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Ramat Tobi Abudu
University College, Cork, Ireland

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Book Review

Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford: Oxford University Press) 2018.

Reviewer: Ramat Tobi Abudu*

Introduction

In her recently published monograph, *International Law and the Protection of People at Sea*,¹ Papanicolopulu pursues a utopian ideology on the evolution of international law from its state-centric approach to a human-centered approach.² Accordingly, this book adds to the array of academic articles appraising the human-centric progression of international law through practice and normative developments.³ Unlike the existing literature, this book goes ahead to formulate a concept and build on a methodology to develop an international legal regime to support this human-centric approach for the good of all people.

Papanicolopulu starts with the analysis of a concept she formulated called “people at sea,” which is built on the fundamental assumption that ‘all people are equal and that egalitarian and non-discriminatory treatment should be the basis for legal regulation directed towards persons.’⁴ From a human rights perspective, this is an ultimate *eureka* moment. However, the authors’

* Ph.D. Candidate at University College, Cork, Ireland.

¹ Irini Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford: Oxford University Press, 2018).

² This is not new as the courts have severally acknowledged such evolution. See, for example, the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Tadic* (Jurisdictional Phrase) (1995) at para 97, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia. ‘A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually, the maximum of the Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.’

³ See also John King Gamble, Charlotte Ku & Chris Strayer, “Human-Centric International Law: A Model and A Search for Empirical Indicators” (2005) 14:61 *Tul J Intl & Comp L* 79. Here, after evaluating all empirical indicators on human centric international law, the authors conclude that ‘ultimately, international law will become more human-centric through practice and specific normative development’; See also Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (translated by Jonathan Huston) (New York: Cambridge University Press, 2016).

⁴ *Supra* note 1 at 5.

objective goes beyond a single legal precept. Papanicolopulu adopts various rules and norms under international law to conceptualize a *sui generis* special regime called ‘international law and the protection of people at sea’ to advance the goal of protection of all persons at sea. Her premise is the pre-existence of norms under international law that ensures the security of all person(s).

In conceptualizing this particular regime, Papanicolopulu uses a methodology that is relatively new to the law discipline called ‘systemic thinking.’⁵ Systemic thinking expressed in the principle of systemic integration fosters regime interaction and deals with the fragmented nature of international law.⁶ Systemic thinking and systemic integration allowed Papanicolopulu to engage with international law as a complete system rather than a fragmented system. Therefore, through systemic thinking, Papanicolopulu first identified the norms, rules, and regulations relevant to the protection of people at sea in each legal regime and then juxtaposed these various laws within the whole system (International law) to reconstruct a wholesome picture.

Structure of the Book

The book is well structured as each chapter feeds into the next, and Papanicolopulu’s’ arguments flow seamlessly. There are five chapters, including an introduction. The introduction highlights the novelty of this field of research, the reason for choosing the concept ‘people at sea,’ the need for a new approach, and Papanicolopulu’s’ own understanding of regimes. Chapter 1 gives a scope

⁵ See Lynn M. LoPucki, "Systems Approach to law" (1997) 82:479 Cornell L Rev at 481: Systems analysis is a methodology developed in the fields of engineering, business information systems, and computer programming to solve complex problems.

⁶ An example of this principle is Article 31(3)(c) of the *Vienna Convention of the Law of Treaties* which provides that the interpretation of a treaty requires the consideration of any relevant rules of international law applicable between the parties.’; See also, *Al-Adsani v The United Kingdom App*, (2001), no 35763/97 (judgement of 21 November 2001) at para 55-56. Here, the European Court of Human Rights used the principle of systemic integration to introduce the law of State immunity into the case involving a claim for the violation of human rights to identify a possible conflict between norms belonging to the two systems. See also the Oil platforms in *Islamic Republic of Iran v United States of America* [2003] ICJ Rep 161 (judgement), where the ICJ used systematic integration to import the entire regime prohibiting the use of force to evaluate compliance with a norm contained in a treaty of friendship, commerce, and navigation.

on the relationship between international law of the sea and international human rights law. Here, Papanicolopulu gives a brief empirical account of the concept of people at sea. According to her, a person at sea is ‘any person who is, for a certain period of time [sic], physically at sea’.⁷ People at sea includes sea fearers, Navy and coastguard personnel, fishers, workers on extraction platforms, passengers, migrants, refugees, asylum seekers, stowaways, pirates, armed robbers, and traffickers. This broad categorisation covers both suspected criminals, State agents, victims, and workers at sea.

There could easily be opposition to this concept of ‘people at sea’ when placed within the maritime security framework. The debate will be that enforcement operations have proved to be effective when security-consciousness is the goal. Therefore, this new concept creates a focus on rights consciousness, which does not fit within the object of law enforcement operations at sea. In dismissing such opposition, Papanicolopulu points out that, although law enforcement is key to the protection of people at sea, excessive law enforcement activities endanger human life and violate human rights provisions. Generally, chapter 1 points out that there is partial and uneven protection of people at sea because of the specialised application of regimes and norms based on the category of persons at sea.

Chapter 2 lays the foundation for the new conceptual approach based on the systemic integration of all existing regimes and norms under international law. As earlier pointed out, the methodology adopted is systemic thinking, which allows Papanicolopulu to enter individual International law regimes and pick relevant norms/principles and then leave such regimes to face the bigger picture of general international law. In doing this, Papanicolopulu starts by identifying core elements of various regimes which are relevant to the protection of people at sea. The

⁷ *Supra* note 1 at 17.

applicable regimes are international law of the sea, international human rights law, refugee law, and technical regimes such as maritime law treaties and labour laws.

Chapter 3 identifies that rights and duties operate within the scope of State jurisdiction. In this chapter, Papanicolopulu addresses all issues affecting the notion and scope of jurisdiction over a person who is at sea. The main problem examined is the lack of norms oriented explicitly towards the notion of jurisdiction over persons at sea. From this central issue, Papanicolopulu identifies four challenges. First, the lack of a uniform framework dealing with the problem, which is due to the dispersion of duties within different regimes. Second, insufficient case law and materials dealing with the notion of jurisdiction at sea. Third, too much focus on the content of obligations at sea rather than the scope of such duties. Fourth, not enough emphasis (by the adjudicatory bodies, states, and academics) on jurisdiction as it pertains to people at sea.

On this basis, Papanicolopulu argues that the notion of jurisdiction under the international human rights framework suffices the deficit under the law of the sea framework. Through the complex web of norms interpreting the concept of jurisdiction under international law, Papanicolopulu was able to deduce two types of jurisdiction over persons at sea. The first is the general jurisdiction which applies where all States have jurisdiction to protect and respect the human rights of persons within their territory and control. The second is functionally limited jurisdiction, which covers the involvement of other States through a link such as ‘the nationality’ principle including *de facto* and *de jure* jurisdiction.

Nevertheless, the scope of jurisdiction over persons at sea has still not fully developed. In recent times there have been debates against the proposition that the human rights approach to jurisdiction helps in protecting people at sea. Concerning migration, Mann is of the view that the notion of jurisdiction under international human rights law (specifically for the European

Convention on Human Rights as interpreted by the European Court of Human Rights) increases migrants drowning at sea. Mann points out that the human rights framework creates several State obligations that function within the concept of jurisdiction, meaning a State can avoid fulfilling its commitments by eschewing any jurisdictional link.⁸ In this sense, States are no longer proactive in rescuing migrants at sea, which has led to an increase in migrants drowning.⁹ However, In this book, Papanicolopulu does not address the notion of jurisdiction under the international human rights framework as a ‘possible’ stumbling block to the protection of people at sea when States themselves are not willing to offer such protection.

Moving forward from the concept of jurisdiction over persons, Chapter 4 argues the emergence of general principles, which creates a positive and negative obligation on States to protect people at sea. Papanicolopulu uses the concept of “consideration of humanity” as a premise to further support the argument that there is an emerging new regime on the protection of people at sea. Papanicolopulu discusses the trajectory of the concept from the *Corfu Channel* case. In this case, based on ‘elementary considerations of humanity’, the ICJ recognised the duty to inform passing vessels of the presence of any sea mines in their waters.¹⁰ Similarly, in the *MV Saiga* case, ITLOS observed that the ‘considerations of humanity must apply in the law of the sea, as they do in other areas of international law’.¹¹

⁸ Itamar Mann, "Maritime Legal Black Holes: Migration and Rightlessness in International Law" (2018) 29 Eur J Intl L 347.

⁹ See the European Commission, 'Progress report on the Implementation of the European Agenda on Migration' (2019) at 481, online (pdf): <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20191016_com-2019-481-report_en.pdf>; See also Sergio Carrera & Ors, "Fit for purpose? The Facilitation Directive and the Criminalisation of humanitarian assistance to irregular migrants: 2018 update" (2018) Policy Department for Citizens' Rights and Constitutional Affairs, Brussels European Parliament.

¹⁰ *Corfu Channel, United Kingdom of Great Britain and Northern Ireland v Albania*, (Merits), [1949] ICJ Rep 4 (Judgment of 9 April 1949).

¹¹ *The M/ V 'Saiga' (No 2) Case (Saint Vincent and the Grenadines v Guinea)*, [1999] (Judgment of 1 July 1999).

Against this background, Papanicolopulu posits that the concept of consideration of humanity allows the introduction of human rights norms and principles into law of the sea cases, which requires a human-centred approach towards the protection of people at sea.¹² This approach is the crux of the emerging new regime. Harrison believes that the concept of consideration of humanity is preferably an example of ‘increased regime interaction or systemic interpretation of existing rules’ rather than a premise purporting the emergence of a new regime.

Nonetheless, the concept of considerations of humanity is a widely recognised principle under international law, which feeds into all fields of international law.¹³ Generally, chapter 4 analyses the various legal norms and rules under international law applicable to people at sea. In concluding this chapter, Papanicolopulu proposes that ‘the obligatory nature of human rights law is significantly affecting the law of the sea rules and is one of the driving forces behind the current transformation of many rights into duties.’¹⁴

In Chapter 5, Papanicolopulu uses two conceptual tools- regime emergence and a human-centred approach to assess if the legal norms evaluated in chapter 4 are coherent enough to constitute a set of norms that forms a sub-regime of international law. The collection of rules on people at sea is useful as it allows a proper evaluation of the gaps and inconsistencies in the existing law, thereby promoting a coherent development of international law.

Papanicolopulu coins a new emerging regime called the ‘international protection of people at sea.’ The title for this new regime illuminates the systemic interaction between all relevant norms and

¹² *Supra* note 1 at 166.

¹³ *Supra* note 10 at 22: the ICJ in referencing the obligation of the Albanian authority to notify the United Kingdom of the existence of a minefield in the Albanian territory the court found that ‘such obligation is based, not on the Hague Convention of 1907, No VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary consideration of humanity...’

¹⁴ *Supra* note 1 at 205.

regimes under international law as opposed to a mere interaction between international human rights law and law of the sea frameworks as present common phrases imply.

A New Regime- International Protection of People at Sea

The author argues that this new regime creates an avenue for interaction between all norms and regimes under international law. It also alters the State-oriented structure of international law only to the extent that it creates a focus on people as the underlying beneficiaries of the law. As a result of this, Papanicolopulu identifies two normative consequences.¹⁵ The first normative consequence discussed in both chapters 4 and 5 is the creation of duties on States to act rather than just rights at sea. Papanicolopulu posits that it intensifies States' positive and negative obligations to protect human rights at sea, which creates a more proactive responsibility for States regarding activities at sea.

The second is the application of human rights law at sea based on the practicalities of the marine environment. This second normative consequence is a welcome development, as it implies that the procedural requirement in fulfilling a substantive right under the human rights framework must take into consideration the nature of the marine environment. For example, the right to liberty under the European Convention on Human Rights requires that persons should be brought to court promptly. Therefore, the description of promptly when applied at sea will take into consideration the precarious nature of the marine environment as it is different from land.

Papanicolopulu identifies the piecemeal components of the new regime in several international legal instruments. These instruments include the 2004 amendments to the Safety of Life at Sea Convention (SOLAS) and the International Convention on Maritime Search and Rescue

¹⁵ *Supra* note 1 at 205.

(SAR Convention) to protect human life at sea better; the 2005 amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention); the adoption of the Maritime Labour Convention (MLC) in 2006 and the Work in Fishing Convention in 2007. Furthermore, the need to protect people at sea and their rights is now routinely included in legal texts relating to maritime activities produced not only by international organisation, such as the United Nations High Commissioner for Refugees, and maritime bodies, such as the International Maritime Organisation, but also other international actors such as the UN Security Council in its resolutions on piracy and migrant smuggling.

This new regime and the generic concept of ‘people’ blurs the distinction between the various classes of people under international law. The group of people currently protected by a special legal regime (*lex specialis*) such as diplomats, refugees, children, women, indigenous people, people with disabilities etc., are all regarded as ‘people’ without reference to their distinctiveness. This declassification of people and their status raises questions about the adequacy of the protection given to the different classes of people under this new regime.

This book does not discuss whether this new regime considers the peculiarities of the various categories of people in ensuring adequate protection. Nonetheless, based on the *lex specialis derogat legi generali* rule, the special legal regimes override the new generic regime coined by Papanicolopulu. Also, due to the new regimes’ methodological approach, i.e. systemic integration, which promotes regime interaction, it can be argued that the new regime interacts with other regimes under international law to facilitate utmost protection of such people. On a high note, this declassification allows for the adequate protection of people considered as ‘irregular

migrants’, ‘suspects’ of illicit activity¹⁶ and even state agents (such as naval officers) that do not have any *lex specialis* adequately protecting them under international law.

Conclusion

Papanicolopulu emphasises that at the core of this new regime, ‘the international protection of people at sea’ is a human-centred approach that goes beyond human rights law.¹⁷ However, Papanicolopulu does not explore how this approach can undermine human rights provisions specifically concerning pre-existing human rights norms, which has already addressed existing issues.¹⁸ Nonetheless, Papanicolopulu discusses this approach in light of creating a framework of assessment to examine emerging issues in ‘human rights litigation or other litigation that involves the exercise of power by a state over a person or, conversely, the disregard of a State with respect to a person.’¹⁹

In her book, Papanicolopulu overlooked the concept of human security as an idea intimately linked to the concept of ‘people at sea’ and the formation of the regime’ international protection of people. However, the author can still be said to indirectly consolidate this concept in her discourse on the emerging legal regime since the protection of people is the underlying objective of the concept of human security.²⁰ Human security is a relatively new and emerging paradigm for the protection of people within the scope of both national and international discourse.²¹ Paris criticises the concept of human security for its ‘expansiveness and ambiguity’ but acknowledges that it allows studies that ‘explores the particular conditions that affect the survival of individuals, groups, and societies.’²²

In this book, Papanicolopulu has done a great job in pointing out the legal and practical development of this new regime. This new legal order might fuel the emergence of a utopian international law system which has been foreseen by the international courts. The author recognises the need for further research to define the scope and application of the new regime.

¹⁶ Please note that international human rights law allows for the protection of these category of people, albeit the present practice shows a growing concern of inadequate protection.

¹⁷ *Supra* note 1 at 229.

¹⁸ See Rhoda E. Howard-Hassmann "Human security- Undermining Human Rights?" (2012) 34: 88 Hum Rts Q 90. The author points out that human security can undermine human rights provisions if it is dealing with issues already dealt with under human rights law.

¹⁹ *Supra* note 1 at 232.

²⁰ S Neil Macfarlane & Yuen Foong Khong, 'Human Security and the UN: A Critical History' (Bloomington: Indiana University Press, 2006).

²¹ The concept first appeared in the 1994 Human Development Report, a publication of the United Nations Development Programme (UNDP).

²² Roland Paris, 'Human Security: Paradigm Shift or Hot Air?' (2001) 26:87 Intl Security 102.

This additional research will hopefully create a definite outline and specifications, thereby distinguishing the new regime from the broad concept of human security.