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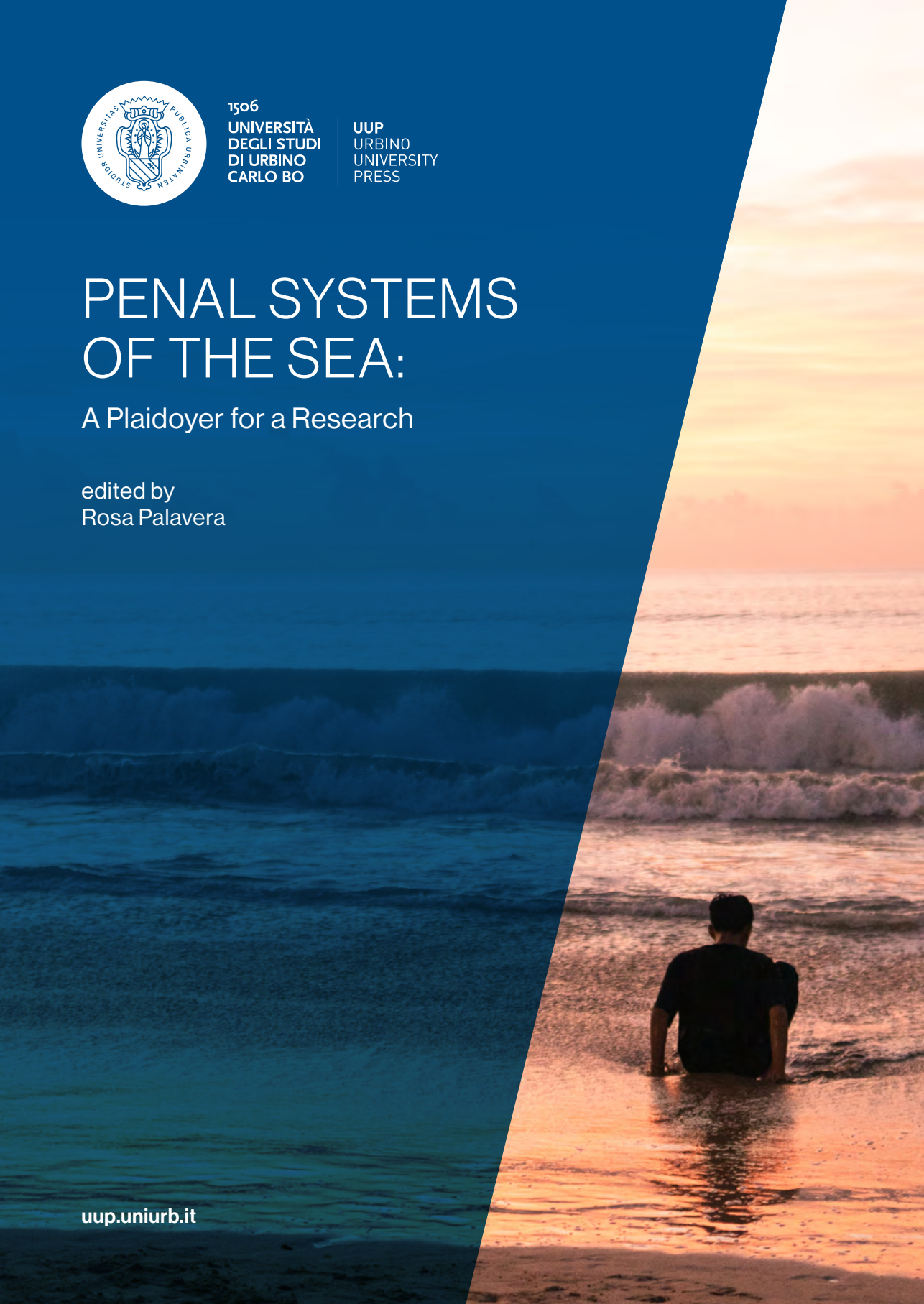
PENAL SYSTEMS OF THE SEA:

A Plaidoyer for a Research

edited by
Rosa Palavera



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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.

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Giovanna Bruscolini

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SOMMARIO

DEEP WATERS

Prolegomena of a penal system of the sea[1]

Rosa Palavera
Università degli Studi di Urbino Carlo Bo

> *«Ocean gönn' uns dein ewiges Walten. / Wenn du nicht Wolken sendetest, /Nicht reiche Bäche spendetest, /Hin und her nicht Flüsse wendetest, /Die Ströme nicht vollendetest, /Was wären Gebirge, was Ebnen und Welt?»*[2]

> *«Das Meer erlöst uns von der unmittelbaren Gegebenheit und bloß relativen Quantität des Lebens durch die überwältigende Dynamik, die das Leben mittels seiner eigenen Formen über sich hinausführt. Die Erlösung von dem Leben als einem Zufälligen und Drückenden, einem»*[3].

> *«Es ist merkwürdig, daß der Mensch, wenn er an einer Küste steht, natürlicherweise vom Lande aufs Meer hinaus schaut und nicht umgekehrt vom Meer ins Land»*[4].

1. METHODOLOGICAL PREMISE

Seen from space, the sea is nothing more than a piece of the Earth. In spite of the planet's name, the area covered by water is not only the largest portion of the planet, but also the distinctive one[5]. It exists, therefore,

1 The paper represents a development of the report at the meeting *Le leggi penali del mare: diritto liquido o hard case?*, Università degli Studi di Urbino Carlo Bo, Urbino, 24 May 2024; a peer-reviewed preview in Italian has been published as «Deep waters: *prolegomena* di un sistema penale del mare», in *Archivio penale*, 2024, 3, p. 1 ff.

2 von Goethe 1832: 176 ff.

3 Simmel 1912: 137 ff.

4 Schmitt 1942: 9.

5 The topic is widely discussed in evaluations of the possibility of other forms of life in the universe, and nothing similar has been observed in the space explored so far, although subglacial expanses and evidence compatible with the hypothesis of past oceanic worlds have been found even in exosolar systems: cfr. Shematovich 2018; Hand *et al.* 2020; De Sanctis *et al.* 2020; Lingam, Loeb

an ontology of the sea as a physical place, which conveys with unceasing rhythms its *naturalistic complexity*: because it is mobile in its boundaries, because it is changeable at its different depths, because in its systemic life it is hyperrelated.

Within the endless naturalistic complexity of the sea, the very rich *detail* of its *anthropic complexity* unfolds. The earthling human species exists as a terrestrial one, that is, because it inhabits that specific planet whose surface is precipously covered by the great waters. Nevertheless, the cultural impact of the sea on human history does not seem much inferior to its biological one[6]. It is not limited to the many resources that the marine environment offers for the purposes of a wide variety of human activities, nor to its capacity for ancestral or pioneering suggestions: its contribution consists, first and foremost, in mediating *relationships between humans*.

Publications and multimedia materials related to the naturalistic and anthropic complexity of the sea fill entire libraries; not even a summary of them can be attempted here[7]. However, the *legal complexity* of the sea can only be read within its naturalistic and anthropic complexity. This is the only methodological premise required by the subject of the sea: *looking at the immeasurable* is a condition for research.

2020; Pham, Kaltenegger 2022; Chakrabarty, Mulders 2024; Sparrman, Bladh, Way 2024; Joseph 2023.

6 Miyazaki, Adeel, Ohwada 2005; Beatley 2014; National Academies of Sciences, Engineering, and Medicine 2022; Kołodziej-Durnaś, Sowa, Grasmeier 2022.

7 By way of example, there are Libraries of the Sea in Palermo, Taranto and Naples, but also in Pesaro, Bagnoli, Giovinazzo and Sestri Levante, where the reading experience is offered close to the beach. Dedicated thematic sections can be found in the libraries of La Maddalena and Santa Teresa di Gallura, while in San Teodoro there is the library of the Istituto della Civiltà del Mare. At the port of Venice there is a library dedicated to the harbour world. In Sgonico, in the province of Trieste, there is the library of the Istituto Nazionale di Oceanografia e di Geofisica Sperimentale. To the CNR belong the libraries of the ISMAR in Bologna, the BSA and the Istituto di Biologia del Mare in Venice, as well as the Istituto di Ingegneria del Mare in Rome, where there are also the libraries of ISPRA, the Ministry of the Environment and the Ministry of Transport and Navigation, as well as the Lega Navale Italiana, with a branch in Naples. The headquarters of the Marina Militare library is La Spezia, that of the Accademia Navale Livorno, that of the Istituto idrografico della Marina Genova. Naval museums with annexed libraries are located in La Spezia, Milan, Genoa and the Tricase port-museum. We must not forget the university libraries of the institutes of maritime law, maritime engineering or marine science: in Genoa, Padua, Trieste, Rome, Naples, Palermo. There are also libraries in the Istituti di istruzione superiore Tommaso di Savoia in Trieste, Cappellini in Livorno, Luigi di Savoia in Naples. Finally, there are some private or linked to shops collections, such as the Libreria del Mare in Milan and the Mare International Bookshop in Rome, which boast respectively thirty thousand and ten thousand catalogued objects, including books and other items. Also these institutions, such as Anna Iltnere's Sea Library in Jūrmala, Latvia, a family collection that is gaining worldwide fame, attest to the widespread interest in the study of the sea.

2. RECONNAISSANCE OF THE AREAS OF CRIMINAL RELEVANCE OF THE SEA

Why should criminal law scholars care about the sea? The *simple answer* is: because even with water, in the water and underwater, *there is delinquency*. Without falling into the stereotype of the *sea as an outlaw place*[8], it can be said that this is a certainty.

One could also advance a *stronger* response: criminal lawyers must deal with the sea because *sea crime* is special, it is a *special case*. But this is only a hypothesis. The certainty of the *simple answer* already uncloses a rather significant variety of criminological areas[9].

It should be kept in mind from the outset that, looking at the aspects of criminal relevance of the sea, one should not see only a *list of offences*, moreover of such breadth as to overflow the body of law known to the average jurist and verge on all-encompassing, with respect to the system as a whole. Rather, what can be gathered is a range of ways in which criminal law can relate to a territory, each of which provide the scholar with different insights.

For this reason, among the many possible options – only by way of example: historical period of onset of the criminal phenomenon, nature of the protected legal asset, type of victim, seriousness of the offence, location of the law source, prosecuting authority – we chose to structure the survey into three lines of inquiry characterised by different *modes of interaction between norm and place.*

(A) THE SEA AS AN OBJECT OF PROTECTION

In the *first line of inquiry*, the sea can be studied as an *object of protection*: more precisely, in criminal law terms, as a *legal asset deserving of protection* and, potentially, of *criminal* protection. The ecosystem dimension stands out in this area of research[10]. *Man's* crimes *against the sea*

8 Cody 2024; see alsoLangewiesche 2004.

9 By way of example, for some topics of *potential* criminal relevance, Braverman 2023; Caron, Scheiber 2004; Gómez, Köpsel 2022; Jacques, Tréguer, Mercier H. 2020; Ribeiro, Bastos, Henriksen 2020; Scheiber 2021; Smith 2004; Strati, Gavoueli, Skourtos 2006.

10 *Ex plurimis*, Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States Ocean Studies Board. Commission on Geosciences, Environment, and Resources National Research Council 2001; Feitosa Ventura 2020; Frank 2007; Marr 2005; Sage-Fuller 2013; Platjouw, Pozdnakova 2023; Portman 2016; Schwerdtner Máñez, Poulsen

are heinous. Assaults are perpetrated routinely, with increasingly offensive consequences: the rise of ocean dumping is one example. In other cases, such as the hunting of large cetaceans and the indiscriminate fishing of other endangered marine species, perceptions of conduct vary significantly from culture to culture, but do not remain confined to their home territories. Whaling ships ply the world's seas to reach the pods, and environmental activists do likewise in an effort to thwart their capture. Different sensitivities *meet at sea*, throwing down the challenge of a unified response to the problem.

On the other hand, offences against the sea are also carried out through widespread behaviour, such as the dissemination of microplastics. Contrasting such conduct with criminal instruments would imply very extensive options of criminalisation, or at least the setting of conventional thresholds, which, to a more or less conspicuous degree, are always contestable in cases where the conduct is distributed substantially in an unbroken *continuum* of intensity with respect to a harm that can be perceived only in cumulative form. The sea *collects*.

Moreover, even if a single offender damaged a marine environment in unquestionably significant terms, their conduct would likely involve a plurality of legal systems, with regulatory approaches that are unlikely to coincide and responses to the offence that are not necessarily compatible. International protection of the sea is being invoked from many quarters, even calling for the introduction of the crime of ecocide: an option that, moreover, various jurisdictions have adopted[11]. Even recognising the sea as a common, as is also increasingly affirmed in the treaties, could lead to options for criminalisation, especially where the slippery slope of considering the commons as legal assets *automatically* deserving (more correctly, *in need*) of criminal protection is deemed to be followed[12].

Furthermore, it does not seem unusual that in approaching the sea as an *object* of protection, some would propose to consider it a genuine *victim*, that is, to attribute to it, by means of some legal artifice, a kind of legal personality. The idea would certainly be no more specious in this area than in others where it has also been put forward, such as with regard to language

2016; Leary 2007. In Italian legal writing, Rizzo Minelli 2023; Mazza 2021; Onnis Cugia 2021.

11 On the subject, Valbonesi 2024; Galanti 2023; Chiaramonte 2023; Poggi d'Angelo 2023; Brizioli 2022; Chiarini 2022; Molteni 2021; Rizzo 2021; Vallini 2021; Fronza 2021; White 2019; Warner 2009; Short, Crook 2022.

12 Critical remarks in Perini 2018; Rotolo 2023; reference may also be made to Palavera 2020.

or culture[13]. However, beyond the ethically and technically non-marginal issue of the power that would thus be granted to the law to constitute, graduate, and consequently also reduce, suspend, or revoke legal personality, it seems doubtful that such an approach could prove functional for an inclusive and effectively participatory management of governance of the sea or penal policy strategies aimed at its protection.

Rather, a realist criminological approach that engages in the enhancement of what basic sciences and Humanities teach about the sea would reveal *crowds of human interlocutors* to question and an equally wide and varied *plurality of victims*, with the sea serving as connector fabric for their more or less consciously relational network. For that matter, if this implication cannot escape a careful eye already in cases where the sea is the *direct* object of protection, it appears quite evident with reference to the broad areas of legislation where the sea constitutes the final object of *indirect* protection, as can be said of protection of waters, or which assume the sea as the intermediate object of *mediated* protection: in its environmental dimension, in many respects global, or even "merely" landscape with respect to coastal areas, as well as in its anthropic dimension, as a multifaceted *resource for humans*, involved in the rights to food, movement, and economic initiative of entire communities, if not of the global community itself; or, again, as a space inhabited by humans, as witnessed, even in their communicative and intergenerational dimensions, by the underwater cultural heritages[14]. On closer inspection, in the immeasurable wealth of interactions in the marine ecosystem, it seems difficult to always be able to distinguish between scenarios in which the sea is the *tool* and those in which the sea is the *target* of protection: the inextricable relationship between the oceans and global warming teaches this[15].

(B) THE SEA AS A RISK FACTOR

Precisely in this synchronous and diachronic cyclicality in which *tout se tient* the *second line of inquiry* is grafted: the sea as a *risk factor*, ancestral, powerful, and yet still largely unknown in its origins and evolutionary

13 Teubner 2006: 499 ff.

14 See Bailey, Harff, Sakellariou 2017; Caporaso 2017; Ford 2011; Dromgoole 2013; Browne, Raff 2023; Perez-Alvaro 2019; Sharfman-Parthesius 2020; Bulut, Yüceer 2023.

15 See Harris 2019; Griffies 2018; Abate 2014; Vallis 2012; Schofield, Warner 2012; Bigg 2003; Siedler, Church, Gould 2001.

dynamics. The first image that comes to mind is that of the *man at sea*: an iconic representation of human vulnerability, but also an example of how it can generate normativity that is sharply structured and characterised, at least in their more traditional expressions, by a rate of customary consensus perhaps unmatched in other branches of law. Normativity that is supportive and yet not oblivious to the pillars of self-responsibility: normativity from which the law of the terra firma should not exclude drawing inspiration. This is the ever-controversial realm of crime by omission: the *simple case* of someone coming across a shipwreck now holds a complex web of responsibilities and obligations to protect by individuals as well as States, all interwoven, though not always consistently, with the experiential *nomos* of the sailing man[16].

The sea as a risk factor, however, goes much further, to the point of jeopardising the very possibility of life on land, awakening entirely new instances of cooperation. The paradigmatic example here is *tsunamis,* about which European populations seem to have achieved widespread awareness only as a result of the events that have affected them as a result of another *way of the sea relating to humans*, namely tourism. And which they can no longer disregard today, even in the face of the expanding of areas of possible outbreaks of the phenomenon, at least in part likely to be linked to the degradation of the global environment, and the realisation that only coordinated monitoring on a very large scale can achieve adequate real-time knowledge, if not yet satisfactory predictability, of the course of their manifestations[17].

Here we are still in the realm of offences (often, but not always, and still broadly speaking) by omission. An area whose origin, barring remote etiological contributions, is purely naturalistic, and with respect to which law can nonetheless only design anthropocentric approaches, which, given a nature *blamelessly deaf* to the fears and dramas of those who populate the shores, *must* turn its attention to the orientation of human conduct[18]. Not surprisingly, with obvious dissimilarity, none of the proponents of the *victimised ocean* puts forward the proposal of assigning legal personality to the *victimising sea* in order to attribute to it legal liability of any kind.

16 V. *infra*, § 3.

17 Valbonesi 2022.

18 With Irti 2013: 1, the law «immediately presents itself as something made by men for other men. The predicate - today rejected or controversial by some - of *positivity* is to reveal the *humanity* of law, which is not given to us by others, but, precisely, "placed" by us for ourselves».

Moreover, also in this front of investigation, the dangers represented by the sea as a *force of nature* are accompanied by those linked to dimensions that are already originally anthropogenic, whereby dangers *originating* from the sea, but constituted or generated by purely human conduct, can come to undermine the economy, health, and security of the communities of coastal states. Furthermore, as technologies advance and the *Earth becomes small*, the sea may find itself transformed by humans into a base of attack toward the landmasses, even without any physical crossing of coastlines. We refer not only to the projection of force, logistical and informational advantage that can result from a naval presence in time of declared conflict and that can result in war crimes where it is deliberately directed against the civilian population. Indeed, when looking at the potential targets of hostile albeit non-belligerent parties or openly terrorist groups, the context of greatest concern today is that of the security of submarine cables and their strategic significance in terms of energy supply, international digital connectivity, and the potential environmental consequences of an attack[19]: an all-too-contemporary confirmation of the long-standing intuition about the sea as *total warfare*[20].

Under the latter assumptions, the sea presents itself as a risk factor only to the extent that it represents a point of vulnerability for the land or infrastructure system. This is reflected, moreover, in the peculiar complexity, from the organisational standpoint of security in the strict sense, of harbour areas, which are geographically *land-based*. In the end, it is still a matter of *protection of the sea* or *from the sea*; in that what perhaps until recently could be regarded as the *sea as a border* and which today, more fragmentarily and unsteadily, must be regarded as the sea that *hosts borders*, in a kaleidoscopic multiplication of lines of potential conflict, but also still of dialogue.

19 On the subject Guilfoyle, Paige, McLaughlin 2022; Hernandez 2023; McGeachy 2022; Pandey, Bhushan 2023; Raha-Raju 2021.

20 Thus Schmitt 1942: 88, «At the heart of sea warfare is the idea that the enemy's trade and economy must be affected. The enemy is, in such a war, not only the combatant adversary but every citizen of the enemy state and even the neutral state that trades with the enemy and has economic relations with him. Land warfare tends towards an open, decisive, pitched battle. In sea warfare one can of course also go as far as naval battle, but its typical methods and means are the bombardment and naval blockade of the enemy's coastline and the seizure, according to the right of prey, of enemy and neutral trading vessels. In the essence of these typical instruments of sea warfare lies the explanation that they are directed against combatants as well as non-combatants. A supply blockade, in particular, affects indifferently the inhabitants of the entire territory subjected to the blockade, soldiers and civilian population, men and women, old men and children».

(C) THE SEA AS A "MERE" PLACE OF CRIME

In the *third line of inquiry*, the sea can be studied as a mere *crime scene*. This is a residual characterisation, since even in the areas reviewed so far, the criminally relevant conduct, harm or danger take place at least in part at sea. Grouped here are those hypotheses which, although related to the sea due to the aspects just outlined, do not see it either as an injured legal asset or as the source of the detrimental event. The sea, in these cases, is simply the *place*, but better said also the *context*, in which the relevant events, at least in part, "simply" *happen*.

Sometimes such a context is implied as necessary to the commission of the offence because of the presence of special "maritime" elements in the provision. Some of these offences are so ingrained in our imagination relating to the sea that it is virtually impossible to imagine their commission on land: this is the case with the crime of piracy, although the parallel with armed robbery has been noted by scholars[21]. In other cases, however, including so-called nautical homicide, the need for special provision has been subject of controversy[22].

Then there are cases which, even in the absence of special elements, reveal the legal peculiarities of their commission at sea only in light of an overall reconstruction of the applicable legislation. In Italy, for example, in the case of a charge of manslaughter with violation of the rules for the prevention of accidents at work, Legislative Decree 81/2008 applies as much to underwater activities as it does to maritime workers, embarked on board a ship, employed in harbour areas or belonging to the fishing industry. Implementing decrees for maritime workers, however, have never been issued. Thus, the previous regulations remained in force, cumulating with the mentioned decree and other sources, including European ones, that followed, and thereby creating a separate *corpus* of provisions, as well as also contentwise distinct from the common one[23].

21 Koutrakos, Skordas 2014; Kraska 2011; Larsen 2023; Mejia, Kojima, Sawyer 2013; Murphy 2008 and 2013; Bohle 2018; Salomon 2016; Brake 2015. In Italian legal writing, De Jorio 2019; Marini 2016; Del Chicca 2016; Vuosi 2014; Scuccimarra 2023; Bartoli 2018; Staiano 2019; Corleto 2022; Noto 2015; Primon 2014; Bevilacqua 2014; Tondini 2013; Romano 2013; Cocco 2012.

22 Piccioni 2023; Demuro 2023 and 2022.

23 Such as, for example, Legislative Decree No. 271 of 27 July 1999, Legislative Decree No. 272 of 27 July 1999, and Legislative Decree No. 298 of 17 August 1999, as well as amendments to the International Convention for the Safety of Life at Sea (SOLAS); Legislative Decree No. 71 of 12 May 2015, implementing Directive 2012/35/EU, amending Directive 2008/106/EC. On the subject, Margiotta 2000; Rizzo 2011; Bencini 2015; Cataldi 2023.

Finally, for some criminal phenomena, an identical regulatory provision is applied to events that occurred at sea and those that occurred on land. The patterns of their occurrence, however, are often drastically different. The migrant affair in the Mediterranean is a macroscopic case. It stands out among many others because of the vivid tragic nature of the intertwining of human actions and environmental determining factors, as well as the reversal of the icon of the sea as a source of life and a way for people to meet. But also because it is a paradigmatic example of the clash between the age-old, shared wisdom of the customary normativity of the sea with the size, speed and complexity of criminal phenomena in the contemporary world and the uncoordinated pervasiveness of criminal law in the legal biographies of individuals (not just migrants). We will return to this shortly. What needs to be emphasised, as the last piece of this reconnaissance, is that the intersections between the three lines of inquiry are not limited to the presence of cross-cutting dogmatic critical issues, but also concern the concrete occurrence of different forms of crime, whose operational synergies can only be facilitated by the lack of unified approaches of contrast.

3. THE INEXTRICABLE CONNECTION OF AREAS OF CRIMINAL RELEVANCE AND THE NEED FOR A THEMATICALLY UNIFIED APPROACH

In many of the respects mentioned so far, the tragedy of migrants by sea deserves a brief review. First, because of its human dimension. But also because of its ability to "bring to the surface" the legal complexity of the maritime context and the extent, which is difficult to map in its entirety, of the effects that the choice of each option, within that context, entails. This complexity, which still does not seem to generate awareness of the need for integrated approaches, turns into uncertainty for those who operate at sea, inefficiency for those involved in security, and, for national and supranational public decision makers, margins of discretion that are not functional in achieving effective and shared policies. With a daily cost in human lives[24], but not only that.

24 The central Mediterranean route is confirmed as the deadliest with 1121 deaths and missing persons in the first months of 2024, followed by 807 on the West African-Atlantic route (data taken from the IOM Displacement Tracking Matrix, *dtm.iom.int/europe/dead-and-missing*, and updated on 23 September 2024).

In the affair of irregular migration on the Mediterranean routes there are very different critical issues and also all of potential criminal relevance. From the project already open to the unlawfulness of travel to its far more serious exploitation, all the way to methods of trafficking. From the *continuum* of assaults, robberies, rapes, extortion and malfeasance that punctuate the journey to embarkation (and sometimes beyond) to decisions to withhold rescue by ships encountered during the crossing or, conversely, to rescue in ways that do not ensure the admissibility of those transported upon arrival. From negligent situations for failure to identify drifting vessels, underestimation of their dangerous conditions, or tardiness of rescue operations, not infrequently with fatal outcomes, to charges of deliberate refusal (because aimed at rejection) of official acts and kidnapping. From criminal organisations ready, in case of disembarkation not intercepted by State activities, to recruit migrants upon their arrival, acting on their vulnerability to involve them in networks of illegal hiring, drug dealing and exploitation of prostitution, to groups dedicated to supporting terrorist activities or arms and drug trafficking that tread the same routes and rely on the same relational networks: large-scale threats that, while not personally involving migrants, who are often indeed unaware, further burden the practices of managing their pathways[25].

Such variety of problems, in relation to which the intervention of criminal law is widely invoked and which include, as is evident, conduct that is very contiguous to legality or at any rate not unlawful because it is justified, as well as some of the major criminal phenomena of the present time[26], are interwoven for the migrant into a single experience of victimisation, while the natural environment of the crossing, already potentially dangerous in itself, contributes to relational conditions capable of exponentially increasing the traumatic impact.

Furthermore, it should not be left unsaid that many of the traumatising components of the migration experience arise from *regulatory* factors, physiological or deviant, of the different legal systems with which the migrant must deal: they feed, episode after episode, into their plural legal biography and, inevitably, will go on to affect his or her decision-making

25 Achilli, Sanchez 2021; Achilli, Tinti 2022.

26 For the most relevant aspects, Pressacco 2021; di Martino 2023; Bevilacqua 2020; with a more general scope Pisconti 2022; Curi *et al.* 2020; De Vittor 2023; Zirulia 2023; Coppetta 2023; Pitea, Zirulia 2020; Fonti, Valentini 2020; Abukar Hayo 2022; Masera 2022 and 2024; Papanicolopulu 2022; see also, for the traditional approach, Coniglio 1924.

architectures in the face of subsequent choices to adhere to the law or transgress it.

It goes without saying that the concentration of management of landings in the few countries of first landing[27], in the absence of an interstate redistribution of the burden of rescue, in addition to making the provision of adequate reception illogically critical in all respects, risks inducing in significant portions of the population a perception of danger, non-dignity or even just quantitative *surplus* of the *entire* allochthonous population, even where this is instead numerically contained or, at any rate, less represented in percentage terms than in some non-coastal countries[28]. Resulting, thus, in an oppositional and hostile environment that is not conducive to the goal of integration, already fundamental in terms of the rights of the individual, but equally decisive for the security of the community as a whole.

To consider as established the inextricable web of connections between the phenomena for which criminal intervention is invoked, one believes that so much is enough (nor would it be hard to find other examples: think of the well-known links between modern piracy and terrorism or the abovementioned multi-offensive consequences in the case of an attack on submarine cables[29]). These are dynamics that are capable of dramatic pervasiveness and influence on society as *a whole*, even in ways whose interactions do not immediately emerge clearly. The apparent *uniqueness* of phenomena of such great impact, however, should not distract attention from the search for their *repeatable* features, albeit on a different scale, and the resulting paradigmatic potential, which makes the sea, as will be seen, an elective context for the identification of grids for analysis, critique and readjustment (also) of criminal policies pursued so far.

27 In the first months of 2024, Italy alone, whose population accounts for just over 13% of Europe's, with a GDP per capita below the average (EUROSTAT, 2024. *Key figures on Europe. 2024 edition*, Kirchberg: European Union, p. 10), dealt with more than a third of irregular entries throughout the EU (data from the IOM's *Displacement Tracking Matrix*, *dtm.iom.int/europe/arrivals*, and updated at 23 September 2024; see also UNICEF, 'Refugees and Migrants in Europe', 13 September 2024, *unicef.it*).

28 The European country with the highest percentage of foreign residents is Luxembourg, but also Germany and Sweden outnumber Italy by several percentage points (OECD, 2023. *International Migration Outlook 2023*, Paris: OECD, pag. 20). Furthemore, it is well-known that either due to the prospect of greater employment opportunities or due to the presence of groups of relatives or compatriots, these northern countries represent the "final destinations" targeted by migrants who decide to cross, representing the landing on southern European shores as a mere "stage" in the migration project.

29 Other emerging themes include self-driving marine vehicles, IT applications and new technologies; see Guo, Gao, Zhang 2022; Johansson *et al.* 2023; National Research Council (U.S.). Committee on Autonomous Vehicles in Support of Naval Operations 2005; Soyer, Tettenborn 2021; Yun, Bliault 2012; Kraska, Park 2022; Lind *et al.* 2021; Artikis, Zissis 2021, Breen 2024.

It is necessary in this regard to clear up misunderstanding. The security approach to the *criminal law of places* generally focuses its analysis on the number of offences committed there, their heinousness or simply the social alarm they arouse[30]. This certainly makes sense, in the economy of a research study, from the selective standpoint of *relevance*: in order to avoid the scattering of reflections toward hypotheses of trifling transgressions, numerically insignificant in their occurrence or such that they do not arouse any social alarm in any case. This, in the present case, can certainly be ruled out. We trust that it has emerged from this cursory review that the *special case* nature, if any, of the marine context does not lie in the phenomenology of the crimes committed, but rather in the interaction that with regard to them is triggered between law and territory, in all its naturalistic and *relational* nuances. From crime, therefore, we need to shift our gaze to *law*.

Moreover, in light of the organisational connections between the different forms of crime, the frequent coinciding of resources that can be involved in combating them, the non-occasional unity of the victimisation experience, as well as the coordination necessary even to design a serious prevention intervention in the territory, this *law* – the criminal law of the sea – can only be studied as a *unitary system*. With respect to this the three areas identified so far – with the various critical issues noted and the sectorially tested solutions in interstate collaboration efforts, to which not even a mention can be devoted here – pose themselves as experiential capitals to be drawn upon in developing common strategies. However, in this very respect, research seems to be languishing in a state of heavy backwardness.

4. THE CURRENT STATE OF RESEARCH: CENTRALITY OF THE TAXONOMIC APPROACH AND ITS INADEQUACY

Despite the obvious criminal relevance of the sea, there are no unitary treatises containing a synoptic picture of it, even at a summary or illustrative level. A very small number of cases have been discussed in specific essays or monographs, while some areas of applicable criminal law are arranged in chapters in manuals of international criminal law or navigation law[31].

30 Be allowed to refer to Palavera 2024a: 4 ff.

31 In Italian criminal law writing, Rossi 2020; Corrieri 2015; De Vincentiis 1961; Spasiano 1958. See also Anand 1982; Baatz 2018; Chandrasekhara Rao, Gautier 2006; Del Vecchio, Virzo 2019;

Blue criminology[32] has so far been understood simply as a part of *green criminology*[33], while further suggestions of criminal policy can be found in texts devoted to maritime security[34] and so-called *governance* of the sea[35].

What seems to be absent in the landscape of penal or criminological scientific literature is an interpretation of the deep weaving of the *nomos* of the sea in its dimension as a complex legal context, within which entire categories of professionals must move and make their decisions, not excluding those specifically concerned with security in its various declinations. Operators who, be they shipowners, captains, officers or other personnel on board in any capacity, entrepreneurs, scientists, coast guards, fishermen, like their "colleagues" on land, are increasingly *concerned* about the criminal aspects (the *crime risk*) of their daily activities, as well as naturally interested in the goal of making the sea as safe a place as possible. Concerns that are, moreover, almost *due*, at least to the extent that they are held by entities obliged to prepare organisation and management models, including for the purposes of safety of workplasces and the administrative liability of entities[36].

The paradigmatic scope of a unitary reading of this normative universe, however, goes far beyond the possibility of an albeit valuable contribution to the resolution of practical issues and the pursuit of *certainty of punitive law*. Rather, its study requires us to consider not only whether and how criminal law can deal with the sea, but also to what extent the legal

Fink 2018; Kittichaisaree 2021; Klein 2004; Walker 2012; Wendel 2007; Myburgh 2019; Nordquist, Koh, Moore 2009.

32 Not to be confused with the well-known and identical expression used, however, with reference to UN crime-fighting actions, in Redo 2012.

33 See *supra*, § 2 (a).

34 Evans, Galani 2011; Klein, Mossop, Rothwell 2010; Kraska, Pedrozo 2013; Nordquist *et al* 2008; Bruns, Petretti, Petrovic 2013; Jopp 2014.

35 Monaco, Prouzet 2015; Partelow, Hadjimichael, Hornidge 2023; Roe 2013; Rothwell, VanderZwaag 2017; Wilson, Sherwood 2000; Nordquist *et al.* 2007.

36 On the subject, Baffa-Cecchini 2018; Fidelbo 2011; Tripodi 2019; Di Vetta 2021a, 2021b and 2023. Needless to mention that the system of administrative liability of entities has its own criteria for assigning territorial jurisdiction and includes among the predicate offences various offences that could be committed at sea: see Legislative Decree 231/01, Article 4 - Offences committed abroad, as well as Articles 25 *bis*.1 - Crimes against industry and commerce; 25 *quater* - Crimes for the purpose of terrorism or subversion of the democratic order; 25 *quinquies* - Crimes against the individual; 25 *septies* - Manslaughter or serious or very serious injuries committed in violation of the rules on the protection of health and safety at work; 25 *undecies* - Environmental offences 25 *quaterdecies* - Fraud in sporting competitions, unlawful gaming or betting and gambling by means of prohibited devices; 25 quinquiesdecies - Tax offences; 25 *sex decies* - Smuggling; 25 *septies decies* - Crimes against the cultural heritage; 25 *duodevicies* - Laundering of cultural assets and devastation and looting of cultural and landscape assets.

experience of the sea can contribute to the *understanding* of criminal law systems, their integration and, possibly, their improvement.

At the state of the art, the research seems to place all hope on some progress in refining the criteria for jurisdiction allocation: «*terra mare et contra mare terras terminat omnis*»[37]. Although, as is evident, the analysis of the criminal law of the sea is far from being exhausted by such issues, it therefore seems appropriate to start precisely from those[38]. To note at once how, read on the fly, the picture presents an authentic Schmittian *Seenahme*: if «every fundamental ordering is a spatial ordering»[39], then the *nomos* of the sea can only be the *nomos* of its *appropriation*[40]. By reasoning in this way, after all, the *legal cartography of the sea* would merely follow the history of the entire marine cartography, in which the shift toward the narrative, inclusive and participatory dimension is still largely to be achieved. For the purpose of resolving even only from the standpoint of competence the problems enumerated above, a taxonomic management of the sea so understood would be really very unpromising.

Even at first glance, however, a *different regulatory complexity* of the sea, in all its declinations, emerges. Just as in some historical periods the freedom of the seas has been little more than a scholarly argument to support the possibility of their dominance[41], so concepts of a purely economic nature have since been enriched with entirely different protection purposes and relational implications. It is therefore worthwhile to retrace the traditional partitions of the sea with the criminal lawyer's eye, because each of them constitutes a snapshot of the relationship between geography and *terrible law*, between State and territory, between sailing individual and *nomos*.

(A) TERRITORIAL SEA AND ARCHIPELAGIC WATERS

Looking at the Italian legal system, the criminal taxonomy of the sea is all in two folds of the code. The former, in Art. 3 of the Criminal Code: the criminal law binds *all those who are in the territory of* the State – subject to

37 Titus Lucretius Carus, *De rerum natura*, I, 1000.

38 *Ex plurimis*, Blake 1987; Blake 1994; Jagota 1985; Kwiatkowska 2006; Lagoni, Vignes 2006; Prescott, Schofield 2005; Zaucha, Gee 2019.

39 Schmitt 1942: 71.

40 On the different declinations of nomos in Schmitt, Schmitt 1950: 36 ff.

41 Grotius 1609.

exceptions and immunities – and likewise those who are abroad, but limited to the cases provided for[42]. The second, in Art. 4 of the Criminal Code: for the purposes of criminal law, *the territory of the State is the territory of the Republic* and *any other place subject to the sovereignty of the State*. This is followed by provisions for ships, to which we will return[43]. Here is created the perfect storm. When can a territory be said to be *subject to sovereignty*? The last apparently safe bulwark, for a criminal lawyer, seems to be Art. 2 of the Navigation Code: the territorial sea *is subject to state sovereignty*[44]. In fact, already in this area sovereignty is beginning to be eroded: you can start to feel the sea air.

The territorial sea consists of the strip of sea immediately adjacent to the emerged territory of a state. In general, its legal regime is traced back to the Montego Bay Convention[45], but it has formed over time as customary law and as such is at least partially recognised even by some states that have not ratified the convention, including the United States of America. Under the background of these premises, it can thus roughly be said that the territorial sea, its bed and its subsoil are subject to the sovereignty of the coastal State to which they relate, but it is subject to certain limitations, the main one being the right of *innocent passage* by ships flying the flag of another state[46]. During this transition, the coastal State's criminal jurisdiction endures preponderant limitations, its exercise remaining exceptional and subject to specific methods of intervention[47].

The legal status of ships in transit is thus outlined by at least three different sources: international law, which defines the conditions under which this passage is granted or may be revoked, how it can be used and the scenarios in which it may evolve into a right of anchorage, as well as the situations and modalities in which the coastal State's criminal jurisdiction may instead be exercised; the legislation of the coastal State, both with regard to obligations relating to the areas of protection provided by international law, including those relating to the safety of navigation and

42 It can be said immediately that one of the cases referred to is 'maritime' and concerns the prosecution of the offence committed by a person who is abroad but in the service of a ship flying the Italian flag (Article 1080 of the Navigation Code).

43 See *infra*, § 3 (c).

44 Romano, Grasso 2004: 97; Dodaro 2024b.

45 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982 (hereinafter referred to as UNCLOS).

46 UNCLOS, art. 17 ff.

47 UNCLOS, art. 27 ff.

the environment, and with regard to the situations in which criminal jurisdiction may be exercised; the legislation of the flag state, which certainly not residually regulates all the activities that take place on board. When the authority of the coastal State has well-founded suspicion that a ship has violated its laws or regulations, if the ship or *one of its boats* is still in territorial waters, it may pursue it, and the pursuit may continue even as far as the high seas, provided it continues uninterrupted[48].

The breadth of the territorial sea is set by the coastal State. For a domestic criminal lawyer, as seen, the reference is to Art. 2 of the Navigation Code, and it is only seemingly simple. The so-called baseline, from which this breadth is calculated, is partly determined by the state, which can choose between the natural boundary of the waters and, under certain conditions, straight lines drawn between the outer points of possibly jagged stretches of a coastline. The water line is identified with reference to the time of low tide, but islands are only considered as such, thus contributing to the identification of the territorial sea, only if they remain emerged during the time of high tide. For the identification of low tide lines, reference should be made to those shown on large-scale nautical charts *officially recognised by the coastal State.* Reefs are also taken into account, but not low-tide elevations, unless lighthouses or other installations permanently above sea level are built there. Finally, bays, historic bays, harbours and roadsteads, as well as highly unstable shorelines, such as those occupied by a river delta, are regulated[49]. Special provisions are made for archipelagic states, sets of islands cohesive by nature *or* history, with the effect of allowing the establishment of an area of *archipelagic waters* endowed with a regime that is substantially similar, but not identical, to that of territorial waters[50].

Beyond the historical and geographical complexities, what may not be immediately apparent is that the *outcome* of the delimitation work may be uncertain and, more importantly, result in an area of non-exclusive sovereignty, since, as one criminal lawyer observed, «*each state proceeds as it sees fit*».[51] To better understand the reasons for this *disorder*, we should mention that the regulatory evolution of territorial sea has some specific

48 UNCLOS, art. 111.

49 UNCLOS, art. 3 ff.; See Gioia 1990; Symmons 2008. For new forms of shoreline instability, Blitza 2019; Purcell 2019.

50 UNCLOS, art. 46 ff.

51 Romano, Grasso 2004; 97.

characteristics that deserve a mention. First of all, its premise is not simply the *possibility of appropriating the sea*, but of doing so in a "muscular" way: originally, the extent of territorial waters was determined by the range of concretely existing coastal artillery posts and, later, by the maximum range recognised to those that could potentially be installed, even if concretely there were no posts on the coast[52].

Moreover, although first this conventional abstraction and later the advent of intercontinental ballistic resulted in the complete overcoming of the *cannon shot* criterion, no agreement on the breadth of the territorial sea could never be reached[53]. For the signatories to the first Geneva Convention[54] and subsequently to the Montego Bay Convention, the establishment of the breadth of the territorial sea meets the limits recognised *therein*, albeit implicitly: twelve nautical miles or the median line for States with opposite or adjacent coasts, or even those arising from other *historical titles* or *special circumstances*[55]. Within those limits, each State is free to set its own territorial sea[56]. These limits are obviously not taken into account by States that have not ratified the conventions and sometimes do not even share the delimitation criteria recognised therein, such as the State of Israel[57]. It is debated whether these States should still respect spatial determinations that other States have made in accordance with conventional limits as they are attributable to customary law[58].

Finally, because of the specific characteristics mentioned above, neither public domestic law nor the ubiquitous international law consider territorial sea as a part of the territory in the strict sense (whose boundaries

52 Galiani 1782: 422: «the distance of three miles from land, which is surely the greatest distance where, with the force of the powder known to date, a ball or a bomb can be propelled». This is the *armorum vis* referred to Romano, Grasso 2004: 97.

53 In fact, these very differences led to the failure of the Hague Agreements in 1930 and the Second Geneva Conference in 1960: See Scovazzi 1994: § 2; Caffio 2020: 46.

54 Convention on the Territorial Sea and Contiguous Zone, Geneva, 19 April 1958 (hereinafter referred to as Geneva I), art. 24.

55 UNCLOS, art. 3 and 15.

56 Italy, whose navigation code provided for a six nautical mile limit, extended it to twelve nautical miles: see Article 2 of the Navigation Code, as amended by Law 359/74, Article 1. The case of the self-proclaimed Republic of Rose Island is well-known: it was an artificial island, unsuitable to constitute independent territory, but nevertheless located, at the time, in a non-territorial sea. A summary, with conclusions, however, of uncertainty regarding this unsuitability and references to the topicality of the issue, in Buccarella 2021.

57 For an exploration of critical issues, Spanier, Shefler, Rettig 2021. For an overview also Teff-Seker, Eiran, Rubin 2018.

58 Per l'esempio della Turchia rispetto alla zona contigua italiana, Caffio 2020: 200 ff.

coincide with the coastline regardless of the baseline adopted for the identification of territorial sea), but rather a *dependence* of it[59]: they determine, therefore, a divergence between territory in the strict sense and the spatial scope of sovereignty, which is exercised in them in a *gradual* form, so to speak, by virtue of a series of more or less internationally recognised acts of *appropriation*. This in itself already goes to break the hendiadys on which the Criminal Code approach rests. Potentially *disturbing* as it may be, however, even beyond the "calm waters" of the territorial sea, the graduation of sovereignty continues or, rather, develops its further *functional declinations*[60]: with what consequences for criminal lawyers, is all to be discovered.

(B) CONTIGUOUS ZONES AND OTHER HYPOTHESES OF FUNCTIONAL SOVEREIGNTY EXERCISABLE BY COASTAL STATES

Beyond the territorial sea, in the waters immediately adjacent to its outer limit and no more than twenty-four nautical miles from the baseline, the coastal State may establish a *contiguous zone*. The boundary of the median line between frontiersmen, which was provided for in the Geneva Conventions[61], was not taken up by the Montego Bay Convention[62], and therefore it is not ruled out that currently the contiguous zones of two States may overlap. In the contiguous zone, the coastal State may exercise powers of control over vessels to prevent or punish violations of laws and regulations in its territory or territorial sea, in customs, tax, health or immigration matters. Within the same limits of the contiguous zone and provided that the contiguous zone has been formally established, one or more archaeological zones may be established in which the coastal State may prohibit the removal of relics and objects of historical value from the seabed.

A contiguous zone exists only when proclaimed and operates only in relation to those violations that the coastal State has identified upon its establishment. The right of hot pursuit initiated in the territorial waters continues in the contiguous zone, but may begin in the contiguous zone only in connection with violations of the rights for which it was established. Of course, the question should be asked whether, once the contiguous zone is

59 Gioia 1999: § 1.

60 On the subject, Gavouneli 2007; Vrancken 2023.

61 Ginevra I, art. 24 c. 3.

62 UNCLOS, art. 33.

established, the State has not only the power to control it, but also the *duty* to exercise it. And this emerges rather vividly when one considers that the reasons for establishment may include those of a sanitary nature, an area in which an omission could be a major contribution to causing offenses to the legal assets for whose protection the contiguous zone is established. Looking forward, moreover, the same problem could arise where, in relation to such assets, a duty of protection, for example at the EU level, regarding compliance with customs, tax or migration regulations is imposed.

However, contiguous areas cannot always be ascertained by the trivial finding of the founding document. The Italian legislature, for example, has mentioned the contiguous zone in connection with the contrast of illegal immigration[63] but has never identified its limit or formally established it, and therefore its operability is controversial[64]. A further reference is contained in the Code of Cultural Heritage[65], with regard to the protection of archaeological and historical objects found in the relevant seabed in accordance with the UNESCO Convention on the Protection of Underwater Cultural Heritage[66]: in this case the limit is identified by the legislation as twelve nautical miles from the outer limit of the territorial sea, although the act of ratification of the Paris Convention provides, in case of overlaps and unless otherwise agreed, for the respect of the median line[67]. It does not seem very clear, therefore, whether there is an Italian archaeological zone that is reduced compared to the contiguous zone. In any case, this is not merely a theoretical issue; in some stretches of sea, the 24-nautical-mile limit from the Italian baseline overlaps with that of the contiguous areas of Albania and Tunisia, both of which are signatories with Italy to continental shelf delimitation agreements, which are not exhaustive of possible jurisdictional issues[68].

63 La zona contigua è menzionata nel d.lgs. 286/98, art. 12 c. *9bis*, come inserito dalla L. 189/02, art. 11 c.1, a proposito del diritto di ispezione e sequestro in ipotesi di trasporto illecito di migranti, art. 24 c. 3.

64 Auspica l'adozione dei provvedimenti di formalizzazione Caffio 2020: 201.

65 D.lgs. 42/04, art. 94.

66 UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001.

67 L. 157/09, art. 3.

68 Respectively, the Agreement between the Italian Republic and the Republic of Albania for the determination of the continental shelf of each of the two countries, Tirana, 18 December 1992, and the Agreement between the Government of the Republic of Tunisia and the Government of the Italian Republic concerning the Delimitation of the Continental Shelf between the Two Countries, Tunis, 20 August 1971.

Outside the contiguous zone, within two hundred nautical miles of the baseline, States may establish "exclusive economic zones". Should a coastal State decide to establish one in its seabed, its subsoil and overlying waters, it enjoys sovereign rights for the purposes of exploration, conservation and exploitation of natural, biological or nonbiological resources, including energy derived from water, currents and winds. It also has jurisdiction within the limits granted by international law in the area of marine scientific research and protection and conservation of the marine environment, as well as exclusive jurisdiction over artificial islands, installations and structures, which no other State can build in the area.

Again, the State establishing the zone becomes the holder of rights and *duties*: for example, it must give notice of the installations, as well as remove them upon their decommissioning, so as to ensure the safety of navigation and respect for the environment[69]. It must also preserve biological resources from overexploitation[70]. For these purposes it adopts laws and regulations, for compliance with which it may resort to boarding, inspection, and detention, but the penalties *provided therein* for violation may not, unless otherwise agreed between the States concerned, include restriction of personal freedom or any other form of physical punishment[71].

Over time, States have established different types of extraterritorial sea partitions within two hundred nautical miles: common fishing zones, reserved fishing zones, protected fishing zones, and ecological protection zones. Upon the introduction of exclusive economic zones, these varied designations were generally traced back to the right of establishment of these zones, even if they referred to areas established at an earlier time. Nonetheless, it is not entirely clear whether qualifying an area established for a specific and delimited purpose as an exclusive economic zone entails the assumption of all the duties associated with it, additional to the original purpose, nor how these duties are apportioned in common areas, whose founding agreements usually regulate the apportionment of rights but not always of duties, nor what happens to the responsibilities assumed when the agreement ends for any reason[72].

69 UNCLOS, art. 60.

70 UNCLOS, art. 61 ff.: highly migratory species, anadromous and catadromous reefs, and marine mammals, among others, are covered; the interests of other States, including developing, landlocked and geographically disadvantaged States, are also balanced, at least with regard to the share of resources that can be drawn and that exceed the exploitation of the coastal State.

71 UNCLOS, art. 73.

72 One example is the common fishing area established by the Exchange of Letters between Italy

A further case in which a State enjoys sovereign rights *as a coastal State*, even beyond the two-hundred nautical mile limit, is the continental shelf, which is the extension of the land territory in its submerged portion, comprising the seabed and the subsoil of the rise, slope and shelf, to its outer continental margin. The coastal State exercises sovereignty over it in relation to exploration and exploitation of natural resources, as well as drilling and any artificial islands, installations and structures located on the shelf. The natural resources to which exploitation refers are those that are mineral or otherwise non-living, as well as sedentary living species that live in continuous contact with the seabed or subsoil. This sovereignty is exclusive, does not require proclamation, and is not lost in case of non-exploitation[73].

Finally, the Hamburg Convention provides that signatory States with shorelines have a *duty* to establish *areas of responsibility* for their search and rescue services[74]. Although the text encourages cooperation among States and numerous agreements have been signed to this effect, including establishing areas of joint responsibility, the extent of one's area of responsibility can be set unilaterally by each State, with no limit on distance from the coast. In such areas, as, moreover, already generically provided in previous treaties[75], coastal States have a duty to provide a search and rescue service, whose legal framework is an essential element[76], and some States have established very broad search and rescue areas, which they claim to be exclusive and in which they believe their own regulatory options should be applied, for example with respect to identifying the port to which to accompany any persons collected[77]. Thus, we have a somewhat

and Yugoslavia concerning the establishment of a fishing area in the Gulf of Trieste, Rome, 18 February 1983 (ratified by Law 107/87), but then no longer signed by the States created as a result of the Yugoslav wars.

73 UNCLOS, art. 76 ff.

74 *International Convention on Maritime Search and Rescue*, Hamburg, 27 April 1979 (hereafter Hamburg), *Annex 2.1.9*.

75 Pursuant to the *Convention Internationale pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes*, Brussels, 23 September 1910, Art. 11 ff., the obligation to rescue rests solely with the captains of the ships, and the signatory states merely undertook to introduce rules to repress the breach of this obligation. In this sense also the *International Convention On Salvage*, London, 28 April 1989, Art. 10. *The International Convention for the Safety of Life at Sea*, London, 20 January 1914, instead, with the introduction of subsequent amendments, up to the London version, 1 November 1974, reg. 15, provides on coastal states for a duty to provide search and rescue services. This direct state duty is also provided for in UNCLOS, Art. 98 c. 2.

76 Hamburg, *Annex* 2.1.2.1.

77 In particular, regarding the identification of ports to which rescued vessels should be taken: for

opposite scenario compared to the types of areas observed so far, in the sense that while in those the establishment of rights entails the arising of duties, here the acceptance of areas of the extension of a *duty* – moreover already generically contemplated, regardless of its spatial reference – Is understood as establishing rights for the declaring State.

Overlapping legal frameworks are thus created where multiple search and rescue zones exist in the same area, established regardless of multilateral agreements, while where such agreements are reached but provide for areas of *shared* responsibility, the criteria for allocating it are not always made explicit. Moreover, also exclusive economic zones, whatever they are called, and continental shelves – with their functional jurisdictions – may also *overlap*. In reality, taking into account the maximum extensions generally envisaged, there is no stretch of the Mediterranean coast from which this cannot take place[78] and nevertheless, after initial reluctance, coastal States have begun to establish such zones, sometimes containing them in the median line or other agreed limit and sometimes, instead, actually generating overlaps.

It is worth noting that all of the foundational thematic areas of the zones reviewed – the environment, cultural heritage, economic interests, public health, border security, and human rights – are of potential criminal relevance. It follows that the various portions of the sea pertaining to them (moreover, with all the uncertainties that have arisen regarding the extent and reasons for establishing the individual zones) should be considered *subject to forms of sovereignty that are limited*, *ratione materiae*, and potentially unrecognised or otherwise overlapping with that of other States, thus constituting "*in a limited manner territory*" and "*non-exclusive territory*" for the purposes of criminal law as well.

The complexity, however, is by no means finished: in fact, in any portion of the sea on the planet, the *functional* sovereignties of coastal States related to the different areas established coexist with portions of sovereignty related to the international nature of the waters and the different activities that States, including non-coastal States, carry out there. The archetypal site of these intersections is the *high seas.*

the well-known case of Malta, whose search and rescue area extends to overlap Italian territorial waters, Jiménez García-Carriazo 2019; Klepp 2011; van Berckel Smit 2020; Trevisanut 2010; Caffio 2020: 150.

78 See Caffio 2020. 86.

(C) "FLOATING TERRITORY" AND OTHER HYPOTHESES OF FUNCTIONAL SOVEREIGNTY EXERCISABLE BY THE STATE, INCLUDING NON-COASTAL STATE

The high seas, understood as the portion of international waters not affected by the partitions mentioned so far, has traditionally been the space of *freedom*. There both coastal and land-locked States enjoy freedom of navigation, fishing, and scientific research. To this end, land-locked States have the right of transit to access the sea and from the sea[79]. There is, in this sense, a genuine *universal right to the sea.* In the high seas, moreover, each State may construct installations and artificial islands, which however do not constitute portions of its national territory, as well as lay submarine cables and pipelines[80]. Currently, most of the energy and data traffic on which Europe depends passes under the sea. Under treaty law, States may punish as crimes the malicious or negligent damage to cables carried out by *their nationals* or *over whom they otherwise have jurisdiction*, and may provide rules for compensation if the damage is caused by the owner of other cables[81]: this, of course, does not preclude the use of *other arguments* to ground the prosecution of such conduct, such as, for example, the event of damage (in theory, the interruption of public service) having occurred at least in part in the territory, i.e. on land. Typically, moreover, not of only one State. The sea *connects*.

The use of the high seas is reserved for peaceful purposes and any claim to sovereignty over it is considered unlawful[82]. Nevertheless, *even on the high seas*, States exercise their sovereignty on various occasions. The freedom of navigation of States, in effect, is expressed in the freedom of navigation of ships *flying their flag*, exclusively and according to the rules that each State has for that purpose. Traditionally, only the flag State exercises its sovereignty and criminal jurisdiction over such ships[83] and so

79 UNCLOS, art. 125.

80 The issue, after an initial moment of interest in the 1970s, has become topical again with the construction of numerous islands in the Persian Gulf and off the coast of China, but also because of the possibility of using this option to counter rising sea levels. It is thus universally invoked to overcome the current regulatory uncertainty: see again Buccarella 2021; but already Walker 1972; Heijmans 1974; Papadakis 1975 and 1977; more recently Zohourian 2018; Saunders 2019; Persada, Setyawanta, Kusriyah 2024.

81 UNCLOS, Art. 112 ff. The State shall also provide rules guaranteeing indemnity to a person who has lost an anchor, net or other fishing equipment in order to avoid damage to a pipeline or submarine cable.

82 UNCLOS, art. 86 ff.

83 The reference, for the Italian legal system, is to Article 4(2) of the Italian Criminal Code: Italian

it is, with some exceptions, even when they transit the territorial waters of another State[84].

The assertion of jurisdiction, which is established by granting the flag, entails a bundle of rights and *duties* to be borne by the State, including the keeping of a register of vessels flying its flag and any measures to ensure the safety of navigation, having regard, for example, to the periodic inspection of the state of maintenance of vessels and equipment, as well as the technical and *regulatory* competence of the masters, officers and crew on board. The State also has a *duty to* exercise its *flag* jurisdiction in a number of activities that such jurisdiction in effect entails: *opening investigations* in case of accidents, *requiring* the commander to rescue at sea, *preventing* and *suppressing* the transport of slaves, *cooperating* in countering piracy and drug trafficking, *acting* in its own right with regulations for its own citizens and ships flying its flag, and *cooperating* in the remaining cases in the conservation of the biological resources of the high seas[85]. As can be easily noted, these are duties with an eminently *regulatory* content. Specific powers are related to some of them. A warship on the high seas, for example, enjoys *right of visit*, that is, it can board, verify and possibly inspect another ship that flies its own flag, is unflagged or is reasonably suspected of engaging in piracy, slave trade or, under certain conditions, unauthorised transmissions[86].

With reference to all these *required* activities, a large part of which, as seen, is normative activity in the strict sense (or presupposes it), we again speak of *functional sovereignty*: intending by this to exclude that flag vessels constitute *territory*, even though it is clear that the exercise of jurisdiction *depends* on their being physically in a *specific place*, namely the high seas, and that they themselves make themselves the perimeter of a spatial dimension of sovereignty.

In order to conclude the "geo-juridical" partition of the sea, however, it is necessary to carry out – it really had to be said – further *in depth ex-*

ships and aircraft are State territory, wherever they are, unless they are subject, under international law, to a foreign territorial law. This is echoed in Article 4 of the Navigation Code: Italian ships on the high seas and Italian aircraft in a place or space not subject to the sovereignty of any State are deemed to be Italian territory.

84 UNCLOS, Art. 27 and 97. The coastal State may exercise jurisdiction over ships in transit through territorial waters if the consequences of the offence for which it intends to prosecute extend to it or if it disturbs its peace or good order in the territorial sea, if intervention is requested by the ship's master or the ship's flag State, or in the case of illicit traffic in narcotic drugs or psychotropic substances.

85 UNCLOS, art. 90 ff.

86 UNCLOS, art. 110.

ploration. The sea floor, ocean floor and related subsoil, beyond the limits of national jurisdiction, constitute the *area*[87].

The Montego Bay Convention declares that the *area* and its resources are common heritage of mankind and cannot be claimed by any State[88]. For the benefit of all mankind, therefore, scientific research, exploration and exploitation of natural resources, preservation or disposal of archaeological assets should be conducted[89]: to this end, the area is governed by the International Seabed Authority[90]. Contracting States must ensure compliance with the rules governing the area and if they are in breach they are liable for damages caused by their own activities or those of their nationals or those under their control[91].

Of course, each system provides autonomously on the entitlement to act – even criminally – In defence of a global common, and the enforceability against non-contracting States of the immunities and exceptions the Authority enjoys, or the legitimacy of its concessions, for example, of exploitation of the area's resources, does not seem easy to understand. Moreover, it tends to be the case that the law is not deemed constitutive of the *commons*, but is limited, *even retroactively*, to recognising them. Here, then, the area territory comes to constitute a new paradigm, which can be extended to various other portions of the marine environment.

Something is already moving in this direction: the principle of the common heritage of mankind is extended in the High Seas Treaty[92] to all waters not affected by the partitions seen above. Although only a tiny fraction of the signatory States has also ratified the treaty, it would certainly constitute a useful argument by those jurisdictions that, even on their own, would see fit to affirm the nature of the high seas as a common, deciding to

87 UNCLOS, art. 1.

88 UNCLOS, art. 136 ff.

89 UNCLOS, art. 140 ff.

90 UNCLOS, Art. 136 ff. The Authority is the organisation through which States Parties, on the basis of the principle of sovereign equality, organise and control activities in the area, in accordance with the provisions of the Convention and with the powers and functions conferred by it: see Article 157 therein. Activities in the area shall be organised, conducted and controlled by the Authority *on behalf of all mankind*: see Article 153.

91 UNCLOS, art. 139.

92 Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, *Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, New York, 19-20 June 2023.

"take it on", as the courts are doing with the atmosphere in several cases[93].

To the wide range of scenarios illustrated thus far, finally, we must add those in which an event or part of the conduct amounting to an offence with all the rest committed at sea has taken place in the territory of a State (including the floating territory)[94]; those relating to the criminal jurisdiction *ratione personae* that can be exercised against those who serve for a flagged ship, regardless of their nationality, where they are and where the offence has been committed[95], as well as the other cases pertaining to universal jurisdiction, to which to some extent some of the cases reviewed can be traced, but which just as well may concern cases (albeit of particular gravity, in every other respect) that are entirely *common*, in the sense that they are not characterised by any specific *territorial* aspects[96]. Even in all these cases, criminal jurisdiction may be exercised over marine areas, whether they are on the high seas or fall within one of the aforementioned gradations of a State's territory, according to rules recognised in treaties or customary international law, but also only unilaterally affirmed in individual jurisdictions.

5. THE INEXTRICABLE OVERLAP OF CASES OF FUNCTIONAL SOVEREIGNTY AND THE NEED FOR A TERRITORIALLY UNIFIED APPROACH

At the end of this review, the images seem to shatter against each other like the breakup of a wreck on the waves. However, «*In this fluid world without turf or ground, we cannot walk, but we can swim*»[97]. Indeed, the sense one gets from it is no longer the map of a simple Schmittian *Seenhame*, but rather the possibility of observing *in vivo* a complex regulatory environment, within which every decision about the legal, though possibly *appropriative* in its initial intentions or *potestative* in its unrelated assertion, is

93 On the hypothesis of the introduction of climate offences, with ubiquitous commission, Ruppel, Roschmann, Ruppel-Schlichting 2013; Frisch 2015; Nieto Martín 2019; Satzger 2020 and 2021; Satzger, von Maltiz 2021, 2023 and 2024; Nieto Martín 2022; Krell 2023; Burchard, Schmidt 2023; Hellwege, Wolff 2024; Zirulia, Sandrini, Pitea 2024. For critical remarks and further references, be allowed to refer to Palavera 2024b.

94 For Italy, *ex* art. 6 c.p.

95 See *supra*, § 4 (a).

96 See Dodaro 2024a: 26; Dean 1963; recently Micheletti 2009; di Martino 2006.

97 White 1985b: 696 and 1985a: 40. I thank the inexhaustibly valuable Maria Paola Mittica for pointing out this passage.

inevitably transformed into a network of *legal relations* and, consequently, into a *bundle of rights and duties*. Something, in short, much more like Robert Cover's *nomos* [98] than Carl Schmitt's one. These rights and duties are descended from a genuine *ocean* of different legal systems and traditions: they are *plural* in the very conceptions of the basis of normativity and at the same time *enveloped* by a common normative life.

This *impression of unity*, however, requires some reminder of the *state of thinking* on the relationship between territory, plurality and law. First, the dangers of a shortcut that is very fashionable today must be averted. It would be dangerous to think, *atroce calembour*, that the criminal law of the sea could be a *liquid* system. That is, since there is a plurality of legal systems dealing with it, it *progresses* "*case by case*", according to the changing attitudes of the field *forces*, without ever con-*solidating* definite and stable boundaries of what is criminally relevant and what is not[99].

Likewise, credit cannot be given, with outcomes of the same *liquidity*, to the assumption that flag ships are self-propelled particles of territory in the strict sense, such that any State with even only a civilian fleet would have a global territorial extent, with a spotty profile and ceaselessly changing borders. At one time it was said that the vessels constituted the *territoire flottant* of a Nation[100]. Ever since Schmitt this idea of the "floating piece of land" is dismissed as an *evident naivety*[101].

Imagining the intersection of international routes in the horizon of *hypermobile* postmodernity, it would be easy to retort that this perhaps naïve but certainly evocative expression has been let fall into disuse by the scholars too soon: it would in fact be highly contemporary, with the sole clarification that today not manufactured portions of a State's physical territory *do float*, as much as the very concepts of territoriality, sovereignty and jurisdiction to which the regulation of those vessels once *anchored*.

98 See *infra*, § 5 (b).

99 See Paliero 2014; Přibáň 2007 and 2015; Messina 2015; di Martino 2021.

100 Expression to which the normative data remain attached: see *supra*, § 4 (a).

101 Schmitt 1955: 542: «It is not about the difference between settled and nomadic peoples, but rather the contrast between land and sea as fundamentally different possibilities for human existence. It is therefore misleading to speak of nomads of ships and name them in the same way as nomads of horses, camels or other lands. This is just one of many erroneous transfers from land to sea. (...) It is already a transfer from cultivated land to the sea to describe the sea as a highway, and it is obvious naivety to describe a ship *territoire flottant*, a floating piece of land, as found in some legal arguments. The horizon of the world seen from a ship emerges different from that seen from built-up land».

The *new paradigms of mobility*[102] also affect objects, *territories* and – why not? – *laws*. Why shouldn't the sea be governed by a *liquid criminal law*?

This last hypothesis can be dismissed in a few lines. The answer is simple (and *rocky*): the *granitic* principles of definiteness, non-retroactivity, culpability *(sub specie* of knowability of precept) preclude it. Principles, all[103] which pertain as much to the aspect of *guarantees* as to that of *effectiveness of rules*. A liquified penal law of the sea simply does not work. The solution, however, is not as easy to identify. Nor is it, as might likely become necessary, to *build*.

Having acknowledged the systematic failure, in terms of legal certainty, of the *zoning* route and having avoided the unhealthy swamps of liquid law, it cannot therefore be merely apodictically asserted that the sea constitutes a unitary territory in its own right. As it would be superficial to say, without further specification, that the criminal law of the sea is simply a *plural* system. For the simple reason that this would allow *bringing together the problems that have arisen*, appreciably inviting an *overall* reflection, but would say *nothing* about how to solve them. Both issues deserve some more attention.

(A) OPTIONS REGARDING THE CONCEPT OF PLURALISM

In more recent studies on nomadism, which highlight its structural dimension and pervasiveness with respect to postmodern society, we come across a curiosity: the expression *floating territory* is not only used to describe the *art of drifting*[104], but also as an example of the path of *dynamic rootedness* that characterises the contemporary man[105].

This observation also applies to law: the individual on the move (in the physical, relational or even just informational sense) *encounters* different legal systems, writing his or her own personal *legal biography*, which in contemporary experience increasingly draws on a plurality of traditions. The case of migrants, already alluded to[106], is only the weightiest example, but the same could to some extent be said of all seafarers and, perhaps, of every man.

102 Sheller, Urry 2006.
103 For more on the aspect of principles, see *infra*, § 6.
104 Maffesoli 1997.
105 Maffesoli 2007.
106 See *supra*, § 3.

Nothing new, after all, if back in the late 1980s Jacques Vanderlinden pointed out that what *really matters* in the analysis of law is the *individual*, «the point of convergence of the multiple regulatory orders that every social network necessarily includes».[107] He adds, «the reference to a dominant (or even exclusive) regulatory order raises the issue of possible mutual conflicts between them, conflicts of which the individual will be the battleground».[108]. This approach, which founds the subjectivist turn in legal pluralism studies[109], postulates the *ontological impossibility* of a plural legal system[110] and seems to respond, more than a decade in advance, to the proposals formulated in the search for an *ordered pluralism* (moreover, still in nubile expectation of their ordering *totem*)[111], reducing them to nothing more than *renewably monolithic* expressions of non-plural legal systems. And this seems difficult to refute, at least where the stated goal is to arrive at an *enforceable* system of rules with respect to a territory or an amalgamation of sovereign territories.

What can be held to be true, if anything, is the plural nature of the actors interacting in the *construction* and *becoming* of different *legal frameworks*, within the dynamics of which (well in advance of the "discovery" of multilevel systems) the model of circular normativity, legal comparison and studies on "first hour" pluralism had already amply attested to the generative, validative and evolutionary role of individual decisions about norms[112]. With *this* rather reduced meaning, it can certainly be said that the

107 Vanderlinden J., 1989. «Return to Legal Pluralism: Twenty Years Later», in *Journal of Legal Pluralism and Unofficial Law*, p. 149 ss., p. 151.

108 Vanderlinden 1989: 151.

109 Vanderlinden 1989: 153: «Let us now consider the problem from the standpoint of the individual. He and he alone finds himself in a situation of legal pluralism. It is his behaviour which is governed by multiple and various regulatory orders (…) It is he who will have to make a choice between these mechanisms in determining his behavior. It is at his level, that which so many political theorists somewhat complacently call the basis, that a possible conflict in socio-legal regulation will acquire its full meaning. Thus instead of looking at the legal pyramid from the top, from the centres of decision, from the standpoint of power, one is brought to contemplate it at the level of ordinary men
in their daily activities».

110 Vanderlinden 1989: 154: «the idea of a pluralistic legal system is impossible. What we (...) have hitherto considered as "plural" or "pluralistic" legal systems are in fact unitary systems which "recognize" special rules for specific persons and/or purposes (...). This was the typical colonial situation (...). Retaining the idea of a "pluralistic" system can only be a source of confusion».

111 Thus Paliero 2014: 1106. The reference is to the "ordering" logic presented in Delmas-Marty 1982 and 2008. For a critique on the human rights route as an ordering category, Bartoli 2012; Meccarelli, Palchetti, Sotis 2014.

112 And even before that Carnelutti 1957: 7 and 1951: 201.

criminal system of the sea, *like any other legal* system, is a *plural* system. Just as it can be said that the *man overboard* is in a *subjective* condition of *criminal pluralism*, in the sense that it is disputed, and disputed is the judgment on his conduct, among various jurisdictions: some of which might provide for such conduct as an offence. As can be seen, the concluding picture that would be drawn from this approach is rather far from the one sketched by Cover just over a decade earlier[113].

Assuming what has been summarised above as the "received vision", however, reflection on the sea generates a number of further questions. First of all, the postulate of the impossibility of plural legal systems does not seem incontrovertible where *several* (albeit perhaps different) sovereign jurisdictions or *no* sovereign jurisdictions (i.e. in the cases of *overlapping* jurisdictions and *lack of jurisdiction*) exist simultaneously on a territory[114].

Moreover, on the assumption that nation-states and supra-state bodies also make *decisions about law in* such cases, it is not quite clear whether their normative actions can be read in terms quite similar to those posited in Vanderlinden's "non-plural" systems, that is, essentially in a dichotomous scheme, in which institutional actors pose as normative agents (if not necessarily superordinate[115], at least) unitarily *"receiving"* with respect to multiple "tributary" normativities.

Finally, the implications of such peculiarities not only on *observed* processes of normogenesis, but also on *potential* ones (i.e. on reflection, as it were, *de iure condendo*) remain unfathomed. The three questions are all about the relationship between criminal law and territory, which must therefore be considered.

(B) OPTIONS REGARDING THE CONCEPT OF TERRITORY

Some older stereotypes inferred from the desire for non-appropriation with respect to the physical territory a poor sense of community, identity and belonging: the kind of stigma by which, to remain in the nautical sphere, the ancient Romans intended to mark distance from the *piratae*[116]. Such views

113 See *supra*, § 5, e *infra*, § 5 (b).

114 This is, in a nutshell, the definition of *complex territory* that is assumed for the purposes of this paper.

115 On the persistence of hierarchical structures in so-called 'horizontal' legal models, let us refer to Palavera 2018: 132 ff.

116 Chadwick 2018. See also Franchella 2012: 159 ff.

can be said to be entirely outdated: on closer inspection, indeed, belied by many historical or present examples of undoubted communal and identity strength, early Jewish law and its development in the Diaspora, the legal traditions of Roma, Sinti and Caminanti, the tribal systems of the nomads of the Sahara. In addition, sedentary peoples can be found who also exhibit a relationship with the land that is not strictly traceable to paradigms of *possession* and *sovereignty*: some Arctic peoples, Native Americans and other sedentary groups, although sometimes more directly influenced by contiguity and economic relations with nomadic societies. Without belabouring the point, then, there is no doubt that law can exist without a territory in which to assert itself, just as it can assert itself in a territory without a prior claim to *dominion* over it[117]. In this extended horizon, any spatial area to which a specific normativity refers can be said to be a territory in the legal sense.

Reflection on the sea, however, involves a further step. There are, as we have seen, normativities that do not depend on a territory. Do there also exist, then, conversely, authentically *territorial nomoi*, that is, which a specific territory has generated or at least whose development it has significantly determined by being its host?

The question, suggestive in itself, reverses the approaches usually taken by *Critical Legal Geography* and the other strands of scholarship inaugurated with the advent of the *spatial turn* in legal research[118], which remain devoted, in almost all cases, to investigating the ways in which *law* affects the conformation of *space* and only much more rarely the reverse interferences.

It would be misleading, however, to consider the two categories of *nomoi* – those enfranchised from territory and those that are territorial "in the strong sense" – as antithetical. Both, in fact, disregard the *assertion of dominance* of law over space. For this very reason, it is not surprising that a hypothetical reconstruction of criminal law of the sea as a territorially connoted law might benefit from the observations on *nomos* by Robert Cover, who, combining his experience as a *common law* jurist with his Jewish heritage, treats with absolute familiarity the idea of legal systems *that do not possess a land*.

117 For a global and contemporary reflection on the relationship between territory and domination, Irti 2006.

118 *Ex plurimis*, Raustiala 2005; Blank-Rosen-Zvi 2010; Delaney 2010; McMillan 2016; Zumbansen 2023; for the integration of time aspects, Farmer 2010; Pecile 2023.

In his thought, as is well known, each individual lives in a *nomos*, «a normative universe»[119]: the «varied and complex materials» that compose it «establish paradigms for dedication, acquiescence, contradiction, and resistance» and are not just «bodies of rules or doctrine», but «worlds to be inhabited»[120]. Up to this point, the proposed model seems to be in line with the already mentioned idea of *legal biography* as a source of an individual's *decision-making architectures* about norms, but also with the Vanderlindenian image of a person as a *battlefield*, contested in a plurality of conflicting regulatory systems[121]. Cover's perspective, however, has two significant differences from the subjectivist pluralism approach.

First of all, every *nomos* is inherently *shared*, even the unrepeatable *nomos* of a single individual, but Cover's *nomos* accommodates not only individuals but also legal systems, determining a value dimension for them: «a great legal civilization is marked by the richness of the nomos in which it is located and which it helps to constitute»[122]. Moreover, Cover shows that he is acutely aware of the oppositional dynamics that fuel the selection of norms in systems and describes them, especially with reference to the case-law sphere, as *violent* forms of *nomos suppression*. However, he believes that this hypothesis is only *one* of the possible evolutionary options of *nomos* and, precisely, a *pathological* drift of it: to use his words, it's *juspathic*[123]. The *evolutionary mode* typical to *nomos*, on the contrary, is underpinned by a *unitive tension*: its foundation is not domination, but *belonging*; its driving force is not fear, but the *sharing of a telos*[124].

What consequences for the idea of territory? In Vanderlinden's approach, a territory could be defined as the perimeter within which the individual is subject to one or more of the conflicting legal systems. It constitutes a contingent factor in the individual's experience of pluralism, in the sense that an individual can escape a legal systems by physically abandon-

119 Cover 1983: 4.

120 Cover 1983: 6.

121 See *supra*, § 5 (a).

122 Cover 1983: 6.

123 Very explicitly, it is stated that case-law reduces the richness of the nomos, since it is pronounced by «people of violence» and, «because of the violence they command, judges characteristically do not create law, but kill it»: in front of the «luxuriant growth of a hundred legal traditions», they «assert that this one is law and destroy or try to destroy the rest» (Cover 1983: 53). See also Post 2005: 11, for which Cover describes a situation in which judges «do not create nomos», «they do not call into being a narrative world of right and wrong», but, «instead use the force of the state to crush the competing nomoi».

124 Goldoni 2008: 10. See also Cover 1983: 16, for the description of paideia as «an etude on the theme of unity», whose «primary psychological motif is attachment».

ing a territory or by affecting the legal premises of his or her subjection to a jurisdiction abstractly applicable in a given place. Although it can certainly not be said that the territory thus understood constitutes an irrelevant variable with respect to the legal status of the subject, it is difficult to recognise it, even if only in power, as playing an active role in the processes of origin of the law, of which it represents, if anything, an acted component.

In Cover's perspective, on the contrary, a territory is the space – perhaps not necessarily physical and certainly not physically determined by a *domain* – In which the materials for the building of a *nomos* converge. In this view, *territorial* legal systems "in a strong sense" can well be imagined. Without in any way seeking to artificially attribute a legal subjectivity to the territory or to postulate some other form of normogenetic agentivity, it is rather easy to note that the characteristics of a space certainly play an active role in the construction of that *nomos* which in it is posited as the *normative abode* of the individuals and civilisations that inhabit it.

Where it is a physical environment, its very naturalistic peculiarities will exert a significant influence on *nomos* from the earliest moments of its development, propitiating and reinforcing in the target communities both a sense of belonging and an awareness of shared *teloi*. This interaction of the land with human (including legal) workings then determines its anthropc characteristics, which also contribute to an environment conducive to the complexity of construction of law. And it is precisely under this dual profile, anthropic and naturalistic, that the sea has been seen to be a candidate as the setting for a *nomos* of unparalleled richness and cohesive power[125].

(C) THE CRIMINAL LAW OF THE SEA AS A TERRITORIAL SYSTEM "IN THE STRONG SENSE"

The normogenetic drive exerted by the marine environment is enhanced by multiple factors. For example, the dual connotation of the sea as a place of danger and as a source of life for humans is certainly remarkable. Technological progress and advances in scientific knowledge have only confirmed and sharpened the awareness, on the one hand, of the need to preserve this essential resource for humankind and, on the other, of the necessity of the supportive communion of information and means to manage its risks.

125 Traits of *normogenetic peculiarities* of the marine environment are found in Harrison 2011; Braverman, Johnson 2020; Hestermeyer *et al.* 2010; Klein 2022; Matz-Lück, Jensen, Johansen 2023; Andreone 2017.

The historical and cultural arguments, after all, are superabundant. Despite the millennia-long history of naval raids and wars, a certain entrenchment of the idea of the sea as a territory not entirely amenable to appropriation has fostered the establishment of practices of negotiating normativity that are prodromal to a legal culture of dialogue. After all, borrowings from maritime law, such as Roman borrowings from the *lex Rhodia de iactu* or *fenus nauticum*, of Greek origin, are well attested historically[126]. Also not to be underestimated is the finding, almost ubiquitous in the cultures of all coastal peoples, of a genuine sense of belonging of seafarers to the sea, often prevailing over citizenship itself, peculiarly accompanied by a convinced profession of freedom and nonetheless characterised by a strong *commitment* to the *rules of the sea,* which each one explains according to rationalisations that are also quite different from each other (from the will of the gods to international customs, from the teachings of the fathers to the ISO 9650 standard), but with outcomes of identical perception of the cogency of the rules, widespread blame for transgression and substantial spontaneity of compliance. To all appearances curiously, then, Hobbes would have chosen for the image of unity in law not the *behemoth*, but the *sea* beast of Leviathan, turning the members of the social contract into scales so still glistening with water that it comes naturally to anyone to imagine that actually terricolous ruler the vigorous fins barely hidden beneath the frontispiece[127]. And it seems no coincidence that from the adventures of Wolf Larsen to those of Billy Budd and Captain Ahab, nautical-themed works are favoured in *Law & Humanities* studies[128], as if they were able, better than others, to convey the heart of that approach to the theme of justice: the capacity of the imagination to bring out the *possible common* from the plurality of the human.

It seems, in short, that the sea more than any other territory has the ability to induce peoples to *share* their *nomos*. What is most striking, however, is the *richness* and *variety of* constituent materials that the maritime *nomoi* bring together. Even confined to the coastal overlooks of Europe, this abundance is evident.

Looking east and south, legal traditions of Latin origin meet those of Maghreb, as well as Near and Middle Eastern ones, including religiously

126 Chowdharay-Best 1976; Pontoriero 2021; Aubert 2007; Ignjatović 2019; Candy, Ferrándiz 2022; for influences on subsequent law, Zalewski 2016; Ferrándiz 2017; Addobbati 2023.

127 Hobbes 1651.

128 Harris 20064; Rognoni 2014; Visconti 2014.

derived legal systems with extensive legacies from Islamic and Jewish law. The northern marine space, in the landscape and geopolitical uniqueness of the polar areas, involves, along with the legal culture of the Euro-communitarian north, the subject of increasing attention among scholars, the legal systems of the Asian and former Soviet area, the major *common law* regimes, and the traditional normativities of the Arctic peoples not organised into States. Toward the Atlantic, then, the cultural breadth becomes truly oceanic and touches on the not always irenic variety of West African rights, as well as the most classic North American pragmatic and ideological approaches, heavily oriented to trade and security aspects, and all the way to the contributions of indigenous cultures to South American environmental constitutionalism.

In this sense, the sea really becomes a *paradigm* of complex spaces: virtual places[129], polar regions[130], atmosphere[131], *outer space*[132]. Humans have dealt with them by experimenting with very different normative approaches, but none of those territories has been as capable as the sea of *putting itself at the service* of human normativity by *bringing nomoi together.* Therefore, it can stand as a candidate for a *leading case* in territorial criminal law research. Without fear of being accused of radical pluralism[133], Robert Cover places a recommendation as seal of his most famous writing: «We ought to stop circumscribing the *nomos*; we ought to invite new worlds»[134]. Well, no territory more than the sea has demonstrated the ability to respond to this call.

129 The literature is endless. For more pertinence to the subject of territoriality, the following should be noted Završnik 2010; Koops 2012; Hildebrandt 2013; Schmitt-Vihul 2016; Bantekas 2017; Tsaugourias 2017; Münkler 2018; Terentyeva 2022; Burchardt 2023; Willmer 2023; Zumbansen 2023.

130 The topic, certainly not new and still largely unresolved, is gaining topicality with increased navigability, geopolitical centrality and the opening of new routes. Among many McKitterick 1939; Bilder 1966 and 1980; Auburn 1973 and 2002; Wilkes 1973; Hook 1978; Cosslett 1983; Machowski 1992; Oude Elferink-Rothwell 2001; Chatham 2010; Rothwell 2012; Bertovsky-Klebanov 2019; Molenaar-Elferink-Rothwell 2013; Kaymer 2020; Myhrer 2020; Joyner 2021.

131 See *supra*, n. 92.

132 See. Gorove 1972; Ratner 1999; Seshagiri 2005; De Roos 2006; Hermida 2006; Oduntan 2011; Chatzipanagiotis 2016; Ireland-Piper-Freeland 2020; White 2021; Mehta 2023; Soroka 2023; Sachdeva 2023.

133 Goldoni 2008: 3.

134 Cover 1989: 68.

6. SOME NOTES FOR RESEARCH AND INCLUSIVE DEVELOPMENT OF THE CRIMINAL NOMOS OF THE SEA

Summing up, what does it entail to consider the sea as a *unitary, territorial criminal system in a strong sense*? And take its *nomic richness* seriously? First, it is necessary to note that at present the hypothesis of a unitary criminal system of the sea remains far from uncontroversial. On the other hand, if it is difficult to avoid noting the failure of the taxonomic model, moving to a unitary model would imply a paradigm reversal.

In the taxonomic model, it seems impossible to rule out overlaps between the different sovereignties that can be exercised, and the problem is basically figuring out *who has the right to intervene*. Although the entire system of zoning is geared toward propitiating policies of prevention and protection, as well as every act constituting a territorial partition in that system is generative *of bundles of rights and duties*, even in the hands of States, constituting authentic *nomoi*, its enforcement is actually concentrated at the moment of enforcement, like all "*living*" law.

Thus, o*rdering* the pluralism of the sea, from this perspective, means prioritising one legal system among many, according to the various criteria available. Which, on the one hand, are not always universally agreed upon and, on the other, tend to favour the system that has provided a criminal (or at least punitive) option and is inclined to apply it. In some cases, the concrete solution could be made to depend on the speed of activation of one legal system over another, or the extent to which a State has reserved the right to exercise its sovereignty. Generally, in short, *criminal law first*. Is this approach justified? Can it be said with certainty that the system that *punishes* (that *punishes the most*) is always the *most advanced*?[135]

Considering the sea as a unitary criminal system entails respecting the *extrema ratio* with reference to, precisely, *that* territorial system. If stating that «without criminal policy there can be no criminal law»[136] encourages the pursuit of common criminal policies, the circumstance that a people, a tradition or simply a legal system, after receiving all the necessary information, nevertheless decides *not* to come to incrimination options should be held in the highest regard. One should, in other words, avert the risk that *leaps forward* for penalty, already truly uncommendable where enacted by a State within its own border perimeter, go on to reenact in com-

135 For everyone, Eusebi 2016b: 287 ff.

136 Eusebi 2015.

mon and complex territories the old *cannonball cast* with which the era of sovereignty over the sea was inaugurated.

Moreover, it is interesting to reflect on the rule that one should not «introduce an incriminating case (nor change it in *malam partem*, including in terms of sanctions) if first – in order to pursue the preventive objectives one would like to entrust to it – a reliable criminal policy strategy has not been prepared, involving the other sectors of the legal system».[137]. When applied to a complex territory in which several States operate simultaneously, this requirement of *prior activation* can only be deployed at the systemic level. A State wishing to arrogate to itself the right of "muscular" intervention in a common territory would have to demonstrate that it has put in place pre-penal preventive policies on *that* territory: which likely also implies providing economic, logistical, technological and informational support to those States that have expressed interest in a common preventive policy but lack the resources to implement it.

Turning then to the time when a crime is to be ascertained and liability is to be attributed, considering the sea as a unitary criminal system may offer some useful hermeneutical pointers. For example, needs of *overall* consistency of the *nomos* certainly speaks for a universal value of justification causes, regardless of their recognition in the system that is actually proceeding[138]. Of course, asking questions of general consistency brings to the surface critical issues that are *uncomfortable* and yet *salubri*ous to cope with. For example, regardless of what types of *model seafarers* the interpreter may create, and regardless of how many laudable efforts a legal system may undertake to make related protection duties *knowable* in advance with regard to the entire marine territory, it seems clear that there are concepts of *consented nautical risk* that do not take such provisions into account at all. In addition to the problem of the disconnect between *standards* of care accepted in the communities of reference and what they consider really *unacceptable* from the point of view of criminal relevance – a reflection that should be made for many areas of *land-based* negligent liability – we find in the criminal system of the sea the profound divergences from distant legal cultures in the very concept of risk: in its perception, in the activation of practices for its reduction, in the social validation of

137 Eusebi 2016a: 1682.

138 The subject was dealt with for the supranational source hypothesis of the permissive rule: See Marinucci 2011; Palazzo 2011 and 2009; Donini 2009. It reconstructs supranational principles as *limits* to the exculpatory effect of the permissive rule Viganò 2009.

judgments of acceptability, and in the reactive experience of adverse events that might occur.

In any case, in order to engage in serious reflection on these issues, the question to be asked should not be *who has jurisdiction*, but rather *what is the most appropriate path* to construct, relating to the facts, at least *shared narratives*[139]. So that the oppositional environment, which is already usually unsuitable to creating the best *chance* of bringing the truth to light, does not find itself further exacerbated, for example, by the mere lesser or greater familiarity of party lawyers with the judging system. Or the outcome of the judgment is not found to be pronounced already under the conflicting stigma of a non-inclusive identification about *which sole* authority had the *right* to proceed.

This is all the more true, of course, when the sea itself is the injured legal asset. *Ocean victim!* How many communities need to be involved for it to be considered truly represented? And in what ways? Reflection on the sea might ask criminal law, in the global dialogue, to find *new models*[140]. Within which to engage in a dialogue not only with respect to the offender's reprehensible conduct, but to the possible co-liability of the broader parts of the community that can be involved, including liability for not having made sufficiently clear, shared and compliant the regulatory content then transgressed. The dimension of *commitment* that Cover ascribes to the hermeneutic moment[141] and, at the same time, the vulnerary potential of the process as a collective experience of *nomos* regeneration would then emerge clearly.

The construction of the criminal *nomos* of the sea, moreover, can only continue along these lines also for the next phase of *response to the crime*, that is, the instruments aimed at contributing to the goal, as far as possible, of victim compensation and offender reintegration. Suffice it to think of the coexistence of different approaches even within the *universal* framework of intent of pacification[142]: think of value-neutral conduct, such as the monetisation of damage through compulsory insurance, or of exquisitely interior elements, of *moral* depth as it were, such as *repentance*, with respect to the evaluation (or the very admissibility) where individual

139 *Ex plurimis*, Eusebi 2010; Visconti 2016; Mazzucato; Mannozzi, Lodigiani 2017.

140 Boin Aguiar, Salm, Roncada 2020; Hamilton 2021; Almassi 2020; Hall 2013; Marotta 2023; Aa.Vv., 2016.

141 Cover 1989: 7 ff.

142 Mazzucato 1999.

legal systems can manifest even significant differences[143]. Wherever, on the contrary, any endeavour that is designed in close correlation with the *ontological* dimension, in the dual *material* (in some cases one might even say *naturalistic*) and *value* aspects, of the offence concretely perpetrated would be likely to show itself capable of channelling the appreciation of the most disparate legal sensibilities, responding to that shared *telos* which alone can legitimise the response to the offence[144].

Again, the vocation of criminal law to «drive out every speaker»[145] opens itself to options that can best represent *all* the legal traditions that the sea *gathers*, while unitarily respecting their plurality. This, at the methodological level, might require incorporating into research practice the evaluation of an unusual parameter for criminal systems: the degree of their *inclusiveness*,with regard not so much to victims or offenders, but rather their *nomoi*, the legal traditions of which each is the bearer within a community. Because «*quando o viajante se sentou na areia da praia e disse: "Não há mais que ver", sabia que não era assim*»[146].

143 For everyone Eusebi 2013.

144 Osserva Siracusa 2023: 13: «law approaches justice when it is oriented towards a strong core of rationality, capable of transcending the particularism of legal systems».

145 Forti 2007: 307 ff.

146 Saramago 1985: 233.

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