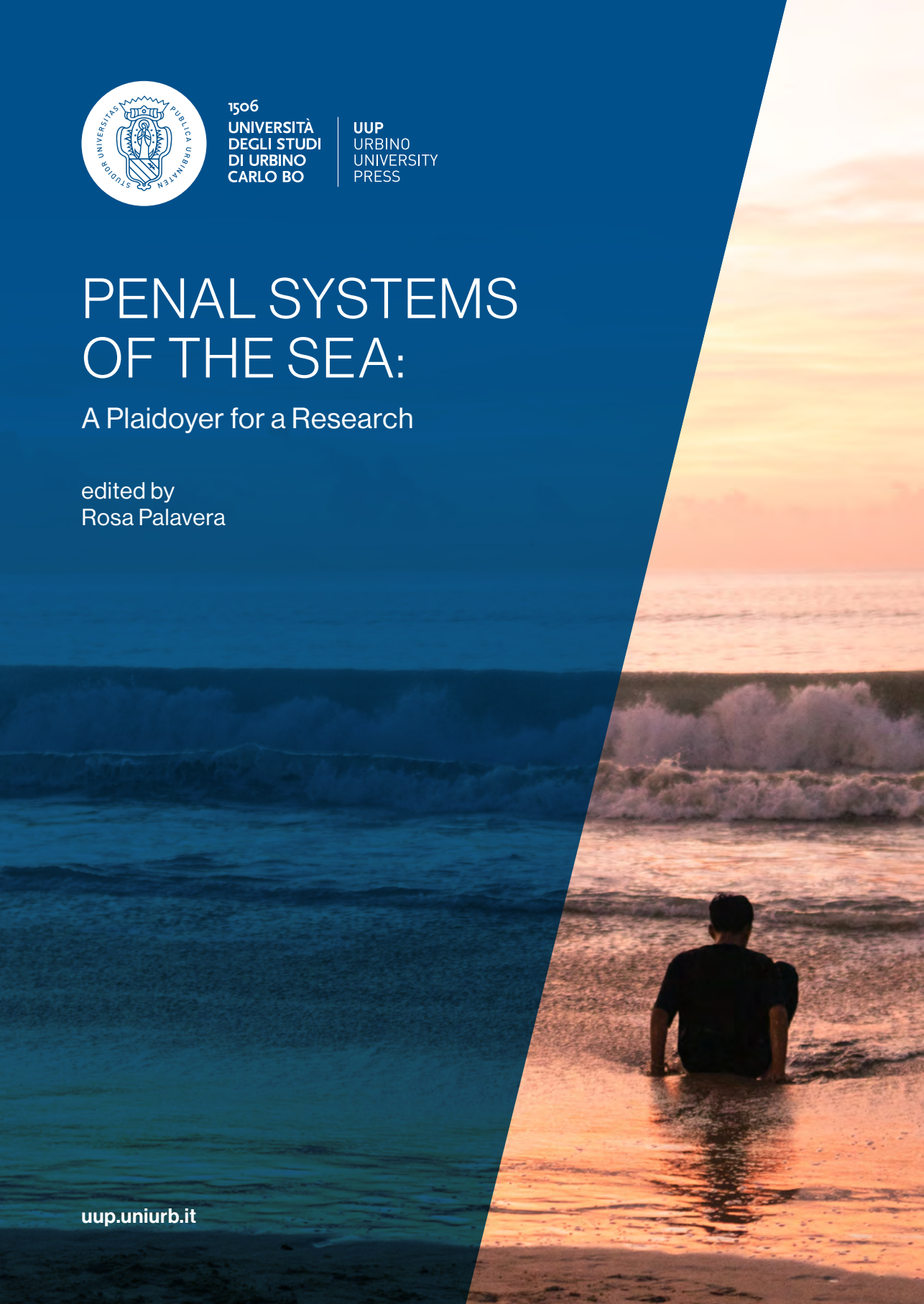
1506
UNIVERSITÀ DEGLI STUDI DI URBINO CARLO BO

UUP
URBINO UNIVERSITY PRESS

PENAL SYSTEMS OF THE SEA:

A Plaidoyer for a Research

edited by
Rosa Palavera



uup.uniurb.it

IEP
INCONTRI
E PERCORSI
N.06

INCONTRI E PERCORSI è un collana multidisciplinare che nasce nel 2022 e raccoglie le pubblicazioni di convegni e mostre promossi e organizzati dall'Università di Urbino.

Volumi pubblicati

01.
Le carte di Federico. Documenti pubblici e segreti per la vita del Duca d'Urbino (mostra documentaria, Urbino, Biblioteca di san Girolamo, 26 ottobre - 15 dicembre 2022), a cura di Tommaso di Carpegna Falconieri, Marcella Peruzzi, UUP 2022

02.
Paolo Conte. Transiti letterari nella poesia per musica, contributi di studio a cura di Manuela Furnari, Ilaria Tufano, Marcello Verdenelli, UUP 2023

03.
Il sacro e la città, a cura di Andrea Aguti, Damiano Bondi, UUP 2024

04.
Diritto penale tra teoria e prassi, a cura di Alessandro Bondi, Gabriele Marra, Rosa Palavera, UUP 2024

05.
Federico da Montefeltro nel Terzo Millennio, a cura di Tommaso di Carpegna Falconieri, Antonio Corsaro, Grazia Maria Fachechi, UUP 2024

1506
UNIVERSITÀ DEGLI STUDI DI URBINO CARLO BO
UUP URBINO UNIVERSITY PRESS

PENAL SYSTEMS OF THE SEA:

A Plaidoyer for a Research

edited by
Rosa Palavera

PENAL SYSTEMS OF THE SEA: A PLAIDOYER FOR A RESEARCH
edited by Rosa Palavera

Studies and notes following the meeting Penal Systems of the Sea: "Liquid Law" or Hard Case?, Università degli Studi di Urbino Carlo Bo, Urbino, Italy, May 24th, 2024.

This volume was published with the financial support of the Università degli Studi di Urbino Carlo Bo as part of its programs to promote and disseminate scientific research.

Progetto grafico / Graphic design
Mattia Gabellini

Referente UUP / UUP contact person
Giovanna Bruscolini

On cover: photo by Mattia Gabellini

PRINT ISBN 9788831205573
PDF ISBN 9788831205559
EPUB ISBN 9788831205566

Le edizioni digitali online sono pubblicate in Open Access su: https://uup.uniurb.it

Via Aurelio Saffi, 2 | 61029 Urbino
https://uup.uniurb.it/ | e-mail: uup@uniurb.it

L'edizione cartacea del volume può essere ordinata in tutte le librerie fisiche e online ed è distribuita da StreetLib (https://www.streetlib.com/it/)

SOMMARIO

NOTES FROM JURISTS

THE CRIMINAL LAW OF THE SEA: SOURCES, RULES, SUBJECTS, TERRITORIALITY.

Stefania Rossi
University of Trento

1. SOURCES AND PRINCIPLES OF MARITIME CRIMINAL LAW

The branch of navigation includes the regulation of air, sea and inland water navigation, but the study of maritime law stands out because of the more prominent regulatory tradition; in fact, rules protecting navigation at sea have been found since ancient times. While, at first, the interest was aimed at safeguarding "sailing" in its "private" dimension (i.e., protecting the ownership of the vessel and its cargo, commercial trades, as well as ensuring compliance with the orders given), over the centuries, the need to preserve a "public" dimension has also emerged, especially in terms of the safety of people from dangers, both those immanent to the environmental context and those caused by third parties[1].

The maritime criminal law has, therefore, assumed increasing importance and within it are norms of a sanctioning nature placed to defend peculiar interests protected by law: such as the safety of navigation, the tranquillity of life on board, the health and physical integrity of persons, the safeguard of the surrounding environment etc. The subject matter finds its main source in the Navigation Code[2], but important provisions are also contained in the Italian Criminal Code and industry regulations, supplementary laws and decrees, as well as within international Treaties and Conventions.

1 For a broader examination of the historical development, may we refer to Rossi 2020: 5 ff.

2 The text was approved by Royal Decree 30 March 1942, No. 327 and came into force on 17 April of that year. Through this Code, an attempt was made to regulate all possible legal events inherent in navigation, and the legislature divided the discussion into three main parts, preceded by some preliminary provisions concerning the sources of law and jurisdiction (Articles 1-14): Part One deals with maritime and inland navigation; Part Two with air navigation (and both are dedicated to civil and administrative profiles): Part Three contains the (common) "criminal and disciplinary provisions".

In terms of principles, the distinguishing features of the maritime criminal law, in a nutshell, are: specificity, autonomy, complementarity, and unity.

First of all, it should be remembered that the maritime criminal law cannot be separated from the regulations of common criminal law, but rather represents a specification, as it reflects particular needs. The specialty of maritime criminal law is thus grounded in the necessity to implement regulatory adaptations that address the inherent characteristics of the nautical and aviation sectors, creating a "system within a system". It is therefore of paramount importance that the maritime criminal law serves as a significant and necessary "adaptation" of the traditional general-part approach, taking into account the unique environmental context and the need for "enhanced" protection of certain legally protected interests[3].

That being said, it is undeniable that the maritime criminal law exhibits substantial "autonomy", whereby, where a case is not regulated, directly, by provisions proper to the law of navigation (by the Navigation Code, laws, regulations, corporate rules and related customs), regulatory integration through the common law is granted only on a subsidiary basis[4].

In addition to its "autonomy" and "specificity", the maritime criminal law manifests a close "complementarity" with ordinary criminal matters, the fundamental principles of which are not replaced but rather are supplemented by provisions of similar general scope, which, however, often have a derogatory nature[5].

3 See, among others, Spasiano 1963; Rivello 1990: 76 ff. e 1985: 3 ff.; Leone 1940.

4 This principle of self-regulation is made explicit within Article 1 of the Navigation Code according to which: "in matters of navigation, maritime, inland and air, this Code, the laws, regulations, corporate rules and customs relating thereto shall apply. Where provisions of the law of navigation are lacking and there are none applicable by analogy, civil law shall apply".

5 The same traditional classification of offenses in navigation (divided into "proper" and "improper" offenses), while formally referencing classifications used in criminal law doctrine, deviates from them with differing interpretative options that necessitate a reconsideration of these categories for a new and different naming. As for "proper" offenses, they are distinguished by the absolute originality of the protection provided; the interest protected by the norm is a *particular* and *exclusive* interest of navigation (for example, the offense of desertion under Article 1091 of the Navigation Code; the offense of false course under Article 1140 of the Navigation Code and that of arbitrary landing or abandonment of person under Article 1155 of the Navigation Code or, again, crew mutiny under Article 1105 of the Navigation Code and abandonment of ship or aircraft in distress under Articles 1097-1098 of the Navigation Code). On the other hand, "improper" offenses are those that coincide with criminal offenses already provided for in the Italian Criminal Code or inferable from the criminal law, but which represent a specialisation of protection, resulting in modifications at the penal level, due to the particular needs of navigation (consider Article 1104 of the Navigation Code, which typifies the offense against a captain, officer, non-commissioned officer, or graduate: this complex case takes the form of contempt of a public official). On this point, more extensively, Rossi 2020: 52 ff.

Finally, the maritime criminal law is characterised by a unified vision, also from the point of view of sanctions: unity is primarily derived from the existence of (special) principles that unite the sectors of maritime, inland, and aerial navigation, which, in terms of criminal law, are contained in Part Three, Book I, Title I (Articles 1080-1087 of the Navigation Code). The unitary imprint is further expressed in the close relationship established between the punitive legal corpus and the various branches into which the entire subject is divided; there exists, in fact, an inextricable intersection between private law and public law, and – within the latter – between administrative norms and criminal sanctions.

2. SPATIAL DELIMITATION, EXERCISE OF SOVEREIGNTY, AND LIMITS TO NATIONAL JURISDICTION

2.1. TERRITORIALITY AND EFFECTIVENESS OF CRIMINAL LAW

In reconstructing the scope of the criminal statute of the Navigation Code, it is necessary to investigate the scope of application of the rules contained therein. As is well known, criminal law is determined in space according to the "territoriality principle," obligating all those, whether citizens or foreigners, who are in the State territory. That being said, from the combined provisions of Articles 3, 4 paragraphs 2 and 6 of the Italian Criminal Code the applicability of national law to vessels and aircraft flying the Italian flag is established, regarded, by *fictio iuris*, as the "territory" of the State, regardless of their location[6].

Although the territorial criterion is based on the absolute presumption of state interest in regulating any fact or relationship that falls within the area subject to State sovereignty, the convergence of other general principles and the need to protect a specific, peculiar category of interests protected by law may lead the legislature to prosecute even acts that were not committed on its own territory and would otherwise go *tout court* unpunished. This exceptional extraterritoriality of the criminal law connotes precisely the navigation sector and, in particular, the incriminating provisions contained in the Code as a result of Article 1080 of the Navigation Code[7].

6 In essence, the term "nationality" or "flag" designates a precise criterion of a ship's connection with the legal system of a State that involves being subject to national law.

7 On the scope of the provisions of the Navigation Code, extraterritoriality of the criminal law, and

The principle of territoriality in the application of criminal law may, then, be further derogated from in cases where the offence has elements of internationality related to the nationality of the offender, the victim, the injured interest, or, again, to the harmful repercussions that criminal conduct can have on the public order of a foreign State and the supranational value of the legal goods involved. In the latter respect, significant exceptions are dictated by international Conventions, especially in the areas of navigation safety and environmental protection, and more generally, international regulations have been fundamental in defining the legal arrangement of spaces, but also in scaling back the principle of jurisdiction closely linked to the flag in the face of the greater significance that instances aimed at protecting absolute values have assumed.

2.2. EXERCISE OF SOVEREIGNTY AND LIMITS TO JURISDICTION

In order to define the sovereignty of the Italian State in the maritime sphere, it is necessary to recall, along with the norms contained in the Italian Criminal Code, the preliminary provisions of the Navigation Code and international law.

With regard to the latter, the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), signed in Montego Bay, Jamaica, on 10 December 1982, which entered into force on 16 November 1994, and consisting of three hundred and twenty articles and nine annexes, is of particular importance. The analysis of the contents of the Convention, in relation to the special legislation, makes it possible to trace the limits placed on a State's sovereignty in the international arena and is of primary importance in delineating criminal jurisdiction at sea.

Regarding spatial delimitation, according to Article 2 paragraph 2 of the Navigation Code, national sovereignty extends over inland waters and over a stretch of sea adjacent to the mainland and island coast (the so-called "territorial sea") that has a precise outer boundary: within 12 miles of the low-tide coastline (standard basis of measurement) or the straight coastline (if the latter appears jagged or indented). This is also confirmed by Article 3 of the UNCLOS Convention, which grants contracting States the power to determine the breadth of their territorial sea "up to a limit not exceeding 12 nautical miles from the coast".

preclusions to special legislation see Rossi 2020: 94 ff.

Premised on this precise statement, the sovereignty of a State over its territorial sea encounters limits that are outlined in international law: this is the so-called "right of innocent passage" by foreign ships over the territorial sea (Article 17 UNCLOS)[8] and the regime for the exercise of "criminal jurisdiction over foreign vessels" by the authorities of the territorial State (Article 27 UNCLOS).

With particular regard to the second limitation, it should be noted that Italian criminal jurisdiction cannot be exercised over warships in transit, as they enjoy absolute immunity. In the case of private and merchant ships, international custom grants exemption from Italian criminal jurisdiction for foreign ships in transit concerning only "internal matters". Article 27 UNCLOS, indeed, specifies that the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship transiting the territorial sea for the purpose of making arrests or conducting investigations related to offenses committed on board during the passage, unless the facts of criminal relevance, by their consequences or by their very nature, disrupt the life of the territorial community, or if the intervention of the local authorities has been requested by the ship's Captain or a diplomatic agent or consular officer of the ship's flag State; or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Based on this principle, in conjunction with the provisions of Article 4 paragraph 2 of the Italian Criminal Code and subject to further exceptions dictated by international law, crimes committed aboard Italian private or merchant ships, which may substantiate "domestic facts," must be considered to be committed in Italian territory, even if the ship was sailing in the territorial waters of a foreign State. If, however, external repercussions (facts disturbing the tranquillity and good order of the coastal State and its territorial sea) result from the events that occurred, the law of the place where the ship is located shall apply[9].

8 An "inoffensive passage" constitutes a rapid and continuous crossing, without the option of anchoring (permitted, exceptionally, in cases of force majeure or danger, or imposed by the need to render assistance to persons or other vessels), which does not prejudice "the peace, good order and security of the coastal State" (*under* Article 19 UNCLOS). The coastal State may always suspend the right of innocent passage, provided that the suspension is essential to the protection of national security, is temporary in nature, is non-discriminatory, and covers specific areas of territorial sea (Ronzitti 2016: 109).

9 Regarding the distinction between "internal facts" and "external facts" as a criterion for delimiting between the opposing spheres of jurisdiction of the flag State and the coastal State, the case of the Italian oil tanker *"Enrica Lexie"* is emblematic, *which ended after a long judicial and diplomat-*

Among the preliminary provisions of the Navigation Code, the same Article 5 is devoted to the law governing acts performed on board (Italian) ships sailing in a place or space subject to the sovereignty of a foreign State, and provides that the same shall be governed by the law of the flag in all cases where, according to the normal rules of private international law, the law of the place where the act is performed or the fact occurred should apply. The rule, within the second paragraph, also specifies how this flag principle also applies to foreign ships transiting through a space subject to the sovereignty of the Italian State, under the condition of perfect reciprocity. However, in connection with what has just been reported, it is worth noting that the Code considers the law of the flag, i.e., the national law of the vessel, to be operative, with a significant clarification: namely, when the fact or act occurred *on board* the vessel *in the course of navigation*.

Returning to the international regime of the sea, distinct from the territorial sea is the so-called "contiguous zone": a seat belt adjacent to the territorial sea that has a 12-mile limit additional to the first drawn boundary (totalling 24 miles from the coastline). The establishment of a contiguous zone is optional and allows the coastal State that proclaims it to exercise the right of *hot pursuit*, that is, to capture those who flee offshore after committing crimes within 24 miles; however, since there are no rules that allow for the assimilation of this area to territorial waters and to consider that the coastal State can exercise its criminal jurisdiction exclusively there, no type of absolute sovereignty extends to this area. Still different is the "exclusive economic zone" (EEZ), which can extend up to 200 miles from the coastline base line; the establishment of such a zone is optional and aimed at the exploration, exploitation, conservation and management of natural resources in the sea and the marine subsoil (but, for this purpose, a proclamation by the coastal State in agreement with adjacent and bordering States is required).

Lastly, there is the so-called "high seas", which identifies "all parts of the sea not included in the territorial sea or internal waters of a State"

ic dispute. In 2020, the judges of the Permanent Court of Arbitration granted functional immunity to the Navy riflemen, noting how they were engaged in a mission on behalf of the Italian State. Contextually, Italy was ordered to compensate the Indian State for the death of the two fishermen and for the damages suffered by the vessel's seafarers. The Indian Supreme Court closed all proceedings against the two Italian soldiers following the Italian State's payment of 1.1 million euros in damages. The Hague Tribunal granted Italy jurisdiction over the criminal case, ending the international dispute. In 2022, the Public Prosecutor's Office at the Court of Rome requested that the criminal case be dismissed, and the Preliminary Investigations Judge of the Court of Rome ordered the dismissal arguing that the two soldiers acted in a state of at least putative legitimate defense (see Mannucci 2014; Caracciolo, Graziani 2013; Salamone 2012; Busco, Fontanelli 2013; Licata 2013).

(and also excluded from the contiguous zone and EEZ). Articles 86-90 of the Montego Bay Convention enshrine the free use of the high seas and, therefore, no State is in a position to impose its sovereignty while being able to freely sail a national ship, which will, in this case, be subject to the exclusive jurisdiction of the flag State. The same regulation is contained in Article 4 of the Navigation Code, titled "Italian ships and aircraft in areas not subject to the sovereignty of any State", which clarifies that Italian vessels located on the high seas are considered as Italian territory.

3. THE GUARANTORS OF NAVIGATION AT SEA

Having defined the legal regime of navigation and its implications in criminal law, and delved into the realm of responsibility, it is important to note that the Navigation Code identifies several key figures within the nautical context, individuals recognized by criminal law as guarantors of the safe exercise of navigation.[10].

The first prominent figure is that of the Shipowner, meaning the person who undertakes the operation of a ship, often relying on a range of collaborators (such as the ship agent). Then there is the captain, who directs a crew aboard the ship, with its members bound by a functional relationship aimed at ensuring navigation safety and maintaining onboard discipline.

During a maritime expedition, understood as a shared endeavour of interests and risks, the Shipowner is ultimately the organizing party, while the Captain serves as the operational leader and the highest authority present on board.

10 In this regard, we refer to the so-called maritime safety, which is distinctly separate from maritime security. Safety pertains to operational security, specifically the prevention of accidents through the monitoring of the efficiency and adequacy of vessels, infrastructure, and personnel. Conversely, security involves the prevention of unlawful acts and the suppression of criminal conduct to ensure safety and public order. This distinction is common to both maritime and aeronautical contexts, and according to some scholars, the conceptual difference lies in the fact that safety refers to the inherent security of navigation, concerning the movement itself, while security pertains to external factors dependent on the actions of third parties (see Arroyo 2003: 1193). Regarding maritime security, it is important to highlight the role played by the Port Authority and Coast Guard, which enforces compliance with both the rules governing nautical navigation and the regulations protecting the marine environment. This body is indeed assigned tasks related to assistance for ships, navigation safety, search and rescue operations for vessels, maritime surveillance, and policing, not to mention its fundamental role in addressing the widespread phenomenon of illegal immigration.

Regarding the Shipowner, this refers to a business entity (or a shipping company) that is usually also the owner of the ship. However, there are also cases of a 'managing' Shipowner (who receives a mandate from the owner to take care of all necessary aspects for the operation of navigation) and a "chartering" Shipowner (who, through the lease of the ship, becomes the assignee of its enjoyment and operates the navigation and associated commercial activities in their own name)[11].

Regarding the main obligations imposed on the Shipowner, they must, first and foremost, equip the vessel, ensuring its constant maintenance, and appoint the Captain. However, they must also commit to safeguarding the efficiency of the working environment, as well as the health and safety of those employed on board or at their owned shipyards. Therefore, they are required not to allow a ship to depart if it is not seaworthy or lacks any of the prescribed furnishings, equipment, instruments, or supplies. The Shipowner will be held liable for permitting navigation despite the lack of essential technical requirements, the absence of an updated safety plan to protect their employees, or the inadequate training of the onboard crew[12].

The Shipowner's position of guarantee (which can be partially delegated to the Captain, thereby increasing the burdens on them) is not limited to events occurring on board, but extends to all operations conducted in the immediate vicinity of the vessel and is aimed at eliminating foreseeable sources of danger for the crew, the technical maintenance staff, and the passengers.

Another significant figure in the operation of a maritime enterprise is the Ship Agent (commonly referred to as a maritime agent in practice): this individual acts as the Shipowner's ground collaborator, tasked with managing their interests at port calls. They carry out a range of administrative and commercial operations (assisting the Captain with local authorities; receiving or delivering cargo; embarking and disembarking passengers; promoting or concluding contracts for the use of the ship with the issuance of the relevant documents, etc.). Essentially, this is an auxiliary connected to the Shipowner by a special contract known as a recommendation contract, to which the rules of mandate with representation apply[13].

11 Berlingeri 1957; Sarfatti 1937; Spasiano 1958; Comenale Pinto, Romanelli 2002; Vermiglio 2010. For a more general overview see Scialoja 1933.

12 For a more detailed discussion, see S. Rossi 2015b: 115 ff.

13 Rossi 2015b: 119 ff.

3.2. THE CAPTAIN OF THE SHIP

The role of the Captain is one of the most complex due to its technical, private, and administrative aspects, as well as the variety and scope of tasks assigned to this individual. The responsibilities that define the command function under Article 1117 of the Navigation Code are essentially the verification of the ship's suitability for navigation (before departure, the Captain must personally ensure that the ship is capable of undertaking the journey, meaning it is well equipped and loaded); the exclusive direction of navigation; the procurement of supplies and everything necessary during the expedition; the maintenance and preservation of documents and ship's logs; and the reporting of extraordinary events[14].

Legally, the Captain assumes the role of a private individual exercising a public function and as a civil status officer, to whom disciplinary and police powers are granted. Regarding the separate, associated hierarchical power, the Captain exercises this directly over the crew and passengers and, as the individual invested with the highest authority, represents the Shipowner in the exercise of legal functions of both a private and public nature.

Like the Shipowner, the Captain is responsible for compliance with regulations aimed at preventing workplace accidents and has the obligation to establish procedures and instructions for the safety of the crew, as well as to inform the Shipowner of any deficiencies and potential risks present on board. The specific prevention obligations imposed on the Captain can be extended by the Shipowner to other individuals (e.g., the second-in-command, the first mate, and other crew members, according to the hierarchical order), who will become jointly responsible without undermining the captain's position of guarantee, as they must ensure constant oversight of all activities on board and all manoeuvres. Therefore, the Captain's conduct in violation of the described prevention obligations establishes their criminal liability, possibly in conjunction with that of the supervisors and the Shipowner[15].

The Captain, as the person responsible for navigation and the head of the expedition, is endowed with the powers necessary to ensure its proper execution and success. In the case of complex manoeuvres (such as entering and exiting ports), delegations are not permitted, and the Captain must directly oversee the operations, coordinating the present crew. This does not mean that the Captain must personally manage the navigation

14 Rossi 2015b: 120 ff.

15 Rossi 2015: 121 ff.

throughout the entire journey (as he is entitled to rest breaks), but it is essential that he instructs the deck officers on the most appropriate manoeuvres and closely monitor their implementation. If events occur during the journey that endanger the ship, the crew, the individuals, and/or the cargo being transported, the Captain must attempt to safeguard the passengers and the cargo by all means at its disposal. In the most serious danger cases, he may not order the abandonment of the ship until all operations suggested by nautical practice have been attempted, consulting the opinions of the deck officers or, in their absence, at least two of the most experienced crew members[16].

In cases where abandonment is the only possible solution, it must be preceded by an international distress message (mayday) requesting immediate assistance from the maritime authority, the Coast Guard, and other vessels in the nearby waters. The Captain must then personally direct the evacuation operations necessary to ensure the safety of all passengers and, ultimately, must be the last to abandon the ship. This behavioural requirement, specifically aimed at ensuring the orderly rescue of individuals and preventing the spread of widespread panic, was notoriously disregarded during the sinking of the "Costa Concordia", an incident that led to one of the most significant criminal trials against a ship's Captain (charged with offenses of negligent shipwreck, multiple counts of manslaughter, multiple counts of negligent injury, abandonment of the ship, abandonment of minors or incapacitated individuals, in addition to a series of other contraventional charges, for failing to immediately report to the competent maritime authority and, in fact, providing false information to it). This case concluded with his definitive sentence of 16 years in prison and one month of house arrest, along with compensation for damages[17].

The case referred to allows, in fact, a further order of considerations, linked to the poor evaluation of the profiles of cooperation negligent, as well as the underestimated impact of an inadequate risk management and control system on the cause of the shipwreck.

16 The reference norm is Article 303 of the Navigation Code (Abandonment of the ship in danger). Regarding the extraordinary advisory body mentioned earlier, it is based on an ancient institution of maritime law that also involved merchants and their representatives present on the ship; this assembly had, in certain cases, the task of making decisions regarding the conduct of the expedition and even the manoeuvres of the vessel. Lefebvre D'Ovidio, Pescatore, Tullio 2019: 352.

17 Italian Supreme Court of Cassation, IV, 12 May 2017 (filed 19 July 2017), No. 35585, in DeJure database. Regarding the dynamics of the shipwreck and the sequence of subsequent events, see Pisa 2012: 367; Aimi 2013; Rossi 2015a: 5 e 2015b. For an in-depth discussion of the entire court case and the final declaration of liability see Rossi 2020: 130 ff.

In the present case, in fact, profiles of responsibilities have emerged that can be attributed to the c.d. "culpable cooperation", an institute provided for by art. 113 c.p., which has generated many questions of interpretation, related to the identification of its function and the assumptions of its operation.

The participation of several persons in the same crime is a matter that mainly concerns the causal relationship and in cases, like this one, where there is a legal obligation which falls simultaneously on more than one person (Captain and "key men" of the crew), the link between the conduct of one of the guarantors and the event is not lost as a result of the subsequent failure to intervene by other parties, who are also under an obligation to prevent the event.

In the concrete production of the harmful event, culpable cooperation can be achieved either through the completion of certain actions or through omissions and what characterizes this institution is the existence of a psychological bond between agents. In reality, the extent of imputation cannot be based solely on this link, understood as awareness of cooperating with others, or (at most) as awareness of the wrongful nature of another's conduct. In an evolutionary process in the interpretation of guilt, this latter, even in the multi-objective imputation, has been understood as a violation of a rule of conduct with precautionary content.

Well, with specific reference to situations in which the partners act "simultaneously" and according to a specific organisational form, it is considered that the common involvement in risk management by the different parties justifies the criminal relevance of "atypical" conduct, unrelated to the violation of a precautionary rule with a precautionary purpose in relation to the event caused.

Ultimately, in cooperation with the other party, the simultaneous management of a common risk should lead to an increase in the efficiency of the precautions.

This is well understood in relation to what happened on board the "Costa Concordia", where the officers present were required to carry out a whole series of "typical" tasks, at the orders of the Captain, concerning the individual professions (such as to report radar information, perform an efficient watch service, signal danger of navigation, prompt advice on any appropriate action to avoid collision with an obstacle), but they were also perfectly aware that the exercise of navigation is not always and absolutely reserved to the commander, and that, on the contrary, they could be

required to intervene if the latter made risky choices or showed objective difficulties in management.

The duties mentioned several times, involving graduated members of the crew in cases of emergency, have, in fact, a precautionary nature that also concerns others' behaviour, in the sense that they require verifying and preventing any negligent activities by third parties (in this case the Captain). It follows that the original margins of the typical single-subjective fault are extended to include a "claim for prudent interaction" whenever the integrated involvement of several subjects is imposed by organisational needs related to the management of a risk (as in this case).

This overall interpretative framework allows to consider the cooperation of the officers in relation to the shipwreck of Costa Concordia: in particular, given a factual situation which made it foreseeable that failure to intervene would have increased the risk and, therefore, the "claim of prudent interaction" was due, failure to act appropriately and holding a passive attitude may lead to imputation under Art. 113 c.p.

The institution of culpable cooperation requires, moreover, a verification on the predictability and evitability of the event and on the fact that it is among those which the precautionary rule violated aimed to prevent. In this second view, to raise a charge of liability against the agent, it is not sufficient to establish the existence of a causal link between the breach of a precautionary rule and the event, but it is necessary to "concretise the risk", verifying whether the type of event actually occurred was among those taken into account in the formation of the precautionary rule.

Now, as for the predictability and subjective evitability, the psychological coefficient of participation of the author in the event must be parameterised in relation to the nature of the case and the constitutional interests at stake: in this case the protection of life and physical integrity imposes a particular level of care and prudence on the author, and for this reason he is called to account not only in cases of inattention or negligence or violation of precautionary rules, but also when he has ignored a dangerous circumstance or has fallen into error on its meaning and the ignorance or the error have been determined by fault and are therefore reprehensible because not inevitable .

In the end, it is considered that the fault is discernible not only if the events were foreseeable, but also if they were not foreseen because a dangerous circumstance was ignored due to fault or wrongly assessed always for fault. And this is precisely what happened on board the "Costa Concor-

dia", where situational awareness was distorted by the presence of more people (even outside the crew), conversations not focused on the operations in progress, the use of mobile phones. On the command deck there was a confused atmosphere, not respecting the most basic safety rules, which contributed to generate false expectations and errors due to lack of attention.

In light of the considerations above, all the required criteria (predictability/ evitability and materialisation of risk) seem to exist and, considering the particular situation in which the events took place, it is possible to identify a "claim of prudent interaction" among the guarantors engaged in command deck the evening of the shipwreck.

However, this classification is partially contradicted by the judgment of the G.u.p. of Grosseto, which applied the sentences agreed upon to the co-defendants of the Captain.

The ruling, while acknowledging that all the conduct was related to each other (according to specific and autonomous positions of responsibility) within a complex organization (such as the governance of a ship), underlines that: This complex organization is distinguished from others by a command structure which is almost entirely vertical; where, by express legal provision that hierarchises the relationship between the entities operating in the same organisation, the individual possibilities of intervention within the respective positions of responsibility and guarantee give way to facing decision-making choices of different and opposite sign taken by the command holder». And also that: «according to the reconstruction of the event and the responsibilities for as evincable from the acts of investigation [...] the conduct of today's defendants, even if not of minor importance, is obviously of less importance than the conduct of the co-defendant who held the command position on the ship».

In a nutshell, the judgment clearly recognises a fault-type liability for all defendants, due to the different positions of guarantee and individual conduct, but does not apply art. 113 c.p. to the officers, confirming it, instead, for the hotel director and the responsible Costa Crociere of the unit of crisis established on ground.

In the end, the culpable cooperation applies to the commission of crimes of murder and multiple colpose injuries (ex art. 589 cc. 2 and 4 c.p.), but not to the crime of shipwreck ex art. 449 c.2 c.p.

This exclusion is not really justified and does not allow a correct reading of the responsibilities in the context of a complex organisation, such as that of a cruise ship, where different operational levels are interwoven.

In addition, in the case under consideration, it is worth remembering that the cause of the shipwreck event was a mix of factors, individual, relational, organizational, but also environmental because they affected bad practices, although not prohibited, such as bowing.

In the absence of significant controls, repeated violations of rules of prudence, tolerated and not sanctioned, trigger a process of normalisation of deviance and very dangerous overconfidence, where the objective limit to be respected becomes a subjective limit to be challenged by those who command the ship. In this context, it is considered desirable to change the operating conditions that made such a disaster possible by reviewing management practices in commercial and tourist shipping, strengthening the system of controls and reinforcing a more general safety culture in transport organisation which limits irregular potentially hazardous practices.

BIBLIOGRAPHY

Aimi A., 2013. «La sentenza di patteggiamento relativa al naufragio della Costa Concordia: ancora sulla distinzione tra dolo eventuale e colpa cosciente», in *Dir. pen. contemp.*, *www.penalecontemporaneo.it*, 18 September, 2013.

Arroyo I., 2003. «Problemi giuridici relativi alla sicurezza della navigazione marittima (con particolare al caso Prestige)», in *Dir. maritt.*, p. 1193 ff.

Berlingeri F., 1957. «Armatore», in *Dir. maritt*., p. 964 ff.

Busco P., Fontanelli F., 2013. «Questioni di giurisdizione e immunità nella vicenda della Enrica Lexie, alla luce del diritto internazionale», in *Dir. pen. contemp. Riv. trimestrale.* 3, p. 399 ff.

Caracciolo I., Graziani F., 2013. *Il caso della Enrica Lexie alla luce del diritto internazionale*, Napoli.

Comenale Pinto M., Romanelli G., «Impresa di navigazione», in *Enc. dir. Agg*., VI, Milano, 2002, p. 494 ff.

Izzo U., Morandi F. (a cura di), 2015. *L'Acqua. Mare, laghi e fiumi. La responsabilità civile e penale negli sport del turismo*, III, Torino.

Lefebvre D'Ovidio A., Pescatore G., Tullio L., 2019. *Manuale di diritto della navigazione*, 15thed., Milano.

Leone G., 1940. «Considerazioni sulla sistematica del diritto penale della navigazione», in *Studi per la codificazione del diritto della navigazione*, I, p. 115 ff.

Licata F., 2013. «Diritto internazionale, immunità, giurisdizione concorrente, diritti umani: le questioni aperte nel caso dei due marò e la posizione della Corte Suprema Indiana», in *Dir. pen. contemp*., *www.penalecontemporaneo.it*, 5 April, 2013.

Mannucci G., 2014. *Il conflitto di giurisdizione tra Italia e India nel caso Enrica Lexie: quale ruolo per il diritto internazionale*, Firenze.

Pisa P., 2012. «Il naufragio della Costa Concordia: i profili di responsabilità penale», in *Dir. pen. proc.*, 3, p. 367 ff.

Rivello P.P. , 1985. «Ambito e connotazione del diritto penale della navigazione», in *Dir. maritt*., 1-2, p. 3 ff.

Rivello P.P., 1990. *Diritto penale della navigazione*, in *Dig. disc. pen*., IV, Torino, p. 76 ff.

Ronzitti N., 2016. *Introduzione al diritto internazionale*, 5thed., Torino.

Rossi S., 2015a. «Fenomenologia giuridica di un disastro: il naufragio della "Costa Concordia" nella prospettiva del penalista», in *Riv. it. dir. turismo*, 13, p. 5 ff.

Rossi S., 2015b. «Garantire la sicurezza in mare: profili penali e attività di polizia», in Izzo. U., Morandi F. (a cura di), *L'Acqua. Mare, laghi e fiumi. La responsabilità civile e penale negli sport del turismo*, III, Torino, p. 115 ff.

Rossi S., 2015c. «Il naufragio della Costa Concordia: norme incriminatrici e categorie dogmatiche alla prova dei fatti (una prima lettura)», in *Dir. pen. contemp.*, in *Dir. pen. contemp*., *www.penalecontemporaneo.it*, 9 November, 2015.

Rossi S., 2020. *Il sistema penale della navigazione. Contributo allo studio del diritto penale marittimo*, Napoli.

Salamone L., 2012. «Riflessioni sul caso dell'"Enrica Lexie": il problema della giurisdizione», in *Dir. maritt*., 1, p. 310 ff.

Sarfatti G., 1937. «Armatore», in *Nuovo dig. it*., I, Torino, p. 729 ff.

Scialoja A., 1933. *Sistema di diritto della navigazione*, Roma.

Spasiano E., 1963. «Il diritto della navigazione come sistema unitario e autonomo», in *Riv. dir. nav.*, I, p. 290 ff.

Spasiano E., 1958. «Armatore», in *Enc. dir*., III, Milano, p. 15 ff.

Vermiglio G., 2010. «Armatore ed esercente», in Deiana M. (a cura di), *Diritto della navigazione. Dizionari di diritto privato*, Milano, 2010, p. 1 ff.