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CYBERSPACE AND THE SEA. THE METHOD OF REUNIFICATION OF MARITIME LAW AS INSPIRING MODEL FOR INTERNET REGULATION

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1. The Internet and Cyberspace: regulation hypotheses

The Internet, according to the inspired and often quoted definition expressed in 1996 by the United States District Court for the Eastern District of Pennsylvania in the matter American Civil Liberties Union, et al., v. RENO, "*is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.* […] *The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment.* […]
From its inception, the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. Among other goals, this redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war. […]
No single entity – academic, corporate, governmental, or non-profit – administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."[1]
The Internet corresponds to Cyberspace, i.e., according to an evocative and effective vision offered by Italian Scholars, a telematic space which stretches around the earth as an over-world, an epidermis, in which the individual who 'navigates' does not move from one place to another, does not leave one land for another, but moves in an indefinite energy field[2].
The advent of the Internet and of the digital era has revolutionized the habits of the contemporary man, projecting him into an ultra-individual dimension, which increases his faculties. Thanks to the Internet, individuals now communicate, meet, use goods and services and organize a great part of their common daily activities in a totally different way compared to the past.
Therefore, economy and society have been strongly influenced by it. Let us think, by way of example, about e-commerce and about how consumer goods – also low value ones – are now sold on an international scale, allowing this form of trade to reach consumers who may be also very distant from the seller, without them necessarily being aware of it.
The phenomenon of social networks is also very significant: by allowing an exchange of information and personal opinions with an abstractly indefinite number of recipients and by diminishing spaces and role of the traditional forms of communication, they broaden the contemporary *agorà*, posing legal issues which demand original solutions.

[1] United States District Court for the Eastern District of Pennsylvania, June 11, 1996, American Civil Liberties Union, et al., v. RENO, an excerpt of which may be obtained at www.aclu.org/technology-and-liberty/decision-aclu-v-reno-trial

[2] IRTI, Norma e luoghi, 61, and further references therein. On the contrary PICA, Internet, denies the existence of cyberspace: according to him the Internet is neither a place nor a space, but only a method of hypertextual communication allowing access – and hence exchange – of digital contents on computer networks connected to the Web through such hypertextual modality. In this perspective, the physicality of the Internet contents, i.e. of the information which may be found through the Web, would consist of the structure of each file, and would hence be spatially rooted in the computer in which the file is located

This revolution takes place by virtue of the peculiarity of cyberspace, where the temporal and spatial dimensions are organized according to categories which are different from the traditional ones and which compel the jurist to rethink the classical categories of law. From a private international law perspective, the application of the traditional connecting factors becomes problematic in the face of the delocalization of subjects, of actions and of their effects implied by the definition of the Internet itself and by its functioning: the information spread via the Internet follows, through "*packet switching*" communication protocols, routes of uncertain traceability; the number of recipients of the materials which are uploaded on the Web is abstractly indefinite, since they may be obtained by whoever has an Internet connection; the place, where the person is imputing information on the Web, may be easily concealed through various forms of anonymization.

From the substantive point of view, the traditional legal institutions at the basis of law are being questioned: such is the case, for example, with the right of property, which is being partly substituted by the right of access, by virtue of the substitution of the traditional markets by the networks[3]. The Courts are in turn called upon to adjudicate disputes – mainly concerning personal data protection on the Web[4] (and the adequacy of the laws in force to safeguard them[5]) and the protection of intellectual property[6] – which witness how the law makers struggle to keep up with the changes brought by the advent of the cyberspace.

It is not so much the immediate subject matter of those disputes which is striking, but the fact that they, explicitly and implicitly, denounce not simply the violation of the existing laws, but also the inadequacy of the latter in providing satisfactory answers to the critical issues faced by changing society.

Indeed, positive law is always subject to transformation, imposed by the need to adapt to social changes. However, in the Internet era, this seems even more evident and faster, also due to the fact that laws in the time of cyberspace are no longer called to govern phenomena which may be contextualized in a space which is cohesive from a territorial, political, linguistic and, more widely, cultural point of view, as is typically the case with national space. Laws are instead now called upon to operate in a context in which, due to the need to establish shared rules outside the limited national borders, the validating role of territory and space is radically questioned.

To this concern it has in fact been effectively maintained[7] that the advent of cyberspace has questioned the persisting validity of the concept based on Fichte's philosophy, according to which the "*validity*" of a law is rooted in a spatial and temporal determination of its effectiveness, by favouring Kelsen's view which seeks the validating dimension of the law in the procedural rules which oversee its formation, confining the territorial aspect to a mere indicator of it.

The above is the background consideration to the identification of Internet governance systems.

According to Italian Scholars there seem to be four systems which may be abstractly used to govern the Internet: (i) applying the law in force, be it national statutes or international conventions; (ii) applying the law in force with the adjustments needed to adapt it to the legal

[3] DI CIOMMO, La responsabilità civile, p. 552, footnote n. 12, and references therein

[4] European Court of Justice, May 13, 2014, C-131/12, Google Spain SL *et alii* v. Mario Costreja Gonzalés *et alii*

[5] Irish High Court, June 18, 2014, Schrems v. Data Protection Commissioner, http://www.europe-v-facebook.org/hcj.pdf

[6] European Court of Justice, July 3, 2012, C-128/11, Unisoft GmbH v. Oracle International Corp.

[7] IRTI, Norma e luoghi, 41 ss

phenomena which occur in cyberspace; (iii) applying the *Lex Informatica* or (iv) subjecting the Internet to the principle of freedom (or anarchy), thus not applying any rule to it[8].
The international debate on which is the best system is intense. Among the protagonists of this confrontation I would like to mention ROSSELLO[9], who reaches the conclusion that the most appropriate way could be that of innovating the existing laws and their sources, with the aim of adapting them to the legal phenomena which take place in cyberspace, in order to achieve a balanced mix between instruments of authoritative regulation and conventional rules ("controlled self regulation").
The Author, in particular, lists the existing sources which are relevant with regard to the Internet phenomeon. He first analyses the so called *Lex Informatica,* i.e. the body of technical rules which, according to some, could govern not only the data transfer modalities but also the substantive relations which occur via the Internet, but which, according to others[10], has the limit – which derives from it being a private law regime – of not having any effect in the jural sphere of those who are strangers to that agreement.
The Author then lists the provisions applicable to the Internet and e-commerce contained in the international Conventions and in the instruments of supranational law[11], in the EU Regulations and Directives[12], in self regulation, in soft law[13], in the *lex mercatoria*, in arbitration case law, in contractual practice and in usages.
The limited length of this work might be insufficient to formulate a carefully pondered hypothesis on which system could better govern the Internet and cyberspace. However, an analysis of the similarities between cyberspace and the sea and a brief description of the route followed by maritime law to pursue a satisfactory regulation of the relations of public law and private law which occur at sea may be useful for such purpose.

[8] ROSSELLO, La governance, 52 ss.; in similar terms DI CIOMMO, La responsabilità civile, p. 553

[9] ROSSELLO, La governance, 52 ss.

[10] DE MINICO, Internet e le sue fonti, 7

[11] EC Convention on the Law Applicable to Contractual Obligations (Rome 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

[12] The number of EC Directives concerning the subject is vast. Without any claim to completeness: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009, Directive 2010/13/UE of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2006/24/EC and by Directive 2009/136/EC, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, amended, as of 13 June 2014, by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, which modified the pre-contractual information requirements, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') and Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

[13] amongst which, by way of example, the Uncitral Model Law on electronic Commerce del 1996; the Guidelines for Consumer Protection in the Context of Electronic Commerce, approved on 9 December 1999 by the OECD Council

2. **Cyberspace and the Sea**.

In common language, and in the legal literature concerning the subject, the term which is more commonly used – in English, as well as in Spanish, Italian, and in many other languages – to express the concept of movement in cyberspace is the verb to "navigate".
Indeed, the fact that the Web has borrowed such expression from shipping does not seem casual, if we consider the quantity of statements generated by the analysis of the Web and of the Sea, which could be used interchangeably. The following statement of the English Admiralty Court in the *The Louis* case is, for example, emblematic: "*in places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another*"[14].
The statement refers to marine navigation, but it could well have been made with reference to navigation in cyberspace.
Quoting it seems, however, useful not so much to point out a principle of *jus gentium* which was authoritatively stated by the British Admiralty Court in the XIX century and which might perhaps be considered still topical by those who embrace the choice of the *Lex Informatica*.
Quoting it seems useful to note that – with the worsening of the crisis of the *Lex Maritima* caused by the burst of nationalisms and by the advent of national laws – the Admiralty Courts came to opposite conclusions on topics of extraordinary ethic and civil impact, such as slavery, despite those Courts being conceived at that time, and indeed in many cases today, as applying a universal *jus gentium*, and despite the fact those Courts in all jurisdictions should come to the same substantive results in all cases because applying identical, universal rules of law[15].
Indeed the case which had given the English Admiralty Court the occasion to express such belief involved a capture by a British naval vessel of a French slaver and its release by the British Admiralty Court on the ground of lack of jurisdiction to apply British penal law in a French Ship or French penal law in a British tribunal, and of no right to arrest a foreign vessel in time of peace[16]. The conclusion reached by the English Court was in fact in the sense that the slave trade was not prohibited by the law of nations, conclusion which was denied immediately afterwards, in an almost identical admiralty case involving a French vessel, by the U.S. Circuit Court, D. Massachusetts, which came to the conclusion that, according to "*the general principles, which may be drawn from the law of nations* […] *the slave trade is a trade prohibited by universal law, and by the law of France*"[17].
The contrasting conclusions reached, in the field of marine navigation, by the decisions in the *The Louis* and *Da Jeune Eugenie* cases on an issue as delicate as the slave trade, on the one hand seem to prefigure the present contraposition – which is favoured by the great uncertainty regarding the laws to be applied to the phenomena which occur in cyberspace – between opposing visions on issues such as the protection of personal data or intellectual property on the Internet. On the other hand, they draw the jurists' attention to the crucial role which uniform law instruments may play in the regulation of those phenomena.

[14] English Court of Admiralty, 1817, "The Louis"
[15] RUBIN, Ethics and Authority, 103, footnote n. 90
[16] RUBIN, Ethics and Authority, 103
[17] United States Circuit Court, D. Massachusetts, 1822, The *Da Jeune Eugenie*

From this perspective I agree with those who[18], belonging to the current of thought which links Internet governance and law merchant[19], maintain that the experience of maritime law may provide cause for reflection, useful to prefigure which road should be followed in order to achieve a satisfactory regulation of cyberspace.
The above not only and not so much because both fields are characterized by the use of the same *lingua franca* and by the constant confrontation between *common law* and *civil law* cultures, but above all because the formation of maritime law was based on a method capable of satisfying the often conflicting necessities of shippers and merchants, giving rise to very successful regulatory frameworks (I am thinking, for example, of the 1924 Brussels Convention on bill of lading) which have allowed navigation and international commerce – terms which up to a recent past were essentially linked to the sea while today are largely coinciding with the use of the Internet – to prosper, thanks to the uniformity of relations and the certainty of law.

3. **From the *Lex Maritima* to the reunification of Maritime Law**.

For centuries maritime law has been the field of a customary law which has tendentially not been restricted to the borders of a single State; in particular the law of the sea and the regulation of the freedom of navigation and of its limits, as well as of the rights of the coastal States, have been founded on a universally acknowledged customary law[20], naturally tending towards uniformity[21], called Maritime Law.
Maritime law is a complete legal system, composed by two major elements: the general maritime law, on the one hand, and national statutes and international conventions on the other, with the latter source predominating over the former[22].
According to an authoritative definition, general maritime law is a *ius commune*, i.e. a law common to a whole jurisdiction or more than one jurisdiction, it is part of the *lex mercatoria* and is composed of the maritime customs, codes, conventions and practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute[23].
The reason why general maritime law should be taken as an example for cyberspace regulation is in the way in which such law has emerged, i.e. through the sublimation of the collective wisdom of the entire marine trade community in a uniform set of legal principles. The members of the international community have, indeed, always shared the knowledge that maritime commerce could thrive only if the principles on which commerce was to be carried out were the same, regardless if applied by the domestic court of the home port or by foreign Judges at the port of destination or refuge, and were applied to citizens or foreign traders in an impartial manner[24].
Therefore, the natural tendency to international unification expressed by maritime law is not the result of the progressive differentiation of the various national regimes, which is connected to the idea of law as exclusive expression of the will of the sovereign States, but rather the expression of the underlying unity of the socio-economic phenomenon which is at the basis of

[18] ROSSELLO, La governance, 46
[19] See MARRELLA – YOO, Open Source Software, 807 et seq.
[20] ZUNARELLI – COMENALE PINTO, Manuale, 1 et seq.
[21] LEFEBVRE D'OVIDIO – PESCATORE – TULLIO, Manuale, 28
[22] TETLEY, Maritime Law
[23] TETLEY, The General Maritime Law, 108
[24] VON ZIEGLER, Alternatives and methods, 232

maritime law, which aims at validating said unity also at a regulatory level[25], thus turning into laws the results reached at an international level through the spontaneous evolution of practice [26].

This clarifies the road followed by maritime law towards unification[27]: in origin, as mentioned above, maritime law was a *ius commune*, it was hence made up of a body of laws which coincided with the practice of merchants and ship owners.

Between the XIX and the XX century, with the assertion of nationalism and the aversion of nation states against the law merchant, which was seen as a potential threat to their political power, the principles of *lex maritima* and *lex mercatoria* were transfused – with the adaptations which were deemed necessary in light of the peculiar domestic interests – in the single national spheres. While this phaenomenon has, in a way, strongly weakened the uniformity of maritime law, gnawing away at the uniformity of the *lex maritima* as *ius commune*, it must in any case be acknowledged that some of these laws contributed to the adoption of some instruments which strongly reaffirmed such uniformity.

Significant examples of such move towards uniformity, largely due to the "consumer pressure"[28], are the 1910 Brussels Convention on collision at sea and the 1924 Brussels Convention on bill of lading. The genetic relationship between those uniform instruments and the British Merchant Shipping Amendment Act of 1862 and the Harter Act enacted in 1893 in the U.S. – national statutes which, assimilating the tendencies expressed by the shipping trade, and blending the opposing interests, have outlined the contents of those conventions – is the most vivid testimony of how international instruments, favoured by the strong intervention of the national legislators, have been able to grasp the spontaneous evolution of the practice established in maritime trade, elevating it to uniform regime.

With the intent to unify (or re-unify[29], as we'd better say) maritime law, a substantial number of International Conventions – aimed at giving uniformity to subjects such as marine navigation, seamen, maritime lien, shipowner's liability and contracts for the operation of the ship – were drafted between the end of the XIX century and the first half of XX century, with an essential contribution by private organizations (ILA, CMI) and by intergovernmental bodies (IMO, ILO) capable of grasping the global trends of the marine industry.

A significant role for the harmonization of maritime law has been played not only by the uniform substantive law conventions but also by other instruments, such as Model Rules (e.g. 2004 York - Antwerp Rules on general average; 1987 Lisbon Rules for the assessment of damages in maritime collisions; 1990 CMI Uniform Rules for electronic bills of lading; 1992 UNCTAD Rules for combined transport documents) and Standard Contracts which have allowed – even though with the possibility granted to the parties to depart from the models – the spreading of homogeneous practices in crucial sectors such as the sale and purchase and the operation of the ship.

At the same time, two phenomena have emerged, which have laid bare the main critical points of the maritime law unification system based on International Conventions.

As for the first one, the obsolescence of the Conventions and the technical progress of navigation and economy have induced the International Community to amend the Conventions through additional Protocols (e.g.: 1924 Brussels Convention on bill of lading, twice amended by the 1968 and 1979 Protocols, to adapt it to the monetary evolution and to containerization), thus running the risk that not all the Countries adhering to the Convention adopt those

[25] LUZZATTO, Metodi di unificazione, 147
[26] LUZZATTO, Metodi di unificazione, 149
[27] See VON ZIEGLER, Alternatives and methods, 232 – 236, and references therein
[28] LORD BERWICK, Importance, 144
[29] VON ZIEGLER, Alternatives and methods, 233

Protocols and leading to a certain degree of dis-uniformity, however normally restricted to aspects which are not usually coinciding with the founding principles of the Conventions to which those Protocols refer.
The second one, partly linked to the new importance gained on the international scene by the so called emerging countries, questions the way itself of conceiving the 'bottom up' formation of the principles of maritime law and certainly seems more disruptive. Such phenomenon manifested itself with the adoption – through a different process to the one which had led to the emergence of the previous Conventions, and hence without an adequate contribution by the marine industry – of some Conventions which had intervened on extremely relevant phenomena of the shipping industry, such as maritime transport of goods (1978 Hamburg Convention), liability of the multimodal transport operator (1980 Geneva Convention) and liability of Operators of Transport Terminals in International Trade (1991 Vienna Convention).
Also due to the inadequacy of the formative process of those Conventions, they have either not entered into force or those who have, have had such a limited scope of application that they have failed. However, the phenomenon has strongly hindered the unification process of maritime law.
Regardless of these critical aspects, the sector of maritime law shows an unchanged tendency to pursue uniformity through the adoption of international conventions, as proven by the approval – just to quote the more recent ones – in 2008 of the Rotterdam Rules on contracts for the international carriage of goods wholly or partly by sea, destined to substitute the 1924 Brussels Convention on bill of lading; the approval in 2006 of the Geneva Convention on maritime labor and by the preparatory work of the Convention on Judicial Sales of Ships.
As mentioned, a non secondary role in the field of maritime law is played by the instruments of soft law, in particular Model Rules and Model Contracts. They are instruments aimed at the harmonization of the relevant rules. Even though at first sight they appear to be in contrast with the unification technique represented by the international conventions, it seems they might play – in the long term – a fundamental role in the sedimentation of general principles universally acknowledged in maritime commerce, and hence particularly useful in the perspective of the sedimentation or in the consolidation of maritime law.
Therefore, a tendency to uniformity is present in maritime law. The existence of a 'tendency' means, however, implicitly acknowledging that uniformity is lacking at present, as has been observed by those who note that many of the approved international conventions regarding strategic sectors of maritime law were not adopted by five representative States[30].
Nonetheless, the existence of general maritime law, in the sense mentioned at the beginning of this paragraph – whose existence allows the orderly exercise of technical and commercial marine activities – is undisputed.

4. **Some examples of the methods to pursue uniformity in Maritime Law**.

I wish to mention the formation process of three international Conventions, one of international public maritime law and two of international private maritime law, since they significantly show how the principles of maritime law emerged and were embodied in International Conventions, thus becoming the core of current general maritime law.
The first example may be referred to the codification of the law of the sea. The phases of its evolution are marked by the technical progress of commercial and military marine navigation and by the improvement of the exploitation capabilities of marine resources.

[30] TETLEY, Uniformity. See in particular Appendix B

Until the States were not able to exercise their soverignity on the sea, the principles, inspired by the natural law of the peoples, of freedom and of non-appropriability of the sea, of the shore and of the beach, asserted themselves in terms of *ius civile* and hence of regulation of disputes between persons, rather than in terms which we would now define of international law of the sea, which was instead regulated for a long time by a *de facto status*[31].
It is only due first to the confrontation between the Italian Maritime Republics and *Signorie*, however limited to disputes on the control over the Adriatic and the Tyrrhenian Sea, and then to the confrontation between Denmark, Spain, Portugal, England and the United Netherlands over the control of the Oceans, which culminated with the dispute between Grotius and Selden, that the freedom and the non-appropriability of the seas acquired significance – from an exquisitely juridical perspective – which was no longer restricted to the civil law sphere.
The principle of the freedom of the seas was in fact invoked by Grotius to justify a reconstruction of the *jus gentium* of the seas which would then lead to the assertion, on the one hand, of the absolute and inderogable principle of the freedom of the high seas, and on the other hand, of the absolute and exclusive sovereignty of the coastal States on the adjacent seas; principles which were attenuated by the recognition of a limited right of hot pursuit and of innocent passage, respectively.
This happened because, between the XV and XVI century, it became technically possible, thanks to ever more sophisticated ships and weapons, to exercise dominion over navigation: however the limits of the technology of the time restricted the exercise of supremacy to the sole commercial and military marine navigation, which has hence been considered for a long time the prevailing, if not exclusive, form of utilization of maritime spaces by the States[32].
Once the principles and the preexisting provisions of international maritime law, in particular those concerning navigation, were gathered in four conventions, on the occasion of the 1958 Brussels Convention codifying the law of the seas, a radical change of the regulatory presuppositions took place.
The *dominium-imperium*[33] dichotomy – upon which Grotius's analysis was based and which was aimed at challenging the attempts made by Spain and Portugal to exclude foreigners from the high seas – has been gradually substituted by the consideration, expressed by one of the most prominent Italian Scholars[34], that national sovereignty radiates from the territory itself to other spatial circles, including the waters that wash the shores of the State, attributing new functional powers to the coastal State (let us think of those which may be exercised, especially in the exclusive economic zone, with concern to fishing and exploiting of other marine resources) and to third Countries (for example with concern to illicit traffic in narcotic drugs and to the protection of the marine environment from pollution), with a reduction of the role of the flag State.
Such functional powers seem focused on the interest to exploit biological and mineral resources of the seas and of the sea beds, which may be pursued by Countries in different ways according to the degree of technological development and to their higher or lower proximity to the sea.
From this perspective the method of formation of the 1982 Montego Bay Convention consisted in the creation of new law and in the innovation of the preexisting one; in fact it

[31] RIGHETTI, Trattato, 437
[32] LEANZA, Giurisdizione, 121
[33] According to RIGHETTI, Trattato, I-1, 444 the *dominium* would consist in a right of property at an international level and would concern the activity of the State concerning the territory or equivalent spaces, as productive goods of material utilities; the *imperium*, or power to govern or "*jurisdiction*", would concern the coercive powers exercised on those spaces by the State on individuals.
[34] RIGHETTI, Trattato, I-1, 447

remodeled the concept of freedom of the high seas and of sovereignty of the coastal State on the adjacent seas, adapting them to the changed capability of exploring and exploiting marine resources. Besides expanding the powers of the coastal States on the adjacent seas and establishing a compulsory system for the solution of possible disputes, it acknowledged – even though safeguarding the traditional freedoms of movement and of maritime communications[35] – the collective interests to the safeguard of the marine environment and to the exploitation of its resources, significantly defined as the common heritage of mankind.

It is, however, the 1910 Brussels Convention on the collision of ships, hence regarding international private maritime law, the one that probably shows more evidently the ability of the secular tradition observed by the shipping industry in the matter to emerge and be transposed in uniform law instruments.

Already Roman Law regulated collisions at sea, based on the rule, applied until modern times, that the party who did not contribute to the event had the right to claim damages against the other.

During the centuries various rules were established alongside the above, which were partly derogatory of it: in the medieval period some European Codes established the rule that in case of collision with an anchored vessel, the owner of the navigating vessel had to restore only half of the damage caused to the other vessel. However, the rule dividing loss was not always confined to one ship being at anchor, and "*in Malacca in the 13th century, in certain cases of collision, when ships were sailing in company for protection against pirates, the colliding ship pays one-third of the damage*"[36].

The outburst of maritime activity during the XIX century laid bare the critical aspects caused by the stratification of different rules. The most frequent occurrance, i.e. when both vessels were to blame for the collision, was indeed regulated differently by the different maritime powers: in countries where Roman law prevailed, neither party was permitted to recover; in countries where the rule dividing loss in case of mutual fault prevailed, it was possible that the damages were divided equally (Great Britain) or apportioned according to the gravity of the fault (Belgium).

The uncertainties generated by the plurality of different regimes were contained by approving the 1910 Brussels Convention on collision at sea, based on the principle of proportional liability in cases of collisions at sea due to mutual faults of the colliding ships[37], with equally divided damages recoverable only where the degrees of fault were equal or unascertainable[38].

The third example is based on the analysis of the process which led to the adoption of the 1924 Brussels Convention. To this concern it should first be pointed out that in the second half of the XIX century the British fleet played a fundamental role in maritime traffic. It was subject to a very severe contractual liability, which could find a limit exclusively in the *act of God* and in the *act of public enemy*.

The possibility, contemplated by the British legal system, of diminishing such liability through the adoption of exoneration clauses, together with the carriers' capability to impose the approval of their forms on the shippers, led the carriers to adopt ever more numerous and more extensive exoneration clauses.

Those clauses, and in particular those which discharged the carrier from liability for damages caused by negligence, were declared valid by the English Courts, while several States of the Union stated their invalidity due to conflict with public order.

[35] LEANZA, Giurisdizione, 121 et seq.
[36] HUGER, Proportional damage, 534
[37] HUGER, Proportional damage, 532
[38] TETLEY, Maritime Law

This caused a serious disbalance between the fleets of the two Countries, leaving the American shippers virtually without protection and forcing them to turn to the preponderant British merchant marine for the transport of their goods[39].
In this context, in 1893 the Congress of the United States approved the Harter Act, a law which was a compromise between the shipowners' interests and those of the shippers, on the one hand forbidding, through a mandatory law, the adoption of exoneration clauses, on the other lessening the rigour of the contractual liability arising from the British principles.
The initiative of the American Congress soon spread to several other Countries, forcing the British Empire to consider the possibility of limiting the range of the exoneration clauses, in order to avoid the possibility that the shippers entrust their goods to ships flying American flag. Forms from all over the world included the contents of the Harter Act more and more frequently and an agreement was reached at the 1921 the Hague Conference on the exclusion of the exoneration clauses in transports for which bills of lading were issued in one of the States adhering to the future convention.
In 1924 the Brussels Convention was signed. It was a uniform instrument which spread almost globally and which, while excluding the validity of clauses aimed at excluding or limiting the carrier's liability, based the carrier's liability on presumption of fault: pursuant to article 4 of the Convention, the carrier is *prima facie* liable for damages occurred to the goods while in his custody, unless he proves that the loss or damage was caused by one of the excepted perils listed by the II paragraph of article 4.
The modes of formation of the above Convention highlight the importance of the balancing intervention of the national legislators with regard to a situation of conflict between the operators of the maritime sector, and clarify the momentum that the initiative of a single legislator – even more so if it inspires other national legislations – could transmit to the International Community in view of the adoption of an international agreement reflecting the same composition of interests.

5. **Conclusions**.

Following the approach mentioned at the beginning of this paper, it does not seem rash to hypothesize that the future holds for Internet governance an analogous development to the one occurred to Sea governance.
The Web and the Sea, indeed, seem to be related by the fact that they seem to be non-places and they are not easily classifiable by using the categories connected to territoriality. Boundlessness, non-existence of borders, scarce pliability to the human will: while on the one hand these seem critical issues common to both, on the other they become their strong points, since it is thanks to these characteristics that they are both able to bring together different cultures and civilizations and to offer mankind ever new ways to carry out their activities.
Among these commerce, scientific research and diffusion (or expansion) of culture have played and are still playing a primary role in stimulating mankind to explore the sea and cyberspace.
It is indeed by virtue of the capability of the sea and of its resources to meet the collective needs that first Hugo Grotius "*proclaimed, explained and in no small measure made the freedom of the seas*" [40] and then, in more recent times, the United Nations' Convention on the law of the sea defined the marine environment as the common heritage of mankind.

[39] BERLINGIERI, Le Convenzioni, 38
[40] SCOTT, Introductory note, 6

Just like the sea, cyberspace too is common to all, and it seems, therefore, essential that the same cautions used in the past centuries to safeguard the ability of marine resources to serve the collective needs, are extended also to cyberspace.
That is to say it is necessary, as stated by the Scholars, that the method already used by the United Nations for the resources of the sea is adopted also for cyberspace, so that also the Internet – in light of its ability to contribute to the diffusion of culture and knowledge – is declared common heritage of mankind, in order to ensure its free use and to guarantee its dedication to the exercise of freedom of expression and of human communication and, hence, of human progress[41].
Issues such as the extent of the powers of States over Internet users with concern to their online activity (e.g. the issue of the prerequisites and of the means to lawfully restrict said activity or to use the information uploaded on the Web by Internet users); matters like Internet domain government and standard settings; issues related to the protection of IP rights; more in general, the fundamental principles which should regulate Internet functioning and usage, could unlikely find a satisfying solution outside an agreement between States transfused into a multilateral international Convention, which – analogously to what the 1982 Montego Bay Convention did for the law of the sea – may recognize, shape and consolidate the fundamental principles which must govern the relationships among Internet users.
The above would be useful especially to take away from national legislators the prerogative of regulating the relevant subject matters, an approach which has up to now led to seriously unequal treatment and uncertainty of relations, since it has given *de facto* authority to the Judges and their discretionality to define the code of conduct which must regulate cyberspace.
If we extend the comparison between the sea and cyberspace to the issue of the regulation of relations of a private law nature which occur on the Internet, the experience of the reunification of maritime law seems to show the path which also the law of the Internet may follow in the future.
There is a fundamental background consideration: if it is indeed true that, in order to encourage maritime trade, it is necessary for shipowners and merchants to know what their rights and obligations are when their ships and their goods are in foreign waters[42], it is likewise necessary for companies and consumers to know their rights and obligations when they navigate in cyberspace in order to encourage electronic commerce and other online activities, which would be strengthened if their rights and obligations were the same the whole world over[43].
We should therefore assess which instruments seem more suitable to pursue such uniformity.
The choice between mandatory international conventions and *soft law* instruments seems to be inclined towards the former.
As already mentioned, instruments such as Model Rules have played a non secondary role in the emergence of homogeneous contractual practices in the field of maritime commerce (think, for example, of the extraordinary success of the York Antwerp Rules) hence showing their usefulness for the same purposes in the field of cyberspace regulation.

[41] ARROYO, Descargas en Internet, of great interest also for the inspired intuition of proposing a minimum access fee to the Internet, to be donated to the companies who own the copyrights which are put on the Web, as a meeting point between the reasonable retribution of intellectual property and the freedom to have access to it through download via the Internet.
[42] LORD BERWICK, Importance, 143
[43] LORD BERWICK, Importance, 143 This consideration refers to maritime commerce, but in my opinion it could well be referred also to electronic commerce

Nonetheless it should also be acknowledged that entrusting the pursuit of uniformity to the adoption of non-mandatory instruments may hinder or slow down the attainment of uniformity, rather than be an advantage.
Even more so, in general terms, because the contexts to be regulated have become much more complex compared to the past, due to the increase of the social, cultural and economic settings to be considered and reconciled when defining rules. The picture is even more complex if we consider cyberspace, in specific terms, where the issue at stake is evidently the control over the Internet in order to use it to spread and make a culture the hegemonic one. A striking example of this are the efforts (achieved to a great extent) of the United States to strengthen their cultural predominance thanks to the Web and the attempt – which has also been successful – by the People's Republic of China to direct the Web into channels which allow the State to exercise its control over the Web's contents.
Certainly different from the two above mentioned national policies, but in any case an example of how cyberspace may be abused to pursue hegemonic aims, is the recent and obscene use of the Web by the Isis terrorists to spread terror outside and inside the territory where they unfortunately exercise their nefarious influence.
In such a complex scenario it is perplexing to accept that self regulation may be an option and that it may really be the true result of a spontaneism which has system operators and user communities as the only protagonists to whom the voluntary adoption of the cyberspace rules shall be ascribed.
The fact that the Web is not able to protect categories which deserve additional safeguard should also be considered: minors, netizens and new economic operators run the risk of losing the negotiation with the strong private groups, because their rightful expectations would be sacrificed by rules formally agreed upon, but substantially disbalanced and hence incapable of making the opposing interests coexist[44].
The route of self regulation (and the choice of the *Lex Informatica* with it) seems, therefore, rather difficult outside an hypothesis of co-regulation contemplating the necessary participation of the public entity in the spontaneous law making.
This leads to think that primary relevance in regulating commerce and other private law activities which occur on the Internet should be ascribed to the international conventions, which may either be moulded on national or EU instruments, which may seem able to interpret widespread needs, or be the expression of already emerging practices.
In doing so care should be taken in avoiding the main critical issues related to the use of those instruments: on the one hand an adequate involvement of the stakeholders (Internet Providers and Consumers Associations *in primis*) in the definition of the contents, to avoid that the rules established by the international legislators are just a highly refined theoretical product, but distant from the real needs of Internet users and hence destined to fail. On the other hand, Conventions should be drawn up in a sufficiently general and not detailed manner, in order to avoid their rapidly becoming obsolescent, so that they do not require a frequent update of the technical aspects through amending Protocols, which up to now have been associated with the risk of dishomogeneous application of the conventions to which the Protocols refer.
Strong perplexities have, however, been raised with regard to whether uniform conventions are suitable to govern the Internet, given the fear that the legal systems of the Countries which would not adhere to the conventions would allow the flourishing of "*data havens*" just like tax havens[45]. It would indeed be wrong to underestimate the risk that international mandatory legislation might be eluded and its effects be frustrated by placing servers (or by adopting other

[44] DE MINICO, Internet e le sue fonti, 5
[45] ROSSELLO, La governance, 73 e 95

similar techniques) which localize the place of supply of services or of performance of the activity governed by the Convention in a non-adhering Country.
Maritime Law, again, offers an answer to those fears. The very successful and internationally widespread 1952 Brussels Convention on the arrest of ships in fact contains a provision (art. 8) which allows the arrest in an adhering State also of ships flying the flag of a non-adhering State: an analogous criterion could be adopted with concern to the data coming from or created by servers located in non-adhering States, by establishing that they too are subject to the authority of the Courts of the adhering States (and thus, for example, that those Courts have the power to stop the access to the national Web of data coming from a non-adhering State), in order to avoid that by placing servers in non-adhering States one could elude the mandatory rules established by the international convention.
There are, of course, considerable difficulties linked to the intrinsic characteristics of the Internet, which allows – by means of mirroring, caching or other similar techniques – to make the origin of online contents not easily traceable, but it is a challenge which should not divert us from the widely felt intent to provide the Web with a governance system which allows the use of the Web according to safe and generally shared rules, to the benefit of the above mentioned objectives: protection of the freedom of expression, human communication and diffusion of knowledge.
If the Web, as has been correctly observed, is common heritage, it is because the values at stake are so significant that they require adequate guarantees in their exercise.
The examples of the routes followed by maritime law to affirm, give rise to and consolidate common technical and commercial practices which allow the orderly performance of maritime traffic and of commerce at sea – which is, as cyberspace, common heritage of mankind – seem a useful instrument to direct the efforts in the research of the best systems for global Internet governance.
From this perspective the mandatory international Conventions seem the most suitable instruments to recognize, shape and consolidate the fundamental principles governing the relationships between Internet users, and to provide a mandatory regulatory framework, within which the exercise of private autonomy may find its space, through soft law instruments and co-regulation.

Books

BERLINGIERI Francesco, 2009, Le convenzioni internazionali di diritto marittimo e il codice della navigazione, Giuffré

IRTI Natalino, 2000, Norma e luoghi. Problemi di geo-diritto, Editori Laterza

LEFEBVRE D'OVIDIO – PESCATORE – TULLIO, 2011, Manuale di diritto della navigazione, Giuffré

QUADRI Rolando, 1944, Diritto internazionale pubblico, Liguori

RIGHETTI Giorgio, 1987, Trattato di diritto marittimo, Vol. I-1, Utet

RUBIN Alfred P., 1997, Ethics and Authority in International Law, Oxford University Press

ZUNARELLI Stefano - COMENALE PINTO Michele M., 2013, Manuale di diritto della navigazione e dei trasporti, Cedam

Articles

ARROYO MARTINEZ Ignacio, Descargas en Internet, December 23, 2009 El Pais, http://elpais.com/diario/2009/12/23/opinion/1261522804_850215.html

BERWICK Lord Lloyd, 1999, p. 141, Importance of unification of maritime law from the point of view of commerce, Diritto Marittimo

DE MINICO Giovanna, Internet e le sue fonti, 2013, Osservatoriosullefonti.it 2/2013

DI CIOMMO Francesco, 2006, p. 548, La responsabilità civile in Internet: prove di governo dell'anarchia tecnocratica, La Responsabilità Civile

HUGER Alfred, 1928, Proportional Damage Rule in Collisions at Sea, 13 Cornell L. Rev. 531 (1928), available at: http://scholarship.law.cornell.edu/clr/vol13/iss4/2

LEANZA Umberto, 1999, p. 121, Giurisdizione nazionale e navigazione marittima nazionale, Diritto Marittimo

LUZZATTO Riccardo, 1999, p. 147, Metodi di unificazione del diritto marittimo e interpretazione uniforme, Diritto Marittimo

MARRELLA Fabrizio – YOO Christoper S., 2007, p. 807, Virginia Journal of International Law

PICA Giorgio, 2004, Internet, Digesto – Sez. Penale, Utet

ROSSELLO Carlo, 2006, p. 45, La governance di Internet tra diritto statuale, autodisciplina, soft law e Lex Mercatoria, Diritto del Commercio Internazionale

SCOTT James Brown, 1916, p. 1, Introductory note to GROTIUS, The Freedom of the Seas, Cambridge University Press

TETLEY William, 2000, Uniformity of International Private Maritime Law - The Pros, Cons and Alternatives to International Conventions - How to Adopt an International Convention, available at: http://www.mcgill.ca/maritimelaw/maritime-admiralty/uniformitymarlaw/

TETLEY William, 1999, Maritime Law as a Mixed Legal System (with particular reference to the distinctive nature of American maritime law, which benefits from both its civil and common law heritages), available at: http://www.mcgill.ca/maritimelaw/comparative/marlawmix/

TETLEY William, 1994, p. 105, The General Maritime Law – The Lex Maritima (with a brief reference to the ius commune in Arbitration Law and the conflict of laws), 20 Syracuse J. Int'l L. & Com. 10,

VON ZIEGLER Alexander, 1999, p. 232, Alernatives and methods of unification or harmonization of Maritime Law, Diritto Marittimo

Case law citations

English Court of Admiralty, 1817, “The Louis”, 2 Dodson 210

United States Circuit Court, D. Massachusetts, May Term, 1822, United States v. The Da Jeune Eugenie, https://law.resource.org/pub/us/case/reporter/F.Cas/0026.f.cas/0026.f.cas.0832.2.pdf

United States District Court for the Eastern District of Pennsylvania, June 6, 1996, American Civil Liberties Union, et al., v. RENO, https://www.aclu.org/technology-and-liberty/decision-aclu-v-reno-trial
Iris High Court, June 18, 2014, Schrems v. Data Protection Commissioner, http://www.europe-v-facebook.org/hcj.pdf

European Court of Justice, July 3, 2012, C-128/11, Unisoft GmbH v. Oracle International Corp.
European Court of Justice, May 13, 2014, C-131/12, Google Spain Sl *et alii* v. Mario Costreja Gonzalés *et alii*