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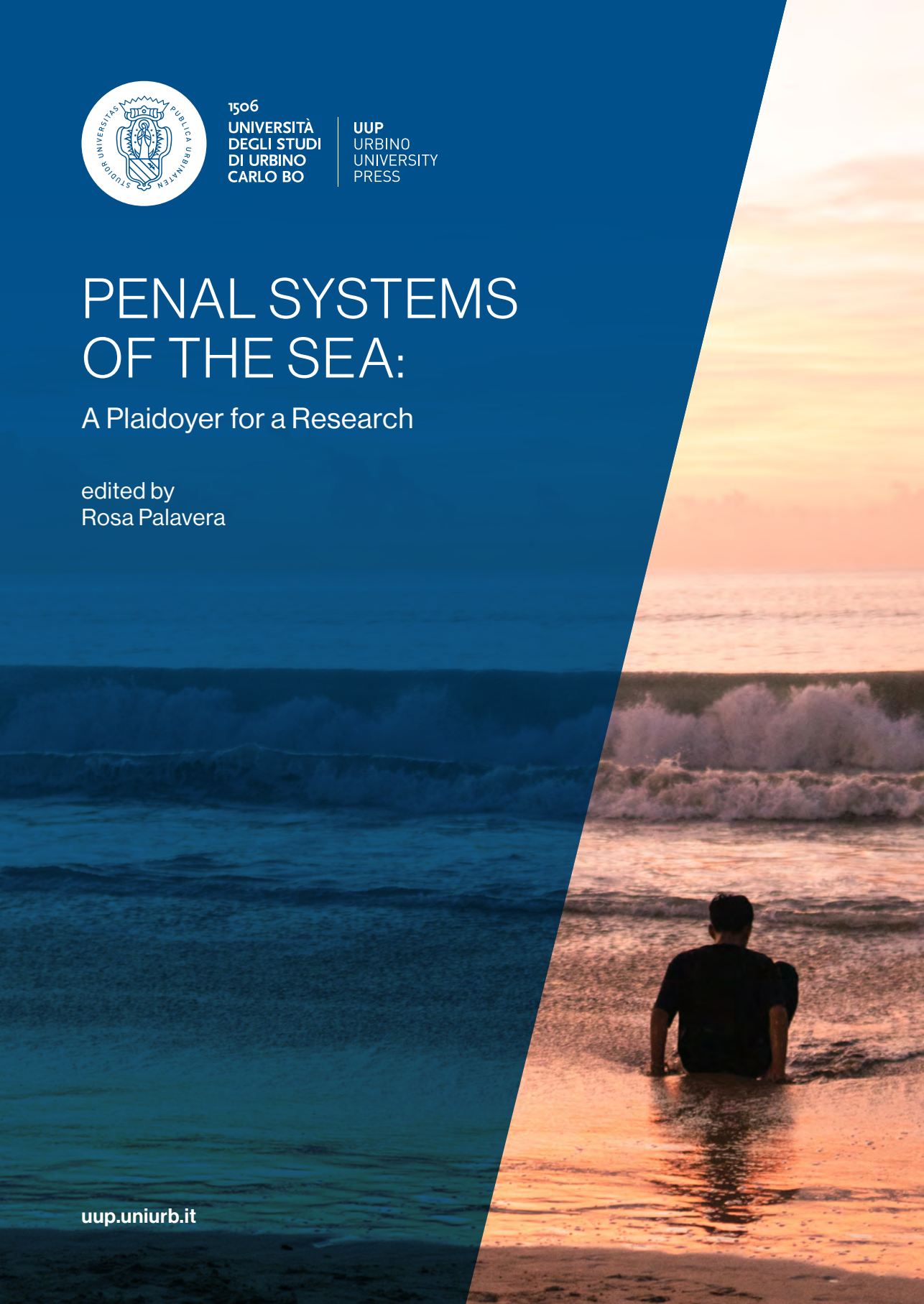
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PENAL SYSTEMS OF THE SEA:

A Plaidoyer for a Research

edited by
Rosa Palavera

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edited by Rosa Palavera

Studies and notes following the meeting Penal Systems of the Sea: "Liquid Law" or Hard Case?,
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SOMMARIO

INTRODUCTION	15
Luciano Eusebi	

LESSONS FROM TSUNAMI

BLACK SWANS AND GREY RHYNOS	21
Alessandro Amato	

IMPROVING PEOPLE'S SELF-PROTECTION BEHAVIOUR TO ENHANCE COMMUNITY RESILIENCE TO TSUNAMI RISK	47
Lorenzo Cugliari	

NOTES FROM JURISTS

THE CRIMINAL LAW OF THE SEA: SOURCES, RULES, SUBJECTS, TERRITORIALITY.	73
Stefania Rossi	

PROTECTING SEA ECOSYSTEM FROM TSUNAMI RISK AND FROM RISK OF MARINE POLLUTION IN THE INTERNATIONAL LEGAL FRAMEWORK	89
Cecilia Valbonesi	

MULTILEVEL NORMATIVITY OF MIGRANT SEA RESCUE BETWEEN STATE DUTIES AND INDIVIDUAL GUARANTEE POSITIONS	139
Filomena Pisconti	

DEEP WATERS	159
Rosa Palavera	

GIFT FROM A PHILOSOPHER

MY SEA	221
Luigi Lombardi Vallauri	

INTRODUCTION

Luciano Eusebi

Università Cattolica del Sacro Cuore

The sea: almost a metaphor for the human condition. We know its surface, but very little of its depths. And yet, even in those depths we delve: sometimes cautiously and groping around, until we encounter some manifestation of life that we would have supposed to be completely improbable; sometimes making those abysses a mere object of human intervention, without investigating anything more than things regarding that purpose: and this is the case of the drilling in a seabed that hides some useful resources or the laying of an underwater cable.

As happens with intersubjective action, the sea unites and divides. It has favored encounters, ever since we began, in prehistoric times, to ride its waves: which, by their very nature, are refractory to boundaries. After all, today most trade passes through the sea. However, the sea has also supported the ships of slave traders and of colonialism. And it continues to host, much more than yesterday, terrible floating war machines.

The sea, like man, gives life and gives death. Water has been the womb of life and marine waters offer nourishment (given that towards its inhabitants – excluding whales, dolphins and turtles – there seems to be less care than for land animals in general). Those waters, then, rise up among the clouds, and from there make fecund the aridity typical of the earth. At the same time, however, the sea can lash the coasts, fuel hurricanes, take on the terrifying force of a tsunami. And also transform itself into a liquid cemetery without gravestones for those who, precisely through the sea, try to open a less painful page in their life: although it would be truly hypocritical, for such a tragedy, to blame the sea.

It is also feared – but the causes are all human – that the water levels could rise further, so that the sea could even swallow up some flat island state; that salinity would give less and less space to fresh water; that the marine environment, used as a planetary dump, ends up being deprived of that biodiversity that is truly fundamental for the planet to remain hospitable to man; that the overheating of the sea upsets the climate, making

atmospheric rhythms and the biosphere itself increasingly less allied to human life, and also spreads marine species that infest areas outside to their original habitat.

And yet, with respect to the sea – that is, with respect to the work of man in the sea, to the risks of altering its stable multi-millennial conformation, to the very need to counter its force when it becomes dangerous for man – a systemic legal approach appears to be completely lacking. Legal systems have considered the sea in a fragmented way (with the exception, in part, of the right to navigation), depending on the contingent needs of individual States and without an overall vision, to the point of having to note overlaps between the claims of dominion or control over certain portions of the sea, or over the ships that sail it, between different countries. Remaining somewhat undetermined are the obligations and any controls regarding, for example, action in the *high seas*, with connected problems relating, above all, to polluting conducts or some sabotages of cables or pipelines.

It is a fragmentation of the juridical presence, that which has been observed so far on the topic, which, however, may not even be entirely negative, as it is susceptible to allowing new regulatory methods compared to the classic ones pertaining to individual States or deriving from conventions or agreements of mere balancing between the most immediate interests at stake.

It cannot be overlooked, in fact, that the interest of legal systems for the sea has often appeared to be aimed, even before that at the regulation of specific activities, at appropriate certain spheres of exclusive competence (of control, fishing, exploitation of underwater resources and so on).

Nor should it be forgotten that portions, at least, of the sea or its depths, as can be said, approximately, of the Antarctic polar zone and the high seas, have not yet been absorbed by the law of individual States and could constitute an embryonic area for what - when the bloody absurdity of the destructive disputes that inflame this small, fragile fragment, in which we live, in the immensity of the universe is understood (that fragment, wrapped in the blue of the sea, whose spherical objective unity has struck all astronauts, that is, its only observers from outside) - could perhaps, one day, constitute the law of the earth.

Not that the premises are exciting: when we talk, in some ways in parallel, about space law, including the celestial bodies – the moon and Mars – of the closest, probable “conquest”, the divisive dynamics in line with the interests of the most powerful seem to be reproduced, dynamics

which risk being reflected in the legal structures that, in this regard, will be further composed.

And yet, indicating new paths, open to forms of shared management on the international level of what – the sea – is undoubtedly a *common* (not immobile, fluid, pervasive of the entire planet), is the task of legal scholars: who must be able to be proactive, or even prophetic, and not just exegetes.

It is precisely in this perspective, therefore, that I would see the meaning of this collection of studies. Humble, if you like, but aimed at making a contribution so that the theme of the sea becomes a non-secondary question – and paradigmatic for future general evolutions – in the legal horizon. According to a multidisciplinary sensitivity, such as the one proposed here, which starts from the knowledge of phenomena, both on the physical-naturalistic level, and on that of the human activities involved.

It is not a matter of introducing mere prohibitions, or identifying, as per tradition, in the use of prohibitions having criminal relevance the solution, often only symbolic, to the problems.

Rather, it is a matter of identifying the assets to be safeguarded and promoted, of sorting the technical tools available for this purpose and of organizing, in the most engaging ways (in countertrend compared with the contemporary crisis of organizations of global relevance), the necessary means and behavioral criteria for the sea to not be yet another terrain of conflict, but a resource, *erga omnes*, of well-being and peace.

Only on this basis will it be possible to also think about the consequences of any conduct that is disharmonious with respect to such a kind of intentions: privileging active instruments of restoration, in conformity with a model of justice that is not interested in creating new antagonisms through retaliatory acts, but rather in constantly striving to make just, among all the subjects involved, relational modalities that have not been so.