Chapter 7

The pandemic and two ships

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Introduction

The origins of the COVID-19 pandemic have most commonly been traced to a wet market in Wuhan, China. In the first months of 2020, however, as the virus spread rapidly through global travel, cruise ships became another locus of contagion. Cruise ships, which are not typically newsworthy beyond holiday travel, suddenly became the subject of regular reporting. Fears of COVID-19 at sea first surfaced in February 2020 with the *Diamond Princess*. The vessel, which was carrying 2,666 passengers and 1,045 crew, reported that passengers were suddenly falling ill. Being in Japanese waters at the time, the ship was forced to quarantine outside the port of Yokohama. In the final count, there were 712 positive cases of COVID-19 and 13 deaths reported on the *Diamond Princess* (Tokuda et al. 2020). At the time, this was the highest number of cases outside mainland China (Klein 2020). Over the following months it soon became clear that the *Diamond Princess* was neither an exception nor an anomaly. By May 2020, forty cruise ships had positive cases. Between March 2020 and March 2021, CruiseMapper (2021) reported 3,519 COVID-19 cases and seventy-three deaths aboard cruise ships.

* We would like to thank participants in the 'Law and Humanities in a Pandemic' speaker series for their questions and comments, especially Carl Stychin for the invitation and for suggestions on an earlier draft. Mostly, we would like to thank each other for a generative collaboration spanning time zones, oceans and continents, and for a friendship nurtured in a time of pandemic. Mikki Stelder's contribution has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie grant agreement No 838904.

Despite the introduction of vaccinations, cases continued to rise. In August 2021, twenty-six crew and one passenger, all fully vaccinated, tested positive for COVID-19 on the *Carnival Vista*, which was on its return voyage to Galveston, Texas from Belize City, Belize. The passenger who tested positive later died (Yee 2021).

In the first few months of the pandemic many cruise ships were stranded at sea. Fearing the rapid spread of infection, authorities in Australia, New Zealand, Canada and the US initially refused to allow vessels to drop anchor and thus prohibited passengers from disembarking. Under maritime law states have the legal right to close their ports of call. But as ships filled with well-to-do travellers from Western countries were turned away, critics asked what it meant for a ship to be in 'distress' and in need of assistance. At the time of writing almost two years later, concerns about cruise ships and COVID-19 continue, as the case of the *Carnival Vista* makes clear. Despite the demands of travellers who are eager to get back to sea, and the optimism and desperation of cruise lines seeking to recover their lost profits and their reputations, many countries continue to impose restrictions on cruise travel. In Canada, passengers planning to take cruises are warned that they 'could be subject to quarantine procedures onboard ship or in a foreign country' (travel.gc.ca [accessed November 2021]). The Canadian government maintains that it will not organize repatriation flights for stranded travellers. According to the Government of Canada website (2021): 'Cruise vessels in all Canadian waters and pleasure craft in Canadian Arctic water are prohibited until November 1, 2021.' Princess Cruises remains hopeful about the future, however. They have plans to relaunch the *Diamond Princess* in Spring 2022.

Cruise ships are massive vessels that operate as self-contained and floating resorts. Although they are leisure destinations for affluent passengers, these islands at sea also invoke longer histories of maritime mobility and immobility circumscribed by colonial, racial and imperial power. 'The contemporary cruise ship', Jonathan Rankin and Francis Collins (2017, 225) contend, 'appears as a paradox of mobility and containment. It is a vehicle for moving from place to place, and yet – more profoundly – it is a moment of enclosure constituting an event in itself.' As the history of quarantine suggests, ships – including leisure vessels – have long been spaces of confinement, especially for crew. As sites of white pleasure, cruise ships demand racial exploitation for some (crew, who are mostly people of colour) in the service of others (passengers).

As the *Diamond Princess* was quarantined outside Yokohama port, the crew were required to continue working, servicing the ship and those aboard. Some were required to share small cabins with other crew who visibly displayed symptoms of COVID-19 (Khalili 2020). According to one source:

> crewmembers [aboard the *Diamond Princess*], later identified as infected … continued to work in roles allowing for potential further spread, including providing guest services and meals to passengers during the quarantine. This may have been a potent route of continued transmission, as at least five passengers with close contact to these crewmembers subsequently developed COVID-19 symptoms (Tokuda et al. 2020, 95).

These exploitative working and living conditions may be one reason why infection rates were so high.

Since the first cases of COVID-19 were reported in February 2020, cruise ships have appeared frequently in the news, mainly through the pleas of desperate and stranded passengers. But some networks have also reported on the dire conditions faced by abandoned crews. As Laleh Khalili (2020, 7) writes:

> In a pandemic with cities and borders closed, shore leave and crew changes not permitted by transit ports, welfare visits to ships disallowed, and no clear and consistent end in sight for such restrictions, the world's 1.6 million seafarers have been feeling anxious about their own fate, about their families' health, about their income now and availability of work in the near future.

The oscillation between mobility and containment aboard the cruise ship – what Rankin and Collins (2017) call a 'paradox' – has long been a condition of life at sea, particularly for sailors and seafarers (Rediker 1989). This dynamic has visibly materialized in the current pandemic, especially as it has unfolded aboard cruise ships and particularly in the vastly different experiences of (white) passengers and crew. The ship as a site of mobility and containment becomes less of a paradox and more of a political, legal and racial strategy of containment when it is situated in longer histories of quarantine and juxtaposed with the conditions facing migrants at sea, as we discuss later in this chapter.

The spread of COVID-19 at sea, narrated through the accounts of stranded passengers and the experiences of exploited crew members, has opened important vantage points from which to consider the current pandemic. As sites of multiple legalities and competing jurisdictions, moving ships bring into sharper focus the ongoing tensions between national sovereignty and international law (Mawani 2018). Importantly, they also reveal the inherent conflicts within the current international legal order, particularly between the UN Convention on the Law of the Sea (UNCLOS) (1982) and the UN Refugee Convention (1951). These competing jurisdictions over maritime mobility and the legal status of migrants have created vastly uneven regimes of life and death. To draw out these tensions between the national

and international legal orders in the context of the COVID-19 pandemic, this chapter focuses on two ships at sea – the cruise ship and the migrant dinghy. Centring these two very different vessels – one explicitly aimed at leisure and mobility and the other at confinement and death while always with the deferred possibility for freedom – invites other angles from which to track the global pandemic and its devastating effects. Specifically, a juxtaposition of the cruise ship and the migrant vessel, we suggest, offers a glimpse into how the COVID-19 pandemic, and the uneven responses to it, has deepened the forces of imperialism, colonialism and racial capitalism.

The argument we develop here, on mobility and immobility, competing legal jurisdictions and maritime regimes of life and death, draws inspiration from the fields of colonial and postcolonial studies and offers a critical reading of the pandemic from an overlooked vantage point: ships at sea. Our reading of the cruise ship against the migrant vessel, we hope, signals how ships have always been spaces of mobility/immobility and freedom/confinement caught in national and global legal orders. These contentions demand that we situate the COVID-19 pandemic within a longer historical arc, one that signals the ongoing importance of the humanities in asking and analysing how the global pandemic has continued to entrench existing inequalities while creating renewed regimes of terror and confinement. When viewed historically, the global pandemic raises urgent questions about the presumed effectiveness of containing the spread of COVID-19 through the fortification, and in many cases the militarization, of territorial borders both on land and at sea.

Histories of quarantine at sea

Conditions of confinement aboard cruise ships that have been brought into view in the current pandemic are preceded by longer histories of quarantine. Moving ships that crossed territorial boundaries and entered ports of call necessitated forms of regulation, inspection and confinement that have been imposed on land through immigration restrictions and prohibitions (Mawani 2018; McKeown 2012). For Alison Bashford, quarantine was deeply entangled with shipping and maritime worlds from the very start. From the early modern era onward, she observes, the archipelago of quarantine stations that appeared along coastal regions joined the world's oceans in unprecedented ways. Quarantine stations linked 'old world and new world histories as surely as the shipping lines and trade routes that connected them' (Bashford 2016, 1). These stations operated as a *cordon sanitaire*, creating an inside and an outside that was ostensibly aimed at protecting port cities and empire states from threats of contagion from without. Quarantine islands, as

Bashford (2017, 265–6) describes them, became 'meeting places of ship and shore', both in their placement and design. Their architecture 'deliberately mirrored the spatial organization of a vessel', separating first-class and steerage-class passengers, and thus reinforcing racial and class distinctions. But ships themselves were spaces of contagion. The regulation of vessels, as the history of quarantine suggests, was central to the creation of racial lines that demarcated inside/outside, healthy/diseased and citizen/foreigner.

Quarantine islands connected the old world and the new, but they had different targets and objectives in Europe and the Americas. In the sixteenth-century Mediterranean, quarantine practices were directed mostly at goods. Ships entering ports of call were required to drop anchor outside and wait – usually 18 to 20 days – before being permitted to enter port. If signs of illness were detected aboard, goods would not be offloaded. Sailors and crew who displayed symptoms of poor health and disease would be sent to island lazarettos or isolation hospitals, where they were quarantined until they recovered or perished (Bashford 2016; Inì 2021). Practices of quarantine in the Mediterranean were intended to strike a balance between health and trade. This was not the case in Atlantic regions, however. After Columbus' so-called discovery of the 'new world', and as European ships began travelling more regularly across the Atlantic from the sixteenth century onward, carrying European colonists and then captive Africans, quarantine became a regular practice that was not only linked to the movement of goods but also to the movements of people. Ships, which were already prisons for enslaved Africans, were increasingly used as spaces of quarantine and confinement (Rediker 2008; Sheridan 1985).

It bears noting that the racial constructions of disease, which continue to inform how we understand health, contagion and transmission, emerged from conquest and colonization. Although European ships were vectors of contagion that were instrumental in bringing new diseases to the Caribbean and to the Americas, and are therefore directly implicated in the genocide of Indigenous peoples, they are not often viewed in these terms (Davis and Todd 2017). The arrival in 1778 of the *Resolution*, which carried Captain James Cook and his crew to Nootka Sound, brought foreign diseases including smallpox, tuberculosis, influenza and measles. Indigenous elders along what is now the west coast of Canada recall that sustained contact with Europeans produced major epidemics that led to the devastation of First Nations communities which did not have immunity (Kelm 1998). Despite these long histories of European colonists bringing disease across the Atlantic to the Americas, the vessels and bodies of Europeans have not been framed as epidemiological or foreign threats, certainly not in conventional histories of the 'new world'. Rather, disease has been more often associated with Black and colonized bodies, as histories of conquest, slavery and immigration make clear.

Quarantine measures in the Mediterranean that centred on the transport of goods and commodities were in part extended from Europe to the Americas through the transatlantic slave trade. Captive Africans who were kidnapped from West Africa and forcibly shipped across the Atlantic to the Americas were transformed in these voyages, and more specifically in the Middle Passage,[1] from humans into 'goods' (Philip 2008; Smallwood 2008). Conditions aboard slave ships were horrific (Mustakeem 2016; Rediker 2008). Captains, acting on behalf of ship owners who were clearly motivated by profits, expressed concerns about the health of enslaved people. Yet illness and death remained widespread. Malnutrition, seasickness and poor hygiene, combined with contaminated food and water supplies, made the slave ship a breeding ground for disease, illness and death (Smallwood 2008, 136). The unsanitary conditions and the 'intermingling of bondspeople into cramped ships holds facilitated the exchange of contagious diseases' (Mustakeem 2016, 57). Upon arrival at their destinations in the Caribbean and the southern US, captive Africans who survived the Middle Passage were carefully inspected to determine their health and ultimately their value (Smallwood 2008). Those who showed signs of illness were confined aboard slave ships, or forcibly held in quarantine stations or in slave hospitals until they were deemed healthy enough to be sold (Sheridan 1985, 132).

Transatlantic slavery, as scholars have noted, was the largest forced migration of peoples in history (McKeown 2012; Mustakeem 2016). For Adam McKeown (2012, 22), racial conceptions of bondage and freedom that developed in the context of Atlantic slavery shaped the regulation of and the restrictions imposed on nineteenth-century migration. Whereas ideas of forced and free labour informed the conditions, transport and circumstances of Chinese and Indian indentureship from the 1880s onward, these legal formations were also used to justify Asian exclusion from white settler colonies, including the US, Canada and Australia (McKeown 2012, 23). Racial concerns of trade and forced migration in the Mediterranean and Atlantic thus also shaped quarantine practices and immigration controls in the Pacific. By the nineteenth century, the spread of disease across oceans and continental regions clearly illustrated the perils of maritime trade and travel. During this period, practices of quarantine became central to the demarcation and protection of national borders (Bashford 2016). Racial practices of border control that distinguished free from unfree, healthy from diseased and citizen from non-citizen, which were shaped by racial distinctions that were developed aboard the slave ship and marked the bodies of enslaved peoples, continue to shape how we think about contagious and non-contagious diseases in the twenty-first century, including leprosy, AIDS, Ebola and more recently COVID-19 (Bashford and Nugent 2001; Mawani 2003, 2007; Murdocca 2003).

From the mid-nineteenth century onward, as large-scale European resettlement and Asian migration increased across the Atlantic and Pacific Oceans, quarantine became more closely associated with the movements of people. Health restrictions were written directly into immigration regulations in the US, Canada and Australia, and became coercive technologies of racial border control (Bashford 2003; Mawani 2003). In the US, for example, Ellis Island and Angel Island served as the first stops for ships crossing the Atlantic and Pacific, respectively (Lee 2003; Shah 2001). Upon arrival, all passengers were inspected for signs and symptoms of contagion, but it was travellers from China, Japan and India who were most often described as being 'diseased'. In Canada and the US, anti-Asian racism directly informed legal regulations directed at Chinese, Japanese and Indian migrants not only in ports of call but also inland. Claims that Asians were diseased dramatically shaped Chinese exclusion through incarceration, deportation and prohibitions on entry (Shah 2001). Racial characterizations of healthy and contaminated bodies – and particularly of Asians as ostensibly diseased – have re-emerged with renewed violent intensity in the COVID-19 pandemic.

The racial regimes of border control that were central to the origins of the nation-state continue to persist both in immigration legislation and in the recent rise of anti-Asian violence. This brief historical account of quarantine and shipping is intended to serve as a reminder that forced quarantine, whether on ships, islands or detention centres is rooted in longer colonial and maritime histories. Quarantine practices that began in the 'old world' Mediterranean and were aimed at goods have newly returned from the 'new world' Atlantic and Pacific through a growing fear of migrants. With COVID-19, racial concerns regarding disease have re-entered the European imagination, shaping violent responses to the thousands of migrants fleeing from North Africa, Southeast Asia and the Middle East across the Mediterranean and seeking entry into Europe (Bashford 2016, 9; Heller 2021). This is an important historical context in which to situate the global pandemic. We return to the figure of the migrant later in this chapter. But first, let us say more on the cruise ship and the jurisdictional tensions between national, maritime and international law that it has brought into view.

COVID-19 and maritime legal orders

By drawing attention to cruise ships at sea, the COVID-19 pandemic has also brought maritime legal orders into sharper focus. In the early months of the pandemic, as we mention in the introduction, cases of COVID-19 rapidly spread aboard cruise ships and infected passengers were placed in

confinement. Many countries denied these vessels entry into their territorial waters. Some states claimed that passengers and crew must first seek assistance and repatriation from the flag states in which the ships were registered (Tirrell and Mendenhall 2021). In the first months of 2020, flags of convenience, a ship registry system that originated in Panama, became a point of focus in stories of stranded cruise ships (Campling and Colás 2021, 783). Under maritime law, the nationality of a ship and the laws under which it operates depend on where a vessel is registered. A flag state determines which laws apply on board. In principle, a ship can fly only one flag at a time. Historically, however, ships carried multiple flags; captains changed them opportunistically to avoid international legal restrictions and regulations. The origins of flags of convenience, some argue, are themselves rooted in illegality at sea. In 1808, after the US and Britain formally abolished the slave trade, ships engaged in illegally transporting captive Africans flew American flags to protect themselves from British searches of their vessels at sea. As historian Walter Johnson (2008, 240) puts it, 'Old Glory became the flag of convenience for slave traders worldwide.'

A ship flying a flag of convenience is typically registered in a country other than the place of residence and nationality of its owners. Flag of convenience states include Panama, Liberia, Honduras, Lebanon, Costa Rica and the Bahamas (Meyers 1967, 57). Typically, ship owners pay a fee to a country to register their vessels in order to avoid the legal restrictions and regulations imposed by their own governments. Flags of convenience allow ship owners and shipping companies to avoid labour laws, environmental regulations and national tax laws. By registering a ship in Panama, the Bahamas or Liberia, shipping companies argue that they can significantly increase their profit margins. In *Fish Story*, Allan Sekula (1995) argues that the flag of convenience registry, which he dates to the 1940s, reveals the destructive effects of globalization. Maritime worlds, he argues, 'underwent the first legally mandated internationalization or "deregulation" of labour markets' (49), allowing a company's owners to live in one country, its ships to be registered in another, while crews are recruited from poor coastal nations including the Philippines and Indonesia. A flag of convenience, he explains, adds 'a new ensign of camouflage and confusion' to the juridical order of ships. 'The flag on the stern becomes a legal ruse, a lawyerly piratical dodge' that allows shipping companies to use unseaworthy vessels and to employ foreign crew without the protection of labour regulations that set a minimum standard of pay and which ensure safe working conditions (50; see also Khalili 2020). In the context of cruise ships, some identify the 1920s as a key historical moment in the flag of convenience system. Many ship owners and companies adopted the Panama flag so they could serve liquor to passengers during American prohibition (Tirrell and Mendenhall 2021, 4).

The appeal of flags of convenience for cruise ship companies continues in the present day. Cruise ships are responsible for causing significant environmental pollution and health concerns for humans and maritime species. Flags of convenience allow cruise ship companies to avoid and defy environmental regulations (Ellsmoor 2019).

Many cruise ships affected by COVID-19, including the *Diamond Princess*, were flying flags of convenience. Carnival Cruise Line is a US-based public company with headquarters in Miami and stocks traded on the New York Stock Exchange. Yet every Carnival ship is registered in Panama, Malta or the Bahamas (Tirrell and Mendenhall 2021, 5). Under maritime law, flag states extend national identity and legal jurisdiction over vessels, and thus are legally responsible for its passengers and crew (Klein 2020). What the COVID-19 pandemic has revealed are the inherent problems with the flag of convenience system, including the tensions between maritime, national and international legal orders. Although these jurisdictional problems have long existed, often with devastating implications for crew, they have become newsworthy now because of their implications for well-to-do cruise travellers. The governments of Panama and other flag of convenience states do not have the financial resources to rescue and repatriate passengers from Europe and North America who are vacationing on luxury cruise lines, even if these vessels are registered in their respective countries. As many cruise ships affected by the global pandemic were registered in Panama, passengers who were confined on these vessels were unable to file successful claims for repatriation. The COVID-19 responses to passengers and crew aboard cruise ships have been highly uneven. While cruise lines such as Royal Caribbean tried to repatriate stranded passengers as soon as possible, many crew remained abandoned at sea and have not yet been paid for work they have already completed (Khalili 2020).

Flags of convenience also have serious financial implications for cruise ship companies seeking pandemic-related assistance. Countries such as Poland, Denmark and the US have refused to provide bailouts for shipping companies, including cruise lines that are flying foreign flags, because they have not been paying national taxes and have not contributed to the national economy. In announcing its bailout plan in 2020, the US government stated that companies such as Norwegian Cruise Lines would be excluded from their $2.3 trillion stimulus plan, thus leaving Norwegian and other cruise ship companies to seek out alternative ways of recovering their losses or risk filing for bankruptcy (Wolfe 2020). It is estimated that cruise lines are burning anywhere from $100 million to $1 billion a month as they wait for cruise travel to resume. Some companies have been aggressively advertising and have resumed travel despite the emergence of new strains of COVID-19, as the *Carnival Vista* makes clear. Carnival, Royal

Caribbean Cruises and Norwegian Cruise Lines have all raised money to stay afloat during this unprecedented pandemic shutdown. Some critics ask whether the pandemic and the resulting cruise ship crisis might finally end the flag of convenience system (Tirrell and Mendenhall 2021). Despite financial and legal troubles, many cruise ship companies insist that the flag of convenience system cannot end, as reflagging in the US would require that they follow tax, labour and environmental laws, thereby significantly diminishing their profits (Harotounian 2021, 977).

Moving ships have raised other legal issues resulting from competing jurisdictions. Some passengers have filed lawsuits against cruise ship companies including Princess Cruises for failing to protect them from COVID-19. Given that these vessels fall under the jurisdiction of flag states and are governed by maritime legal orders, travellers have found themselves confronted with obscure maritime laws that have placed them between jurisdictions, making it difficult, if not impossible, to seek compensation from flag states, cruise ship companies or the countries in which they live. The COVID-19 pandemic, and the refusal of states to allow ships to enter their ports of call, has also raised key legal and political questions about what it means for a ship to be in distress. Under the International Convention on Maritime Search and Rescue (SAR Convention 1985), 'distress' is defined as '[a] situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.[2] Concerns regarding ships in distress have compelled coastal and port states, often begrudgingly, to assist illegalized migrants when their vessel is in danger of sinking, often without any media coverage or response (Tirrell and Mendenhall 2021, 7). During the COVID-19 pandemic, distress has gained attention only because those imperilled are cruise passengers from Western countries.

Cruise ships have taken on a new visibility and significance in the current global pandemic. For passengers, these ships have been transformed from sites of pleasure and mobility to spaces of contagion and confinement that are reminiscent of earlier colonial and racial histories of maritime travel and quarantine. For many crew members, by contrast, these luxury liners have long been floating prisons – even more so under pandemic conditions. These uneven and unequal conditions brought into view by COVID-19 at sea have revealed the tensions between national, maritime and international law and how these jurisdictional overlaps work to exacerbate global and racial inequalities. The outbreak of COVID-19 at sea is a potent reminder that profits remain paramount and only certain lives are worth saving. These conditions are further exemplified when the cruise ship is juxtaposed against the migrant vessel, to which we now turn.

The virus and the migrant dinghy

COVID-19 has had a devastating effect on migrants crossing the sea. In comparison to the cruise ships that we discuss above, migrant vessels have received far less media coverage and state action. Although concerns regarding migrant vessels have historically been concentrated in the Mediterranean, the global pandemic has expanded the so-called 'migrant crisis' to other waters, most notably in the Indian Ocean. On 16 April 2020 the Royal Malaysian Air Force spotted a small boat off the coast of the Pulau Langkawi in the Malacca Strait. The boat was carrying over 200 refugees who were fleeing the overcrowded camp of Cox's Bazar in Bangladesh, where they were stranded after facing persecution and genocide in Myanmar (Ratcliffe 2020). Noor Hossain, a Rohingya community leader living in the Balukhali refugee camp in Bangladesh, stated that as COVID-19 has rapidly made an already untenable situation worse, 'more and more Rohingya are willing to flee Bangladesh' in search of different shores (Ellis-Petersen and Rahman 2020). Soliciting the help of human traffickers who provide passage in overcrowded and unseaworthy dinghies at a high price, Rohingya refugees are commonly turned away upon arriving in the coastal waters of Indonesia, Thailand and Malaysia. With the global COVID-19 pandemic, the situation for Rohingya people in refugee camps and at sea has declined even further.

Following the interception of this small boat, the Malaysian Royal Military Air Force (RMAF) reported that the Malaysian government feared that a group of 200 'foreigners' might bring COVID-19 into the country, claims that are reminiscent of longer racial histories of quarantine, disease control and national protection, as we discussed earlier. The RMAF claimed that the Navy, operating on humanitarian grounds, gave these 'foreigners' provisions before pushing the vessel outside its territorial waters (Malay Mail 2020). This case is one of many that demonstrates how the COVID-19 pandemic has been used by coastal states to legitimize the protection of their territorial borders through the killing and the letting die of migrants stranded at sea (Heller 2021).

In the Mediterranean, where migrant deaths at sea have long been a source of conflict between coastal states and non-governmental organizations, migrants and activists have reported a rapid decrease in search and rescue missions. On the one hand, this decrease is a result of a European Union (EU) policy to shift the surveillance of refugee boats in the Mediterranean from sea to air. The EU is using unmanned drones developed with the assistance of Israeli military technology (Mazzeo 2020), which places the responsibility for search and rescue missions on the Libyan coastguard. European states have engaged in illegal push-backs and have

criminalized activists and fishermen who assist in rescue operations at sea (Ahmed 2020; Rankin 2019). Coastal states and the EU are using COVID-19 to normalize efforts to close national borders to supposed foreign threats at sea and to further justify 'non-assistance' at sea, as noted by activists from the monitoring organization Alarm Phone (2020).

Since 2019, illegal push-back actions by coastguards have become more systematic. 'Help-on' policies and push-back actions violate the principle of *non-refoulement* stipulated in the UN Refugee Convention of 1951 and its 1967 Protocol, which prohibits rejection at the frontier, interception and indirect refoulement of individuals at risk of persecution (UN High Commissioner for Refugees 1977). The pandemic has expanded flows of migration due to the effects of lockdown policies (Gazzi 2020). Push-backs and non-assistance at sea have become increasingly routinized as supposedly legitimate border management practices (Border Violence Monitoring Network 2020). What this brief discussion of the migrant ship suggests is that international legal regimes governing the movements of subaltern peoples at sea – UNCLOS 1982 and its 1994 amendment, and the UN Refugee Convention of 1951 and its 1967 Protocol – are often in conflict with one another. Like the cruise ship, the forced maritime travel of migrants and refugees during the COVID-19 pandemic reveals the tensions between national, maritime and international legal orders, as well as the inherent limits of addressing a global pandemic through the militarization of borders and the reterritorialization of the nation-state into ocean regions.

Shipping, as some scholars have noted, was foundational to the development of an imperial international legal order that persists to the present day (Anand 1982; Benton 2009; Mawani 2018). If 'global capitalism is a seaborne phenomenon', then international law has emerged and developed to protect European and American interests, rather than the well-being of subaltern subjects who have been forced into ocean spaces as cheap and exploitable labour, as enslaved people or as forced migrants (Campling and Colás 2021, 1). UNCLOS makes no mention of refugees or transnational subaltern working classes. It is dedicated to shipping, the movements of global capital and the supposed protection of ocean resources (Ranganathan 2019). Migrants who qualify as refugees are regulated by the UN Refugee Convention of 1951 and its 1967 Protocol, which is rooted in a notion of individual human rights (Mann 2016). Terrestrial in origin, the Refugee Convention makes no mention of the struggles or the legal position of migrants stranded in international waters, often aboard unseaworthy vessels. It is not coincidental that in contemporary legal discourse, oceanic refugee crossings continue to be undermined and invisible. The criminalization of migrant crossings must be situated 'in the wake' of colonial practices of confinement including histories of maritime quarantine. As Christina

Sharpe (2016, 15) argues, Black people crossing the Mediterranean have become '*carriers* of terror [including disease] ... and not the primary objects of terror's multiple enactments', which include colonial occupation, war and climate catastrophe (emphasis in the original).

Under UNCLOS, the only way migrant vessels may become visible as (il) legal actors is in article 98, which mandates 'the duty to render assistance' to ships in distress at sea 'without serious danger to the [rescuing] ship'. Distress, as we suggest earlier in this chapter, has become a point of contention in pandemic conditions. Whereas cruise ships have newly claimed to be in distress and thus are in need of saving, migrant boats in distress are framed as 'diseased' and viral, as potential 'carriers of terror' rather than people terrorized at sea. Article 92 addresses the status of ships, including 'ships without nationality'. It bears noting that upon arriving in coastal waters, migrants are often moved by human traffickers from larger vessels onto flagless dinghies (Mann 2016). Article 111 grants coastal states the right of 'hot pursuit' to apprehend ships navigating coastal waters that are in violation of national laws including those against human trafficking.[3] Unflagged vessels do not have a nationality at sea and thus are considered stateless and thereby lawless. Stateless ships have a different legal status than ships under the sovereign jurisdiction of a flag state, even a flag of convenience. UNCLOS makes no mention of stateless people stranded on flagless or stateless ships, other than to authorize local coastguards to board these ships when they enter coastal waters. For flagless ships with no national sovereignty, the coastal state's sovereign power is in force against the vessel and its passengers. These jurisdictional overlaps, contradictions and divides between UNCLOS, the UN Refugee Convention and the national jurisdiction of coastal states are making conditions at sea even more deadly for migrants.

(Re)territorializing the sea

UNCLOS divides the sea into six oceanic zones predicated on what we might think of as negative and positive sovereignty. Zones one to five fall under different specifications of national jurisdiction, while zone six, the high seas and the deep ocean floor, is beyond the jurisdiction of nation-states. The latter is considered to be the 'common heritage of mankind' (article 136). Where it concerns the full extent of the sea, the Convention pertains to the movement of ships and jurisdiction over customs infringement, fiscal immigration and sanitary laws, while at the same time defining the high seas and the deep sea as 'free' and beyond the territorial claims of nation-states. Originally, the inauguration of oceanic zoning, and the Exclusive Economic Zones (EEZs) in particular, was a response initiated by coastal

states in the Global South to the imperial and colonial lines dividing oceans and informing maritime imaginaries (Anand 1977; 1983). In effect, however, UNCLOS has provided the conditions for the perpetuation of imperial and territorial expansion that is rooted in a notion of the sovereign nation-state (Ranganathan 2019; Esmeir 2017). With a focus on facilitating the movement of global capital and resource extraction, UNCLOS' ocean imaginary remains restricted to what Dutch humanist and United Dutch East India Company (VOC) ideologue Hugo Grotius in 1609 called the 'free sea' (Grotius 2004). For Grotius, the high sea was the free sea, beyond sovereign jurisdiction, and thus open to European imperial expansion (Mawani 2018, 39).

Under UNCLOS, a coastal state is entitled to use its jurisdiction to impose sanitary laws, such as quarantine regulations, and to prohibit the entry of non-citizens assumed to be a threat to the health of the nation-state. At the same time, the UN Refugee Convention stipulates the principle of *non-refoulement*, which warrants that a state must protect those facing persecution elsewhere.[4] The seaborne migrant who attempts to come to shore is one example of how the international legal regimes that address the sea and refugees collide. Although push-backs might be illegal under the UN Refugee Convention, these actions are enabled by UNCLOS, another international legal regime that (re)territorializes the ocean, dividing national territories from international ones. The creation of EEZs, critics argue, has promoted a scramble for the oceans that has remapped 70 per cent of the planet (DeLoughrey 2017, 32). Yet in the Mediterranean, 50 per cent of the sea continues to be considered the high seas. Most countries surrounding the Mediterranean have not yet claimed or defined their EEZs. No Mediterranean border state could claim its EEZ without infringing the EEZ of another state (Grbec 2014, 1–2). With half of the Mediterranean designated as the 'high seas', and thus a zone of negative sovereignty, refugees become the responsibility of 'the international community', which often means no one. The legal status of the high seas actively produces and exacerbates the statelessness of migrants, despite the mandate for rescue under international law.

The principle of *non-refoulement* is part of customary international law, which is binding on all states across the globe (International Review of the Red Cross 2018). Although Malaysia, Thailand and Indonesia are signatories of UNCLOS, they have not ratified the UN Refugee Convention. Italy and other European states, by contrast, have ratified the Refugee Convention but have not claimed their EEZs, thereby leaving the protection of seaborne refugees stranded on the high seas to 'the international community'. Rather than simply framing push-backs and inaction as illegal, which they are, juxtaposing UNCLOS and the UN Refugee Convention shows how international law is implicated in the crisis of migrant deaths at sea. These overlapping international legal regimes and their competing jurisdictions

obscure refugees fleeing from violence and create conditions for letting migrants die at sea (Heller and Pezzani 2017). Within these international legal regimes 'illegal push-backs' are enabled through the very mechanisms that seek to render such actions unlawful. The territorial and cartographical grid that UNCLOS has placed onto the ocean enables push-back actions as a means of deterring responsibility for search and rescue and protecting the health of the nation-state from 'viral encroachment' through the enforcement of sanitary laws (Heller 2021). Furthermore, both UNCLOS and the UN Refugee Convention require ratification to carry authority. They are always already written and formulated with ambiguous legal language, including 'reasonable cause and action' and 'potential risk' for sovereign states. In other words, if the security or sovereignty of the nation-state is presumably threatened, a state is able to act in its own interests, creating conditions in which some can live (citizens) and others are left to die (migrants). Such legal determinations are often accompanied by racist and anti-immigrant discourses rooted in longer histories of forced displacement (Smythe 2018; Black Mediterranean Collective 2021).

In an article on the 1955 Bandung conference, Samera Esmeir (2017) problematizes the ways in which UNCLOS has continued to redefine the ocean according to the principles of territorial sovereignty. Decolonizing states attempted to limit and change imperial laissez-faire politics on the high seas by introducing EEZs and the 'common heritage of mankind' principle. The sea, she explains, is split into two parts: 'one where competing sovereigns can navigate the ocean's surfaces and project themselves onto them, and another where humankind can descend to preserve its heritage (while also failing to counter the destruction of the commons)' (Esmeir 2017, 89). The introduction of this horizontal regime of freedom, aimed at navigating the high seas, she writes, forms the conditions of possibility for a vertical regime of resource extraction: 'the heritage of humankind in the depths of the sea is conceivable only once its surface has been detached as a distinct but enlarged domain for sovereign states' (89). Esmeir observes an important parallel between the reification of the logic of the nation-state projected onto the ocean and the division between citizens and non-citizens in international human rights law. Human rights campaigns advocating for rights in the Global South assume that citizens of the Global North have sophisticated civil rights regimes to which they can appeal. 'The two splits, in the law of the sea and in human rights law', Esmeir concludes, 'posit humans as an object of protection of international law, leaving strong states free' (89). What international human rights law and international refugee law have in common is that one's humanity depends on the law's capacity to confer or confiscate that status (Esmeir 2012, 6). One can only appeal to the law's protection insofar as one is rendered human by and through it.

The 'crisis for refugees' at sea, as Gurminder Bhambra (2017) calls it, reveals the violence inherent within these overlapping regimes of international law. On the one hand, the law of the sea transforms the ocean into a terrain for both the extraction of resources and the movement of global capital via ships. At the same time, however, refugees are cast as objects of international refugee law whose access to the protection afforded to citizens of the nation-state remains forever deferred. In both legal regimes, the supremacy of the imperial state remains persistent and undeterred. Examining the pandemic from the perspective of the sea brings new insights. A view from ships at sea sheds light on the politics of containment and contamination experienced by subaltern people on the move, both historically and in our current context. Histories of quarantine and racial fears of disease and contagion, as discussed above, reveal how colonial-racial policies continue to determine who can cross oceans freely and whose movement must be contained and restricted. Today, viewing the pandemic from the cruise ship and the migrant vessel offers a sober reminder that certain lives continue to be valued while others are not. This racist distribution of life and death, which is rooted in longer colonial and imperial histories of quarantine, transatlantic slavery and immigration controls, suggests that (inter)national legal regimes rooted in the sovereign nation-state remain spaces of violence.

Although the challenges for migrants at sea have existed for much longer than the global pandemic, COVID-19 has exacerbated these conditions. Coastal and island states in the Mediterranean, Southeast Asia and beyond are using the pandemic to justify push-backs and inaction. Within what Sara Ahmed (2004, 15) has called an 'affective economy', the viral refugee is portrayed as a threat to the body and health of the nation-state, turning anti-immigrant hatred into concerns over the health of the nation, particularly for the bourgeois citizen-subject. Both depend on prior colonial and racial histories of containment and border control. What the COVID-19 pandemic makes clear is the differential distribution of responsibility and accountability. The mobility of the bourgeois citizen-subject via cruise ships has contributed to the global spread of COVID-19. Yet passengers, like European colonists on ships that crossed the Atlantic, are rarely described as 'diseased' or dangerous (Khalili 2020). As discussed earlier, in the early months of the pandemic, cruise ships reported the highest rates of infection beyond mainland China. For migrants, oceans remain 'carceral spaces', not simply through push-backs, but also in the redeployment of ships, ports, warehouse stations and islands which have become the containment sites of contagion and which are deployed as spaces for the indefinite incarceration of refugees (Braude 2020; Khalili 2020). Since 2020, Italian politicians have started to conflate threats of COVID-19 with fears of migrants. Although Italy was at the centre of the European COVID-19 crisis in early 2020, Matteo Salvini, former minister of the interior, criticized the arrival

and disembarkation of 276 migrants. He argued that 'allowing the migrants to land from Africa, where the presence of the virus was confirmed, is irresponsible' and called for Italy to make its borders 'armour-plated' (cited in Heller 2021, 118). Italy has also been hiring vacant cruise ships to use as spaces of quarantine and ultimately 'as floating jails for refugees' (Braude 2020).

The movement of seaborne migrants, Ratna Kapur points out, poses a challenge to the borders of the nation-state and the idea of the liberal subject at the centre of national and international law:

> The legal regulation of cross-border movements is contingent on law's understanding of and engagement with difference ... Although migration is a fact of a globalized economy, the response of the international legal order to what is cast as the migration dilemma is either incomplete, or one that aggravates the situation of those who cross borders (Kapur 2003, 7).

This 'migration dilemma' has become particularly pronounced at sea during the pandemic. For Sudeep Dasgupta (2019, 102), political discourse around the threat of migration and the need for clearly demarcated spaces in political discourse 'represses a relational understanding of the world as a space of the co-presence of peoples'. This co-presence becomes particularly repressed under a regime of international law that is premised on reifying the boundaries and powers of the nation-state while facilitating global capitalism at sea. It is the movement of migrants, sailors and refugees, who serve as cheap, racial, exploitable and expendable labour, that continues to challenge 'the rearticulation of the nation-state and the uniformity of the liberal subject' (Kapur 2003, 8).

Conclusion

Cruise ship passengers and crew confined at sea have drawn attention to the competing jurisdictions of national, maritime and international legal orders. These recent reports recall racial and colonial histories of immobility, incarceration, capture and maritime violence (Perera 2013, 157). Under pandemic conditions, the cruise ship – a site of leisure and pleasure for well-to-do travellers – has been newly transformed into a space of terror and confinement, as it has long been for the mobile working poor and for migrants at sea. 'Questions of the mobility and blockage of bodies', Suvendrini Perera writes, 'of who moves, and how, or who cannot, or does not, are questions of power, naturalised, made invisible' (60). With the rapid global spread of COVID-19, we are led to believe that globalization has been stopped in its tracks. But as Charles Heller (2021, 113) notes, it is the 'global web of transport infrastructure, enabling human mobility for business, tourism, and migration', that has

become 'the conduit through which this new virus [has] spread at lightning speed'. The effects of the current pandemic have been most devastating for subaltern subjects 'already present within countries or those seeking to reach them such as refugees and migrants – leading to heightened border violence but also hardening social boundaries within daily social interactions' (114).

Following Deborah Bird Rose, Perera describes international law as part of the 'death-work of unmaking water'. UNCLOS, she claims, subjects 'the livingness of water' to a logic of national security, economic advantage and territoriality. International law, in Perera's formulation, 'ensnares sea-borne refugee bodies in the crude sovereign logic of territoriality' (2013, 59). Examining the overlapping regulatory mechanisms and uneven responses directed at cruise ships and migrant vessels draws attention to the lethal effects of international law for those trying to cross the sea. The pushing back and allowing migrants to die, which has only intensified during the pandemic, shows the clear limits of international legal regimes based on the logic of the liberal citizen-subject, the flow of capital and the nation-state. The cruise ship has now become a carceral space where crews are confined until further notice and where migrants are detained under the guise of quarantine (Braude 2020). The high seas are a liquid graveyard. The global division of labour, capital and citizenship becomes particularly visible when the cruise ship and the migrant vessel are juxtaposed. The figure of the ocean-borne migrant emerges alongside the dispossessed maritime subaltern labouring class and stands in stark contrast to the white and wealthy passenger.

The pandemic has brought into sharp relief the differential distribution of mobility and immobility, the unequal right to protection and the limits of international law, including the flag of convenience system, the principle of *non-refoulement* and oceanic zoning. Whereas most cruise ship passengers who spread COVID-19 across the globe (Khalili 2020) have long been returned to their countries and are seeking ways to initiate legal actions against cruise lines for negligence, migrants in distress at sea have no recourse to legal protection and are simply left to die. COVID-19 has deepened disputes around who must take responsibility for those at sea, thus illustrating how territorial sovereignty and global ocean governance interact in deadly ways. Closing borders has only exacerbated rising nationalism, xenophobia and racist border policing. Shifting our attention to the cruise ship and the migrant vessel opens a longer historical perspective on who is worth saving and who is left behind. This letting live and letting die, based on racist regimes of freedom of movement, is what Achille Mbembe (2019) calls 'necropolitics'. International law conditions this power to *let live* and *make die*. Contemporary politics of containment and contamination at sea have hardened the boundaries of the nation-state while at the same time declaring a(n) (inter)national state of emergency that leaves those without recourse to legal representation and citizenship the most unprotected.

Notes

1. The 'Middle Passage' is commonly used to reference the seaborne transport of enslaved peoples and the unspeakable violence that European captains and crews inflicted upon African women, men and children aboard ships as they were transported from Africa to the Americas.

2. See https://www.international-maritime-rescue.org/news/sar-matters-defining-distress-continued

3. This article is further expanded in article 8 of the Protocol against the Smuggling of Migrants.

4. It must be noted that the concept of who constitutes a 'refugee' in a legal sense is unstable and dependent on shifting international and local categories. *Non-refoulement* only applies to those who fall within this category.

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