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Navigating maritime law, law of the sea and human rights protection to inform climate adaptation

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Abstract

In 'From survival cannibalism to climate politics: Rethinking Regina vs Dudley and Stephens', Itamar Mann argues *inter alia* that survival cannibalism and the duty to rescue at sea can inform how to approach climate politics (Mann, p 1). In this piece, I will address this claim through maritime law, the law of the sea and human rights law perspectives. In particular, I will argue that the criminalisation of survival cannibalism is justified on grounds of protection of the fundamental right to life. Survival cannibalism is presented here as a 'practice' or 'custom of the sea' rather than a maritime custom or 'bottom-up customary law' (Mann, pp 4–6). I will suggest an alternative model of sacrifice accompanied by a system of redress grounded in the maritime custom of general average to inform the commonist lifeboat model proposed. In this process that starts at the *inner circle* before moving to the *outer circle* where the customary duty to rescue at sea is examined, class dynamics will be briefly considered. The environment will be the last element examined through the *Teitiota* case. Human rights concerns inform the overall approach taken in an effort to affirm and advance fundamental principles in addressing climate adaptation.

Keywords: general average; maritime custom; maritime law; maritime search and rescue; principle of non-refoulement; right to life

Introduction

In 'From survival cannibalism to climate politics: Rethinking Regina vs Dudley and Stephens', Itamar Mann argues *inter alia* that survival cannibalism and the duty to rescue

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at sea can inform how to approach climate politics (Mann, p 1). In this piece, I will address this claim through maritime law, the law of the sea and human rights law perspectives. In particular, I will argue that the criminalisation of survival cannibalism is justified on grounds of protection of the fundamental right to life. Survival cannibalism is presented here as a 'practice' or 'custom of the sea' rather than a maritime custom or 'bottom-up customary law' (Mann, pp 4–6). I will suggest an alternative model of sacrifice accompanied by a system of redress grounded in the maritime custom of general average to inform the commonist lifeboat model proposed. In this process that starts at the *inner circle* before moving to the *outer circle* where the customary duty to rescue at sea is examined, class dynamics will be briefly considered. The environment will be the last element examined through the *Teitiota* case. Human rights concerns inform the overall approach taken in an effort to affirm and advance fundamental principles in addressing climate adaptation.

Inner circle

Survival cannibalism: a 'custom of the sea'

The eradication of the practice of survival cannibalism is presented here through the lens of human rights protection, rather than as an expression of social fragmentation or in Mann's terms of 'opposition between bottom-up traditional norms and top-down sovereign commands', or of hierarchy 'among classes' or 'between land and sea' (Mann, pp 6–7).

Survival cannibalism at sea spoke to consequentialism in circumstances of utter necessity, justified with the end result of the survival of some. It required following the accepted process of casting lots among survivors. Substance and procedure could not be segregated, in order to ensure that all faced the same risk and all lives were treated equally.

In *Regina v Dudley and Stephens*[1] the defence relied upon the common law of necessity in utilitarian terms.[2] The court examined the central question of whether the killing of the cabin boy Parker was an act of murder where considerations of morality informed the assessment of necessity in the circumstances of the case. This included questioning how to measure the value of the lives at stake to determine who deserves to live when the decision is self-serving, in other words, made by a person directly benefiting from it to save his own life. On this point the judgment linked the defence of necessity to the choice of killing the boy Parker: 'In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"'.[3]

A utilitarian approach would justify a confined and selective sacrifice typically with lots being drawn only among cabin boys. In a utilitarian discourse to achieve the best possible outcome, the lives of those providing for their families were to be valued higher. However, that status differentiation would seemingly not consider the value of lives *per se*, or realities such as those boys supporting their widowed mothers, as was the case on board the *Francis Spaight* (1835) where no charges followed (Minchin 2020).

Maritime crews would appear as a diverse, multi-ethnic community, generally from lower classes. However, the hierarchical organisation of work and life on board a ship, and the social structure within that community, would reveal an iteration of the class system and social domination, or simply physical overpowering, at a smaller scale. This would

[1](1884) 14 Q.B.D. 273.
[2]Digest of Criminal Law, Art 32, Necessity.
[3]N. 1 at pp 287–288.

lead to top down impositions of who would be sacrificed for the survival of the rest, as it seemed to be recurrently the case, where any sense of fairness in the idealisation among coastal communities was effectively abandoned.

Any initial consent given to the risk of being sacrificed under this practice and that notion of the greater good, reliant on an equal opportunity of survival, could not be deemed valid in this exercise of abuse of power in the selection of the person to be forfeited. Cabin boys were not the only vulnerable group. Racial and ethnic minorities would be among the 'unlucky' ones in the drawing of lots, as Mann points out (Mann pp 5 and 17; Mitchell-Cook 2013). This practice would arguably strip them of any sense of human dignity (*Cf.* Mann, p 17).

With the above considerations in mind, and in contrast with Mann's view on a 'hierarchy between land and sea' (p 7), the application of criminal law at sea is represented here as an early expression of human rights protection in universal terms, and so justified. One may therefore contemplate the eradication of survival cannibalism at sea as a recognition and protection of the fundamental right to life. This universal right is to apply not only within the confines of the State territory but also at sea, including the high seas. In the continuing development of human rights, a growing concern over the protection of human rights at sea has seen an increasing body of scholarly work and litigation in the last decades. The on-going reflection on the role of the United Nations Convention on the Law of the Sea regarding the protection of people at sea[4] and the Geneva Declaration on Human Rights at Sea,[5] the latter underpinned by four fundamental principles, including that '[a]ll persons at sea, without any distinction, are entitled to their human rights' and that '[t]here are no maritime specific reasons for denying human rights at sea', illustrate the pressing need in continuing efforts to consolidate and advance the respect of human rights at sea. In this endeavour and context, prescriptive and enforcement jurisdictions to deter and punish the criminal offence of killing someone, whether on land or at sea, arguably appear as legal mechanisms to secure the right to life rather than instruments to repress maritime custom or rather a custom of the sea.

Maritime custom of general average

The maritime custom of general average illustrates that marine-centric custom and law would not necessarily be suppressed by land-based law, on the basis of *bottom-up traditional norm v top-down* rules in the realm of property rights and criminal law, as Mann claims in the sphere of survival cannibalism (p 7). The customary maritime principle and practice of general average exemplify an absence of a hostility by the courts towards maritime custom broadly speaking. General average is presented here as a possible alternative to survival cannibalism in informing climate politics, given the nature of the sacrifice involved and its mechanism of redress, as explained below.

A consequentialist argument arguably underpins the maritime legal principle of general average, informed by situations of emergency and necessity at sea, where, for instance, part of the cargo would be jettisoned to avert the sinking of the vessel and the loss

[4]The Law of the Sea in the 21st Century report by the House of Lords International Relations and Defence Committee, March 2022 <https://committees.parliament.uk/publications/9005/documents/159002/default/>.

[5]Human Rights at Sea, The Geneva Declaration on Human Rights at Sea, January 2022, <https://www.humanrightsatsea.org/sites/default/files/media-files/2022-02/GDHRAS_Jan_2022_Final_online_version_sp%20%281%29.pdf>.

of the whole maritime adventure. The sacrifice of property, rather than lives, are in essence underpinned by mutual aid and anchored in some intrinsic solidarity. General average can be traced back to the Rhodian Law, deeply rooted in earlier non-codified customary maritime practice with the purpose of preserving the maritime adventure and achieving a better outcome in terms of value of property saved over loss of some of the property sacrificed (Rose 2017, Chapter 1). This could hence be considered as a bottom-up custom to adapt to sudden threatening conditions at sea, and to save the maritime adventure as a collective effort.

General average regards losses derived from "extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo (…) and must be borne proportionally by all those who are interested."[6] The first consideration to extract here is the situation of imminent danger that imperils the common maritime adventure, including the ship and cargo. This situation in the context of general average requires a general average act, either by way of extraordinary sacrifice, or by way of extraordinary expenditure, done voluntarily and reasonably for the common good, i.e., for the benefit of the overall maritime adventure, or the greatest number of interests in the particular maritime adventure (Rose 2017, Chapter 1). The second consideration is the intrinsic mechanism of redress underpinned by substantive equality among all parties involved in the maritime adventure. This is grounded in maritime equity (Rose 2017, at [1.14] and [1.23]) and ensures a degree of fairness to the extent that the persons suffering the general average loss are entitled to contributions by those whose properties or interests have been saved. Those contributions are proportionate to the values saved. A parallel could actually be drawn between the maritime custom of general average and the Somali pastoralist social insurance system 'Gergar' Mann valuably brings to the discussion (pp 18–19).

The ancient principles of general average, far from being eradicated or ceding relevance to the marine insurance sector, are widely accepted. The York-Antwerp Rules are incorporated in shipping contract frameworks and it is acknowledged in legal instruments such as the Marine Insurance Act 1906 (s.6). As tool of loss management rather than risk management, it has seen heightened relevance in the modern context of payment of ransom upon the hi-jacking of ships.

It is therefore suggested that the maritime custom of general average in any of its current normative expressions, with its notion of sacrifice and implicit solidarity, could bring some light to guide the commonist lifeboat Mann proposes in the conceptualisation of climate politics. The question arises whether the practice of survival cannibalism is to remain relevant in that endeavour.

Outer circle

In preserving lives at sea, the maritime custom of rendering assistance and rescuing those in distress at sea remains most significant. Originally anchored in coastal communities' practice to assist those shipwrecked close enough to the coast, and allow vessels in distress to seek refuge at their ports, it developed into a practice extended among seafarers with the increase of encounters of ships at sea (Papanicolopulu 2022). It defined a community of mutual assistance and protection in this hostile and often dangerous environment. This maritime custom, undisputedly engrained in humanity, was acknowledged as a positive legal duty, holding the status of customary law, in early cases such as *Scaramanga v Stamp*

[6] *Birkely v Presgave* (1801) 1 East 220 at 228, by Lawrence J.

in 1879.[7] Succouring those in danger at sea was recognised in this case as a universal and uniform practice 'of the maritime world' and 'founded on the common interest of all who are exposed to the perils of the seas', on grounds of morality and, 'the promptings of humanity'.[8] This reference to the 'common interest of all who are exposed to the perils of the sea' would seemingly speak to that mutual aid and customary form of insurance Mann highlights (p 16).

Yet, this duty to rescue at sea sharply contrasts with common law as reflected by Mann (p 5) and the reluctance towards affirmative duties in tort whereby as a general rule no liability for omissions arise, with some recognised exceptions in case law.[9] This could therefore also be seen as an indication of an absence of opposition between periphery bottom-up maritime custom, and central top-down normative framework, or imposition of land-based law over custom at sea.

This maritime custom, later codified in international law, is currently contained in a number of international instruments, notably the United Nations Convention on the Law of the Sea, Article 98, and the International Convention on Maritime Search and Rescue, 1979, as amended (SAR Convention). The SAR Convention holds to that reminiscent approach to the 'common interest' and sense of mutual assistance and reliance among seafarers (Mann, pp 7 and 8) in the maritime sector in referring to the Convention being 'responsible to the needs of maritime traffic' in its third preambular paragraph. However, paragraph 2.1.10 of its Annex reads in universal terms: 'Parties shall ensure that assistance be provided to *any* person at sea. They shall do so regardless of the nationality or *status* of such a person or the circumstances in which that person is found' (emphasis added).

That said, the question arises as to what the effect is when the sense of mutual assistance is lost and the notion of burden takes over in the context of search and rescue of migrants at sea. States' prioritisation of border control, securitisation, deterrent practices at sea with differing degrees of violence, and delayed or inadequate engagement in the coordination of search and rescue operations, illustrate some of the States' strategies to avoid disembarkations on their shores in the context of irregular migration by sea. These States' practices violate maritime search and rescue duties contained in legal instruments and anchored in customary law.

States' readiness to contravene SAR duties and violate human rights, fundamentally the right to life,[10] arguably echoes Hardin's lifeboat ethics and the 'politics of the armed lifeboat' (Ghosh 2017; Parenti 2011) in the context of climate change politics as Mann examines. To illustrate this, in June 2023 at least 646 people perished because of the sinking of the overcrowded fishing trawler in distress, the *Adriana*, off the coast of Pylos (Greece). The capsizing and subsequent sinking have been linked to the intervention of the Greek coastguard. According to survivors' accounts, coast guard officials on board a patrol speedboat attached a rope to the trawler and pulled aggressively (a dangerous malpractice, potentially aiming at towing migrants back as done in the past). No rescue operation was coordinated. Given contradictory accounts by the officials involved, judicial investigations are ongoing, however, with scarce progress so far.

Further strategies informed by restrictive migratory policies undermine the customary and treaty-based duty to rescue at sea. These include the design of hostile legal frameworks that enable the criminalisation of non-governmental rescue organisations on the

[7] *Scaramanga & Co v Stamp and Another* (1879) IV CPD 316, and (1880) V CPD (CA) 295

[8] (1879) IV CPD 316, at 318 and 319; (1880) V CPD (CA) 295, at 304 and 305.

[9] *Stovin v Wise* [1996] A.C. 923, 927.

[10] *Safi and Others v Greece*, App No 5418/15 (ECtHR, 7 July 2022); HRC *A.S. and others v Italy* (CCPR/C/130/DR/3042/2017).

grounds of facilitation of illegal migration that weaken the integrity of the SAR system. These comprise for instance, the Nationality and Borders Act, 2022, s. 41; the EU Facilitation Directive 2002/90/EC of 28 November and the 2002 Framework Decision [2002] OJ L328/1, collectively known as the Facilitation Package (Carrera et al. 2018; Cuttitta 2018; Cusumano and Villa 2021; Campàs Velasco 2024). These instruments may be seen as examples where the criminal law system is resorted to in order to advance a political priority, if not hegemony, to curb unauthorised arrivals by sea. This is achieved by deterring humanitarian civil society activism at sea, in clear conflict with the maritime custom and its current legal framework.

Both custom and legal frameworks, therefore, remain vulnerable to States' violence in their pursuit of particular priorities threatening human rights protection. Accordingly, where a sense of lack of mutual assistance risks weakening the maritime custom to rescue at sea and its normative framework, considerations of humanity need to be brought to the forefront and reinforced for due protection of the right to life at sea.

Environment

Consideration is finally given to the limitations of refugee law and human rights law present in protecting fundamental human rights threatened by climate change.

Current rigid approaches shaping the limitations refugee law presents in the normative definition of refugee, including a narrow understanding of the concepts of persecution and persecutor, and the element of discrimination, were made tangible in *The Teitiota* case. As an alternative ground, the complementary protection human rights law offers was relied upon based on the alleged violation of Article 6 of the International Covenant on Civil and Political Rights substantiated on the principle of non-refoulement.

However, the Human Rights Committee (HRC) views[11] further expose the limitations in the protection of the right to life in the international human rights law sphere in the context of deteriorating living conditions due to climate change. Despite acknowledging that the right to life 'includes the right of individuals to enjoy a life with dignity'[12] and that environmental degradation and climate change 'constitute some of the most pressing and serious threats to the ability to enjoy the right to life',[13] the HRC applies a very high threshold to satisfy the test applicable to the principle of non-refoulement. This is particularly the case in circumstances where, rather than presenting a personal risk, general conditions or circumstances apply in the State of origin, for instance, environmental degradation. In these scenarios, the obligation of non-refoulement would apply only in the 'most extreme cases'[14] making the threshold almost unattainable (Berhman and Kent 2020). This appears aligned with the ECtHR approach, according to which, when no special distinguishing features apply, a general situation of violence would reach the required level of intensity 'only in the most extreme cases of general violence.[15] This arbitrary differentiation arguably obliterates

[11]Human Rights Committee, CCPR/C/127/D/2728/2016, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, 23 September 2020.

[12]At para 9.4 and HRC General Comment No 36 on Article 6: right to life (CCPR/C/GC/36), at para 3.

[13]At para 62.

[14]HRC General Comment No 36 on Article 6: right to life (CCPR/C/GC/36) at para 30.

[15]*N.A. v United Kingdom* (Application No 25904/07) (ECtHR, 17 July 2008), at para 115.

the consideration of dignity as an intrinsic component of the right to life, weakening the fundamental principle of non-refoulement in all cases regarding environmental degradation and climate change. Living conditions would need to deteriorate to untenable levels, and compounded with violence, in order for the principle to apply. Muhumuza's gripping closing remarks in his dissenting opinion: 'New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all, there are other voyagers on board' inexorably evokes Hardin's lifeboat ethics and its catastrophic model as poignantly discussed by Mann.

Conclusion

The commonist approach Mann proposes presents a much-needed alternative to the 'providential' and the 'catastrophic' lifeboat metaphors. Values and principles to propel this commonist lifeboat for addressing climate adaptation would be informed by the protection, respect and worth of every life understood in dignity. They would include mutual assistance accompanied, it is suggested, by solidarity, substantive equality and shared responsibility. These can be identified in the maritime customs of the duty to rescue at sea and general average. In the normative sphere of human rights law, a dynamic approach to its living instruments to respond effectively to new challenges, including the threats of climate change, remains essential.

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