does not allow a foreign cruise ship to enter its port.

(ii) Port state refused foreign cruise ships to call at ports. For instances, the South Korean government issued a temporary order restraining the entry of foreign cruise ships on 10 February; the Ministry of Health and the Ministry of Transport of Malaysia jointly decided to prohibit entry of foreign cruise ships on 7 March. Besides, some individual cruise ships were refused to call at ports by various port states. In February, the Italian-flagged AIDA Perla with persons tested positive for COVID-19 was refused to call at Saint Lucia and in Dominica; the Dutch-flagged Westerdam with passengers suspected of being infected with COVID-19 virus onboard (hereinafter “suspect³ passengers” or “suspect persons”) was refused to call at Manila in the Philippines, Kaohsiung in Taiwan, China, Ishigaki in Japan, Guam in the United States and Laem Chabang in Thailand; the Maltese-flagged MSC Meraviglia with suspect passengers was refused to call at Ocho Rios in Jamaica and George Town in Grand Cayman. In March, the Dutch-flagged Zaandam with passengers infected with COVID-19 virus onboard (hereinafter “affected⁴ passengers” or “affected persons”) was refused to call at Punta Arenas in Chile; the Australian-flagged Breamar was refused to call at ports in Dominia, Barbados and Bahamas. Several cruise ships on which persons showed no symptom of COVID-19 were also refused to call at ports, e.g. in March, the Italian-flagged Costa Fortuna at Phuket in Thailand and Penang in Malaysia, the British-flagged Golden Princess at Acaroa in New Zealand and the Bahamian-flagged Norwegian Gem at Papeete in Polynesia and Lautoka in Fiji.

(iii) Port state only allowed a foreign cruise ship with persons tested positive for COVID-19 to call at designated berths. For example, the Bermuda-flagged Grand Princess was ordered to call at a non-commercial berth in Oakland following her entry into the waters of the United States in March.

(iv) Port states allowed foreign cruise ships to call at ports, but did not allow persons to timely disembark. For instances, the British-flagged Diamond Princess with more 3,700 persons was allowed to call at Yokohama in Japan in February, but they were placed onboard for quarantine inspection for two weeks; the Bahamas-flagged Greg Mortimer was allowed to call at Montevideo in Uruguay in April, but persons were not allowed to disembark until two weeks later.

(v) Port states allowed foreign cruise ships to call at port, but did not allow persons to timely disembark without prior testing for COVID-19 for persons. For instance, 23 passengers on the British-flagged Diamond Princess disembarked without testing at Yokohama in Japan in February. More than 3,800 passengers on the Maltese-flagged MSC Meraviglia were allowed disembarked without testing for COVID-19 at Miami in the United States in March, although a passenger in her previous voyage had been tested positive for COVID-19. In April, passengers on the Bahamas-flagged Voyager of the Seas and Ovation of the Seas, and the

³ Art.1 of IHR defines “affected” as “those persons, baggage, cargo, containers, conveyances, goods or postal parcels considered by a State Party as having been exposed, or possibly exposed, to a public health risk and that could be a possible source of spread of disease”.

⁴ Art.1 of IHR defines “affected” as “persons, baggage, cargo, containers, conveyances, goods, postal parcels or human remains that are infected or contaminated, or carry sources of infection or contamination, so as to constitute a public health risk”.

Maltese-flagged Celebrity Solstice were allowed to disembark at Sydney in Australia without testing; among the 2,647 passengers and 1,148 crewmembers on the Bermuda-flagged Ruby Princess, 128 persons felt uncomfortable, but only 13 persons were tested before the passengers' embarkation at Sydney.

The various port states' responses to foreign cruise ships during the spread of COVID-19 as described above demonstrated the importance and urgency of improving the international system of port states' responses to public health risks on foreign cruise ships. For this purpose, the following five arguable legal issues exposed during the spread of COVID-19 need to be solved:

- Whether a port state is obliged to grant free pratique⁵ to a foreign cruise ship with affected or suspect persons and implement public health measures and medical treatment to the affected persons?
- What conditions shall be met for a port state to grant free pratique to such a cruise ship and to take public health measures?
- Whether a port state is entitled to implement health measures including quarantine for suspected persons and isolation of affected persons onboard a foreign cruise ship?⁶
- Whether a port state is entitled to seek collaboration or assistance of the flag state and other states concerned?
- Whether a port state can claim for compensation for the expenses of public health measures?

Based upon the above experience of various port states' responses to the foreign cruise ships during the outbreak and spread of COVID-19, the public health theory and the features of cruise ships, the authors put forward and analyze the principles to be followed in determining the obligations and rights a port state in public health response to foreign cruise ships with affected and/or suspect persons and its main obligations and rights.

2. The principles to be followed

To study the obligations and rights of port states in response to foreign cruise ships with COVID-19 or other epidemic risks, it is essential to analyze what principles shall be followed. In the authors' view, the obligations and rights of port states shall reflect following principles: -

2.1. The principle of state sovereignty

This principle means that, as a fundamental rule of international conducts, the sovereign states should mutually respect in the international intercourses and mutually recognize the supreme power of a state in independently handling its

⁵ So far as a ship is concerned, Art.1 of IHR defines "free pratique" as permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores.

⁶ Art.1 of IHR defines "quarantine" as the restriction of activities and/or separation from others of suspect persons who are not ill, and "isolation" as separation of ill or contaminated persons from others in such a manner as to prevent the spread of infection or contamination.

internal and external affairs in its own field according to its own will. Art.2(7) of the Charter of the United Nations (UN) generalizes this principle by directing the UN not to “intervene in matters which are essentially within the domestic jurisdiction of any state”. As the cornerstone of international law, state sovereignty embodies internal sovereignty and external sovereignty. The internal sovereignty includes territorial supremacy and personal supremacy. State sovereignty first means the territorial supremacy of a state over all the people and things within its territory. By virtue of this principle, clearly a port state enjoys jurisdiction over foreign cruise ships and other ships in its internal waters. However, there was no universally accepted international law basis for a port state to enjoy jurisdiction over foreign ships within its territorial sea until Art.2 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) confirms that “the sovereignty of a coastal state extends, ... to an adjacent belt of sea, described as the territorial sea.” Therefore, once a foreign ship enters into the territorial sea or internal waters of a coastal state, both the ship and people onboard are subject to the port state’s administrative jurisdiction and judicial jurisdiction, provided that she enjoys the right of innocent passage in the territorial sea.

The principle of state sovereignty is complied with by the widely accepted International Health Regulations of 2005 (IHR) adopted by WHO which expressly provides in Art.3(4): “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies.”

The way a port state exercises its administrative jurisdiction over a foreign cruise ship during the outbreak and spread of COVID-19 or other epidemic is to grant or refuse free pratique to the cruise ship and, where free pratique is granted, to take public health measures in accordance with its national law within the scope and limits determined under IHR, UNCLOS and other related international treaties to which the port state is a party. Beside administrative issues, civil disputes and criminal cases may be involved, such as cruise service disputes arising from the epidemic prevention and control, as well as epidemic-related crimes committed by persons onboard or shipping companies.⁷ However, the civil and criminal jurisdiction is out of the scope of discussion in the paper.

One issue relating to the principle of state sovereignty is whether a port state has the right to interfere in the internal affairs of a foreign ship within its territory? No accurate answer can be found from UNCLOS and other international treaties and there are three different views on this issue. The first view is that a ship navigating on the high seas or in the territorial waters of a coastal state other than her flag state shall be deemed as a floating territory of its flag state. Consequently, her internal affairs shall only be governed by the flag state and the port state has no right to interfere in these affairs. The second view is that the port state’s jurisdiction over a foreign ship can be considered as the extension of its personal jurisdiction according

⁷ For example, among the 2,647 passengers and 1,148 crewmembers onboard the cruise ship Ruby Princess, only 13 persons received nucleic acid test. Except the 3 affected passengers, the other passengers were allowed to disembark, potentially becoming a major source of infection in Australia. The cruise ship and her operator, Carnival Australia, were under criminal investigation by New South Wales State Police.

to the theory of personification of ship under maritime law (Gu Jingwei and Liu Qiang, 2013). Thus, the jurisdiction of a coastal state over the ship within its internal waters or territorial sea shall be exercised by both the port state and the flag state (Zhao Jianwen, 1996). The third view is that a foreign ship is, in principle, within the sovereignty of the port state and consequently the port state may exercise its jurisdiction over the internal affairs of the ship.

In the authors' view, the theory of floating territory as mentioned above seems unreasonable as it is in contradiction with the excludability of territorial sovereignty. On the contrary, both the second and the third opinions affirm that a port state enjoys jurisdiction over a foreign ship within its territory. The difference between these two opinions is whether the flag state's jurisdiction over the ship is recognized at the same time. The significance of the flag state's jurisdiction lies in filling the "vacuum" in the field of jurisdiction when the ship is navigating on the high seas and divorced from sovereign territory (Yu Zhigang and Li Huaisheng, 2017), rather than solving the issue of parallel jurisdiction. Based upon the territorial supremacy of the principle of state sovereignty, the port state's jurisdiction over the internal affairs of a foreign ship cannot be denied, provided that such affairs affect or will affect the interests of the sovereignty of the port state. Such an understanding is useful in the study of the obligations and rights of a port state in response to foreign cruise ship with COVID or other epidemic risks.

2.2. The principle of international human rights protection

This principle requires a port state to protect persons onboard a foreign cruise ship. The theoretical bases of this principle are the theory of international protection of human rights and the principle of relativity of rights and obligation. Noticeably, this principle may be in contradiction to the principle of state sovereignty. Therefore, coordination between these two principles is an essential point in determining the obligations and rights of a port state in response to foreign cruise ships with COVID or other epidemic risks.

2.2.1. The theory of international protection of human rights

International protection of human rights means that a sovereign state shall assume the international obligation to protect the fundamental human rights according to international treaties and practice. In this regard, cooperation, guarantee and mutual supervision are necessary for preventing infringement upon the basic human rights and freedom and achieving the aim of protecting them. International protection of human rights by a sovereign state can be divided into two categories, i.e. protection of foreign nationals within its territory and protection of foreign nationals outside its territory. The study in this paper of a port state's response to foreign cruise ships with COVID-19 or other epidemic risks relates to the first category.

The Universal Declaration of Human Rights of 1948 (UDHR) lists 28 basic human

rights covering civil, political, economic, social and cultural rights. Human rights in the sector of public health are in the nature of social rights. UDHR provides in Art.25: “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including ... medical care and necessary social services.” In addition, Art.12 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) requires state parties to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, to achieve the realization of “the prevention, treatment and control of epidemic” and to create the conditions which will “assure to all medical service and medical attention in the event of sickness”.

Therefore, a port state has an international obligation to provide health care and other necessary social services for the persons onboard a foreign cruise ship with COVID-19 or other epidemic risks for the purpose of their health and controlling the spread of COVID-19 or other infectious diseases.

2.2.2. The principle of relativity of obligations and rights

According to a universally recognized customary rule of international law, each state has the right of protecting its own citizens abroad and accordingly, every state has the obligation to give treatment to foreigners in its territory in accordance with certain legal rules and principles (Oppenheim, 1971). Therefore, a port state has the obligation of protecting the lives and securities of foreign nationals onboard a foreign cruise ship with COVID-19 or other epidemic risks within its territory.

2.2.3. Contradiction between the principle of state sovereignty and the principle of international human rights protection & their coordination

IHR complied with both principles. Besides Art.3(4) as cited *supra* which well reflects the principle of state sovereignty, Art.3(1) provides: “The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.”

Clearly, a port state is under an international obligation to protect the human rights of persons onboard foreign cruise ship based on the principle of international human rights protection and by virtue of Art.3(1) of IHR. In the experience of response to foreign cruise ships with COVID-19 risks, however, some port states refused to grant free pratique to the ships in order to prevent or control the imported cases of COVID infection by waters, especially after the Director-General of WHO declared COVID-19 as a pandemic on 11 March. As introduced in the first part of this paper, free pratique to the cruise ships such as Zaandan, Breamar, Westerdam, MSC Meraviglia, Costa Fortuna and Golden Princess were refused by various port states. On one hand, such refusal may be understood to have been made based on the principle of state sovereignty. On the other hand, it seems such refusal may be deemed as non-compliance of these port states with the express principled provision of Art.28(2) of IHR that ships shall not be refused free pratique by the state parties

for public health reasons. In essence, nevertheless, such refusal demonstrated the contradiction between the principle of state sovereignty and the principle of international human rights protection. Then, a consequential issue is how to coordinate the two principles.

In this regard, noticeably, the independent International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian government, made a report on the Responsible to Protect (R2P) in September 2000. The R2P report established the R2P theory and indicated that “sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states” (ICISS, 2001). The protection provided by the international community may come from international organizations or other states.

According to the R2P theory, the nationality states of persons onboard a cruise ship bear the primary responsibility of protecting their nationals during the spread of COVID-19. When the cruise ship is within the territory of a port state, if these nationality states are unwilling or unable to bear the responsibility, the port state shall assume the supplementary responsibility of protecting their lives and health. In the scope and degree of responsibility, supplementary responsibility shall not exceed the primary responsibility. If the port state does not have the capability to protect the persons onboard a foreign cruise ship, it shall not be required to assume such supplementary responsibility. This implies that the principle of state sovereignty takes precedence over the principle of international human rights protection to the extent of contradiction between the two principles. However, such precedence shall not ignore the application of principle of international human rights protection.

2.3. The principle of international cooperation

COVID-19 or other highly infectious diseases spread among states without geographical restrictions. COVID-19 spreads through droplets and contacts. It became a pandemic in early March from a PHEIC in the end of January 2020. It is impracticable for a single state to prevent and control the spread of COVID-19 or highly infectious disease independently due to its limited technical and economic capacity, or the lack of sufficient information. Therefore, the implementation of the principle of international cooperation that emphasizes the common interests and responsibilities of mankind is essential. For this purpose, Art.44 of IHR emphasizes the international cooperation by means of comprehensive collaboration and assistance among the states and between WHO and its state parties.

International cooperation is also very important in response to foreign cruise ships with COVID-19 or other epidemic risks, especially due to the multi-national characters of international cruise ships. Where a port state responds to a foreign cruise ship with COVID risks, first, it is necessary to give full play to the role of WHO by providing advice and assistance because WHO has a function to provide each state party with technical support in the prevention and control of infectious

diseases. Secondly, the port state, the flag state of cruise ship, the nationality states of persons onboard, and the nationality state of shipowners or operators other than the ship's flag state in case of ship's flag of convenience⁸ or otherwise shall cooperate with each other. Particularly, the port state may seek collaboration and assistance from the other related states.

2.4. The principle of beneficiary pays

The principle of beneficiary pays (BPP) is a quasi-public goods supply principle based on the benefit of a specific enterprise and requires the specific beneficiary to pay the corresponding expenses according to the benefit degree (Hu Yefei and Tian Shiyu, 2019). The theoretical basis of this principle is the "beneficiary pays" theory. This theory requires the special beneficiaries of specific public utilities or services to share the public costs based on the special benefit relationship within the scope of their benefits. The development of global public health governance mechanism from individual behaviors to joint cooperation shows that the positive externalities in the field of public health can enable the international community to obtain broad common interests (Zeng Ruisheng, 2012).

Where a port state responds to a foreign cruise ship with COVID or other epidemic risks, the public health and safety interests widely obtained by the international community are the general interests, while the interests of the flag state, the nationality states of persons onboard, and the nationality state of shipowners or operators other than the ship's flag state, are the special interests. Such special interests are available at the costs paid by the port state. Thus, it is reasonable for the benefited states to share such costs.

2.5. The principle of reasonable administration

This is a basic principle of administrative law. It means that the activities of a governmental organ within the scope of administrative authority should be reasonable (Hu Jianmiao, 2012). That is, a governmental organ should make administrative decisions and measures according to the conditions, types and range stipulated by law. The decisions and measures should conform to the intention or spirit of the law and conform to the legal rationality such as fairness and justice (Wen Jinfeng and Xu Guoli, 2015).

A port state's response to a foreign cruise ship with COVID-19 or other epidemic risks is made by or under the control of the public health authority and other competent authorities exercising administrative powers on behalf of the state. These authorities should follow the principle of reasonable administration in taking response measures. The reasonableness shall be manifested in the following three

⁸ The term "flag of convenience" refers to registering a ship in a sovereign state or region different from that of the shipowners which carries out an open registry or allows registration of ships owned by foreign entities for the purpose of taking advantages of reduced regulation, lower taxes and administrative fees, greater numbers of friendly ports and/or other benefits. The states or regions of flag of convenience include Panama, Liberia, Malta, Bermuda, Marshall Island, Belize, Cyprus, St Vincent etc.

aspects: -

First, reasonable motivation, i.e. the measures taken by the competent authorities of the port state should be for the purpose of protecting public health safety of the persons onboard the cruise ship and of the nationals of the state itself.

Secondly, reasonable measures, i.e. the measures taken by the competent authorities of the port state should be able or at least reasonably expected to protect public health safety of the persons onboard the cruise ship and of the nationals of the state itself and at the same time to avoid unnecessary interference with the voyage of the cruise ship and unnecessary prejudice to the dignity, human rights and fundamental freedoms of persons onboard the ship. In particular, in the case of two or more alternative measures to protect public health and safety, a competent authority of the port state should choose the one which can best realize the goals.

Thirdly, reasonable result, i.e. theoretically the public health interests protected by the port state should not be less than the infringement on individual rights. Public health is different from clinical medicine, as the former pays more attention to the protection of group interests rather than individual interests. Therefore, the primary ethical evaluation criterion of public health measures is whether the measures taken can protect the health and safety of the group (Wang Chunshui *et al.*, 2008). Thus, the public interests protected by the public health measures in response to foreign cruise ship with COVID-19 or other epidemic risks should not be less than the infringement on the human rights of persons onboard the ship.

3. The obligations of a port state

3.1. Granting free pratique to a foreign cruise ship

As introduced in the first part of this paper, free pratique to some cruise ships were refused by port states during the outbreak and spread of COVID-19. Whether a port state should grant free pratique to a foreign cruise ship with COVID-19 or other epidemic risks, especially where there are affected or suspect persons onboard, proves to be the most prominent legal issue.

3.1.1. General obligation of a port state to grant free pratique

Generally speaking, in the case of a foreign cruise ship with COVID-19 or other epidemic risks, especially where there are a large number of affected or suspect persons onboard, free pratique to her is a precondition and even conducive for the port state to promptly and effectively provide medical assistance to the affected or suspected persons and to play an important role in protecting the health and life safety of all the persons onboard. This is also a direct embodiment of the principle of international human rights protection.

Thus, by virtue of the principled provision of Art.28(1) & (2) of IHR, a port state shall not refuse free pratique to a foreign cruise ship for public health reasons to enable her to enter a port and to enable the persons onboard to embark or

disembark, whether there are affected or suspect persons onboard and irrespective of their number.

3.1.2. Exceptions of the obligation of a port state to grant free pratique

Art.28(1) of IHR stipulates that the obligation of a port state to grant free pratique is subject to Art.43 thereof. Art.43 allows the state parties to implement additional health measures in accordance with their relevant national law and obligations under international law in response to specific public health risks or PHEIC, but is subject to the general condition that “such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection”. By virtue of Art.43(1)(b), such additional health measures can include refusal of free pratique which is prohibited in Art.28(1) & (2) of IHR, “provided such measures are otherwise consistent with these Regulations.”

In the event of a foreign cruise ship, however, it will be very difficult to meet the above general condition in practice, because refusal of free pratique will or may cause prejudice to taking promptly health measures by other related state or states and thus will not “achieve the more appropriate level of health protection” than the case of the port state’s granting free pratique, unless the port state lacks the capability to take health measure as analyzed *infra*. In addition, the condition of “such measures are otherwise consistent with these Regulations” contained in Art.43(1)(b) seems ambiguous. As a result, it will be very difficult or even impossible to justify refusal of free pratique to a foreign cruise ship with COVID-19 or other epidemic risks by availing of the provisions of Art.43 of IHR. This may imply that IHR pays more attention to the principle of international human rights protection than the principle of state sovereignty.

Free pratique granted to a foreign cruise ship with COVID-19 affected or suspect persons onboard is for the purpose of the ship’s calling at port and the embarkation of the persons onboard to receive public health response by the port state. In exceptional cases, the embarkation of the persons onboard is for the purpose of their repatriation. Thus, as an exception of the obligation of a port state to grant free pratique, it seems necessary to consider whether a port state can refuse free pratique a foreign cruise ship on the basis of the principle of state sovereignty if the required prompt and effective public health response to the ship in the pandemic situation of COVID-19 is beyond its actual response capacity.

In the authors’ view, the port state’s actual response capability should not be ignored. As required by Art.13(1) of IHR, all state parties shall develop, strengthen and maintain their capacity to respond promptly and effectively to public health risks and PHEIC as set out in Annex 1.⁹ According to statistics, however, among the 196 state parties to IHR, 104 states have the basic capability to prevent, detect and control the outbreak of COVID-19 (Nirmal Kandel *et al.*, 2020). Thus, 45% of the state

⁹ As required by Art.1 of Annex 1 to the IHR, each state party shall make such a core capacity available not later than five years from the entry into force of the IFR, i.e. by 15 June 2012.

parties to IHR do not have the capability as required by IHR. In addition, a port state that has such capability may no longer be able to respond to a foreign cruise ship with a large number of affected or suspected persons onboard if a serious pandemic situation has broken out in the port state or two or more cruise ships apply for free pratique at the same time or successively.

If a port state is required to comprehensively respond to the public health risks under such a circumstance, it will not be beneficial to the safety of persons onboard the cruise ships, but may also to the public health and safety of the nationals in the port state, which is not in line with the principle of international human rights protection, that of state sovereignty and that of reasonable administration.

To balance these two principles, consequently, it is advisable to differentiate granting free pratique to a foreign cruise ship from implementing public health measures. In other words, free pratique is granted, but the public health measures shall be implemented within its actual capability. However, a port state should not refuse free pratique to the ship on the grounds of insufficient capability in implementing public health measures. In such a case, granting free pratique is for the main purpose of (a) disembarkation of passengers to allow those who are nationals of the port state to be quarantined, isolated or medically treated according to their health situations, and repatriation of foreign nationals by other means of transport, and (b) taking on fuel, water, food, supplies and stores.

3.1. Risk assessment for a foreign cruise ship.

Before responding to a foreign cruise ship with COVID-19 or other epidemic risks, a port states shall conduct a risk assessment on the ships and take the assessment results as the basis of policy formulation. Such an assessment is called “evidence-based risk assessment” (EBRA) and the resulting policy is called “evidence-based policy” (EBP). EBP emphasizes the use of evidence tested by scientific procedures and empirical methods as the basis for policy-making. It is a relatively advanced public policy theory formulated in western developed countries in recent years (Zhang Yunhao, 2017).¹⁰ Thus, where a foreign cruise ship applies for free pratique, risk assessment of the port state should be passed to enable it to judge whether it has the capability of response and what health measures are to implement. The risk assessment shall be made scientifically by use of available evidence of risks to the public health of persons onboard and potentially to the public health of the nationals of the port state.

¹⁰ The United Kingdom is an important advocate of evidence-based policy. In March 1999, the British Blair government published the white paper *Modernising Government* which pointed out that policies should be “shaped by the evidence rather than a response to short-term pressures”. See: White Paper: *Modernising Government*, March 1999. <http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm>. (Accessed 20 June 2020). In September 1999, the Cabinet Office of the British government published the *Professional Policy Making For The Twenty First Century*. The document proposes eight core competencies for professional policy-making, the fourth of which is the capability of “using evidence”, that is, to use the best evidence “from a wide range of sources and involves key stakeholders at an early stage”. *Strategic Policy Making Team Cabinet Office: Professional Policy Making For The Twenty First Century*. See: <https://dera.ioe.ac.uk/6320/1/profpolicymaking.pdf>. (Accessed 16 July 2020).

Noticeably, some foreign cruise ships were directly refused free pratique by various port states without conducting EBRA during the outbreak and spread of COVID-19. For example, after leaving from Hong Kong on 1 February 2020, the cruise ship *Westerdam* with 1,455 passengers and 802 crewmembers had been refused free pratique at Manila in the Philippines, Kaohsiung in Taiwan of China, Ishigaki in Japan, Guam in the United States, and Laem Chabang in Thailand, before she was finally allowed to enter Sihanouk in Cambodia on 13 February, although no affected or suspect person was found onboard. Another example is, after leaving from Miami on 23 February 2020, the cruise ship *MSC Meraviglia* with 4,580 passengers and 1,600 crewmembers onboard had been refused free pratique at Ocho Rios in Jamaica and Georgetown in Grand Cayman Island, before she was finally allowed to enter Cozumel in Mexico on 28 February 28, although the medical records showed only one case of seasonal influenza onboard and the patient had never been to any area affected by COVID-19.

Advisably, therefore, risk assessment including the factors to be considered and the procedures should be made specific in national law or international treaty. The IHR requires in Art.43(2) a state party to conduct EBRA before adoption of “additional health measures”. It seems also helpful or necessary for a port state to conduct EBRA before taking general health measures other than “additional health measures” to ensure the measures be taken scientifically and the requirement of granting free pratique provided for in Ar.28(2) of IHR be better complied with.

3.2 Implementing surveillance, notification & verification and health measures

As stipulated in Art.1 of Annex 1 to IHR, the core capability of each state shall include “surveillance, reporting, notification, verification, response and collaboration activities”. It can be inferred from this provision that a port state has the obligation of implementing surveillance, notification and verification, and health measures with respect to a foreign cruise ship with COVID-19 or other epidemic risks.

3.2.1. Surveillance

Surveillance of public health risks of a foreign cruise ship is the premise of ensuring a port state to take prompt and effective response measures. Surveillance normally begins with health or epidemic declaration of a cruise ship. Normally, the ship’s agent in the port of call obtains the health information from the medical personnel onboard the cruise ship and reports to the public health authority of the port state. Practice proved that this method is difficult to ensure the integrity and accuracy of information due to the limitation of medical personnel's capability. For example, on 2 July 2016, the Italian-flagged cruise ship *Medi Cagliari* applied entry into Qingdao in China and one crewmember was infected with malaria. However, the ship’s agency did not have this information and failed to report truthfully in the maritime health declaration. Consequently, the risk assessment made by China's Qingdao Entry-Exit Inspection and Quarantine Bureau was insufficient, resulting in

the risk of epidemic spread (Yu Yingquan, et al., 2017). Advisably, it is more effective for the public health authority of the port state to contact the medical personnel onboard the ship directly and, when necessary, to dispatch personnel to board the ship for quarantine inspection.

After obtaining sufficient and accurate information of a cruise ship's public health, the competent authority shall determine the appropriate quarantine inspection mode to be implemented, as required by the principle of reasonable administration. In this regard, the Administrative Measures for the Quarantine of Entry and Exit Cruises of 2016 in China stipulates in Art.13 that the quarantine inspection may be implemented at berth, onboard during voyage, at anchorage or telegraphically, as the quarantine inspection institution has decided based upon the declared information and the scale of quarantine risks of a cruise ship.

In deciding the mode of quarantine inspection, the efficiency of inspection, and the accuracy and sufficiency of public health information shall be taken into consideration to enable the port state to implement appropriate response in a prompt and effective way. During the outbreak of H1N1, the cruise ship Diamond Princess called at Qingdao in China in October 2009 and Fuji Maru called at Tianjin in China in January 2010. Quarantine inspection was promptly implemented onboard at anchorage. Consequently, the suspected passengers were timely detected and separated from others (Wang Xiqin *et al.*, 2010).

3.2.2. Notification and verification

As required by Art.6 of IHR, where a foreign cruise ship may constitute a PHEIC within its territory based upon assessment, a port state shall through its National IHR Focal Point and by the most efficient means of communication available inform WHO within 24 hours of the assessment of public health information as well as any health measure implemented in response thereto. Following a notification, the port state shall continue to communicate to WHO timely the accurate and sufficiently detailed public health information available to it on the notified event and report, when necessary, the difficulties faced and the support needed in responding to the potential PHEIC. In addition, as requested by WHO, the port state shall verify the notified case of potential PHEIC, i.e. to provide of information to WHO confirming the status of the event. Such notification and verification are necessary for WHO to play its role in response to a PHEIC, e.g. consulting with and attempting to obtain verification from the port state, duly making the information to other state parties, determining whether the event constitutes a PHEIC, and providing appropriate guidance, advice and assistance to the port state.

Notification and verification shall be based upon assessment of PHEIC risks. In response to COVID-19 risks onboard a cruise ship, assessment is based upon body temperature measurement and nucleic acid detection of the persons onboard, especially the suspect persons. Samples of nucleic acid detection are sent to the laboratory to obtain the test data. Laboratory data are also the basis of inspection

and quarantine to be implemented by the competent authority of the port state in accordance with its national law (Bi Yuguo et al., 2008).

3.2.4. Public health measures

The public health measures for the affected or suspect persons shall be implemented by a port state on the basis of a risk assessment and appropriate to the other prevailing circumstances, and for the purpose of health protection of persons onboard and the nationals on land in the port state. The measures mainly include quarantine or other health measures for the suspect persons for public health observation, and isolation and necessary treatment of the affected persons.

(1) Quarantine or other health measures for suspect persons

Quarantine is against the suspect persons in order to avoid potential infection to other persons. Where suspect persons are quarantined, the following health measures shall be implemented, e.g. continuous body temperature measurement and nucleic acid test, for the purpose of public health observation.

As introduced in the first part of this paper, it was arguable whether it was appropriate for a port state to place and quarantine the suspect persons onboard the cruise ships for public health observation during the outbreak and spread of COVID-19 due to two reasons, i.e. limited capability of placing the suspected persons in land facilities of the port state and prevention of the spread of infection on land. For instance, more 3,700 persons onboard the British-flagged Diamond Princess had been placed onboard for quarantine inspection for two weeks before they were allowed to disembark at Yokohama in Japan in February. On 18 February 2020, Kentaro Iwata, a professor at Kobe University Hospital of Japan pointed out that there were serious defects in the prevention and control of infectious disease on board Diamond Princess including the lack of division of safe and dangerous areas, and the lack of professionals responsible for infection control. The Japanese National Institute of Infectious Diseases (NIID) explained in a report that “to maintain operations of the ship, some crewmembers continued to perform essential and limited services while the ship remained in quarantine”, which resulted in crewmembers “not fully isolated, in the same manner as passengers, during the quarantine period” (Japanese National Institute of Infectious Diseases, 2020).

Noticeably, a cruise ship has limited and confined space. Many passenger cabins are even without openable windows. The air conditioning and ventilation systems equipped with air purification devices cannot prevent virus transmission onboard. As a result, placing a large number of suspect persons onboard the cruise ship for the quarantine purpose is not appropriate. First, it may cause potential infection to others. Secondly, it is difficult to provide timely and comprehensive medical services for them onboard. Thirdly, as the period of quarantine for persons in the case of COVID-19 risk is usually 14 days, it may excessively confine the freedom of the suspected persons causing mental pressures on them and consequentially significant interference to their health. Moreover, most of the passengers on a cruise ship are

old ones¹¹ and some may have other chronic diseases and need special medical services. In other words, if the port state has quarantine facilities ashore, quarantining the suspect persons onboard may be deemed as a deviation from the principle of reasonable administration, unless such quarantine can be justified under the prevailing circumstances. For example, when the cruise ship Costa Atlantica called at Nagasaki in Japan, there were no passengers onboard, but only 623 crewmembers. The Japanese government arranged the suspect persons with mild symptoms and the close contacts onboard for quarantine and isolation. The cruise ship was able to provide cabins with good ventilation for healthy crewmembers, and therefore the quarantine and isolation purposes could basically be achieved.

Noticeably, IHR does not provide specific requirements and guidance of how quarantine is to be carried out. However, effective health measures should ensure that the potential spread of infectious diseases will not be further enhanced (WHO, 2020). According to the principle of international human rights protection and that of reasonable administration, however, a port state shall not place the suspect persons onboard the cruise ship for the quarantine purpose solely in consideration of preventing the spread of infection on land beyond the necessary time needed for risk assessment. Nevertheless, placing the suspect persons onboard a cruise ship will be justified by the limited capability of placing the suspected person in land facilities of the port state.

(2) Isolation and treatment of infected persons

According to the principle of international human rights protection, where affected persons are detected onboard a cruise ship, the port state shall arrange their isolation and provide appropriate medical treatment after their disembarkation, unless they are repatriated from the port state.

IHR contains provisions in this regard in four places. First, Art.18 stipulates that the recommendations issued by WHO to state parties with respect to persons may include advice on implementing isolation and treatment where necessary of affected persons. Secondly, Art.31 stipulates that, as health measures relating to entry of travelers, if there is evidence of an imminent public health risk, a state party may, in accordance with its national law and to the extent necessary to control such a risk, compel the travelers to undergo or advise the traveler to undergo additional established health measures including isolation that prevent or control the spread of disease. Thirdly, Art.32 stipulates that a state party shall provide travelers appropriate medical treatment in implementing health measures. Fourthly, ANNEX 1 to IHR stipulates in B(2) that the core capacity of ports required for responding to an event that may constitute a PHEIC shall include provision of care for affected travelers by establishing arrangements with local medical facilities for their isolation, treatment that may be required.

¹¹ According to statistics, 51% of passengers on cruise ships are over 50 years old. In the case of the cruise ship Supreme Princess called at Auckland in the United States on 9 March 2020, the average age of passengers was 66 years old and 1,200 passengers were over 70 years old. https://www.cdc.gov/quarantine/pdf/signed-manifest-order_031520.pdf. (Accessed 1 May 2020).

From the above provisions, two conclusions may be drawn: first, IHR does provide how a port state shall isolate the affected persons and provide them necessary medical treatment and it seems clear that isolation and medical treatment shall be dependent upon the national law of the port state; secondly, Art.1 of IHR separately defines “traveler” and “crew” and therefore, the obligations of a port state under Arts.31 & 32 do not apply to the crewmembers onboard a cruise ship or other conveyance.

Following an outbreak of COVID-19 onboard a cruise ship, the obligation of a port state in the isolation and treatment of affected persons was a crucial issue.

So far as isolation and medical treatment is concerned, in the case of cruise ship Diamond Princess at Yokohama in Japan in February 2020, the affected passengers onboard were finally arranged for hospitalization by the Japanese authorities. In the case of the cruise ship Grand Princess at Oakland in the United States in March 2020, the US government gave priority to hospitalizing the affected passengers. Unlike the expression of “treatment where necessary of affected persons” in Art.18, Art.32 of IHR requires a port state to provide the affected passengers “appropriate medical treatment”. Understandably, “appropriate medical treatment” means the medical treatment which is necessary for protecting the health of the affected passengers and is also practicable within the capacity of the port state under the prevailing circumstances of the case.

So far as crewmembers are concerned, a large cruise ship normally has more than one thousand crewmembers and they should be treated to protect their safety in a same or similar way as passengers. In the case of the cruise ship Ruby Princess, she arrived at Sydney in Australia on 19 March 2020. Among the 13 persons who received nucleic acid test, 3 passengers and 1 crewmember were found infected with COVID-19 virus. The 3 affected passengers were sent to hospital for treatment, but the affected crewmember remained onboard with the rest of the crew. On 6 April, she called at Kembla near Sydney. 22 crewmembers onboard were found infected and about 200 crewmembers had symptoms of infection (MarineLink, 2020). This example may well prove the importance of treating crewmembers same as passengers.

4. The rights of a port state

4.1. Implementing public health measures on arrival and departure

By virtue of Art.23 of IHR, a port state may implement the following health measures upon the arrival or departure of a cruise ship for public health purposes of preventing the international spread of disease: (a) requiring information concerning passengers’ destinations so that they may be contacted, their itineraries to ascertain if there were any passengers in or near an affected area or other possible contacts with infection or contamination prior to arrival, as well as reviewing of their health documents; (b) taking non-invasive medical examinations, and, on the basis of evidence of a public health risk, applying additional health measures of the least

intrusive and invasive medical examination with regard to suspect or affected passengers on a case-by-case basis; (c) inspecting baggage, ship, goods and other things onboard.

Besides, by virtue of Art.31(2) of IHR, if there is evidence of an imminent public health risk, a port state may, in accordance with its national law and to the extent necessary to control such a risk, compel passengers to undergo or advise them to undergo least invasive and intrusive medical examinations that would achieve the public health objective, or additional established health measures to prevent or control the spread of disease, including isolation, quarantine or placing passengers under public health observation.

Noticeably, the above right of a port state is concomitant to its obligations of implementing public health measures the purpose of health protection of persons onboard and the nationals on land in the port state and is requisite for fulfilling this obligation.

In this regard, the above IHR's provisions expressly relate to the passengers and there is no provision in relation to the crewmembers. As a large modern cruise ship normally has hundreds or more than one thousand crewmembers onboard, advisably the above IHR's provisions should also apply to the crewmembers to fully comply with the principle of international human rights protection.

5. Conclusion

When a port state responds to a foreign cruise ship with COVID-19 or other epidemic risks, it has the obligations to grant free pratique to a foreign cruise ship, implementing surveillance, notification & verification and public health measures, provided that the granting free pratique and the public health measures shall be based upon scientific assessment and within its capability.

The port state has the rights which are requisite for fulfilling, concomitant to or consequential upon its obligations, i.e. implementing public health measures on ship's arrival and departure, requesting assistance and collaboration from WHO and other related states, and claiming compensation for expenses of public health measures from shipowners and/or their liability insurers. Advisably, WHO need develop specific rules or guidelines regarding the port state's obligations and rights for the purpose of improving the national law of the state parties and for the port state's implementation of prompt and effective public health measures.

IHR does pay enough attention the principle of state sovereignty and therefore this principle and the principle of international human rights protection need be re-balanced by reference to the experience of various port states' response to foreign cruise ships during the outbreak and spread of COVID-19. IHR does not contain sufficient provisions with regard to crew of conveyance and more attention should be paid to the crewmembers onboard a cruise ship same as the passengers. In addition, provisions of IHR regarding reimbursement of expenses of public health measures incurred by a state party need be improved.

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