

“Internet Governance“

Definition; Governance tools; Global Multi-stakeholder entity

Klaus W. Grewlich*

*Ambassador (Federal Foreign Office, Berlin); Professor International Law & Communications (Bonn); *Member of the High-level Panel of Advisors to the United Nations ICT Task Force*; at present United Nations Information and Communication Technologies Task Force Secretariat, Room DC1-1456, One UN Plaza, New York, N.Y. 10017; Tel 00(1-212) 9633-5796 (interim); kwgr@gmx.de. - The contribution reflects the present status of work both in the WGIG and the United Nations ICT Task Force and draws to some extent on “Governance in Cyberspace – Access and Public Interest in Global Communications”, Vol. 9 Law and Electronic Commerce, (The Hague/London/Boston: Kluwer Law International 1999). - The author expresses his personal opinion. ©kwgr.

Executive summary:

- **Work on Internet governance in the WGIG is well under way. While the WGIG has covered a great number of issues pertaining to Internet governance, including governance bodies, governance levels and priority public policy issues, it did not yet deal in some depth with *governance tools* (such as Treaties, Custom, Jus cogens, Soft law, Self-regulation/”cooperative self-regulation”, Private international law, “Code” and “Technical Solutions”) . However, it may be difficult to achieve successfully the objectives of the WGIG without a solid understanding of existing governance tools (*multi-instrument analysis*).**
- **The *Internet* may be *defined* as a “network of networks”, where end users communicate to each other “peer to peer” via multiple interconnected servers, linked together by the TCP/IP protocol.**
- **A *definition of Internet governance* should be as broad as possible. The WGIG should agree upon the notion of a *dynamic approach*, on some sort of “*living definition*” of Internet governance comprising:**

- continuously evolving governance bodies (multi-actor analysis),
 - governance levels (multi-level analysis),
 - substantive governance principles and governance tools (multi-instrument analysis).
- “Governance” is *not the final objective* in terms of a “final regulatory regime” but an exploratory notion for the present step by step process towards an “*effective international rule of law*” (comprising private governance tools). In this process states still are actors of primary importance; but in governance reality the state is competing with foreign, international and private governing authorities or is joining them in hybrid efforts.
- The issues pertaining to Internet governance are a sub-set of the secular process towards an effective international rule of law. Understanding this may alleviate concern regarding the perceived lack of a definition of Internet governance.
- The expression “cyberspace” suggests similarities to physical space, such as land, sea, air or interstellar space. However, this analogy is misleading. As illustrated by the Internet, the “space” created by global information networks is different in nature from physical phenomena. - Even if there is no full fledged “regime” for cyberspace there exist elements of international and national, private and public governance at different levels. The current governance of cyberspace is divided among many groups, some composed of volunteers such as the Internet Engineering Task Force (IETF), some like the World Wide Web Consortium (W3C) or ICANN, composed by hundreds of private and public sector entities, others entirely run by the private sector, as are many domain name registration bodies. International Organisations deal with basic policies affecting the access to cyberspace for instance in the field of e-commerce (WTO), liberalisation of services and cultural identity (UNESCO), intellectual property (WIPO) and technical standards (ITU, ISO and IEC).
 - In the present transition period there is governance by law and governance without law but also governance in areas of emerging law. In national and international socio-economic and legal reality there is a continuum, a whole

variety of instruments/governance tools such as treaties and conventions, contracts, *non-binding* charters, codes and guidelines, incentives or moral suasion purporting to *affect or change behaviour of addressees*. In reality non-binding instruments may deploy considerable effect. Effective Internet governance may imply that a multiplicity of instruments act in combination. It is primordial to establish the right *mix of instruments* in view of objectives to be reached.

- **Having considered the mechanisms of multi-stakeholder, multi-level and multi-instrument action (policy mix of governance tools), an open, transparent and inclusive multi-stakeholder approach to issues pertaining to governance is vital, bringing in also stakeholders that are not as yet sufficiently involved in policy making today such as the content community and the marginalized. Ensuring sustainable and neutral financing from public sources (core funds) and sponsors possibly from industry, NGOs or private parties (activity funds) and designing an appropriate business model and operational governance structure would be crucial. The envisaged global multi-stakeholder entity would operate from a set of principles that would be drawn from the WSIS-Geneva two key documents, i.e. the Declaration of Principles and the Plan of Action.**

- **The year 2005 presents an opportunity to move decisively in this direction. In September 2005, world leaders will come together in New York to review progress made since the United Nations Millenium Declaration; the World Summit on the Information Society will take place in Tunis in November 2005.**

Introduction

On 11 November 2004 United Nations Secretary-General Kofi Annan announced the establishment of the Working Group on Internet Governance (WGIG)¹.

The task of this Working Group is to organize an open dialogue on Internet governance among all stakeholders, and to elaborate recommendations on this subject as a ground for decisions on this issue by the second phase of the World Summit on the Information Society (WSIS), to be held in Tunis in November 2005.

At the first Phase of WSIS, held in Geneva in December 2003, Heads of State and Government noted² that the Internet is a central element of the infrastructure of the emerging information society but that there are differing views on the suitability of current institutions and mechanisms for managing processes and developing policies for the global Internet. The two documents adopted by the World Summit on the Information Society held in Geneva in December 2003 – the Declaration of Principles and the Plan of Action – asked the WGIG “to investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005”. The Group was inter alia requested to:

- Develop a working definition of Internet governance;**
- Identify the public policy issues that are relevant to Internet governance; and**
- Develop a common understanding of the respective roles and responsibilities of governments, international organizations and other fora as well as the private sector and civil society from both developed and developing countries.**

The WGIG is chaired by Nitin Desai, Special Adviser to the United Nations Secretary-General for the World Summit on the Information Society. The Working Group includes 40 members from governments, private sector, and civil society, representing all regions.

¹ United Nations, Press Release PI/1620 (11 November 2004)

² WSIS Declaration of Principles, Paragraphs 48-50, WSIS-03/GENEVA/DOC/4-E (12 December 2003)

The WGIG held its first two meetings in Geneva. It decided on a preliminary structure for its report, identified public policy issues and set out a time frame for its work. The Group reported that it had moved closer to a common understanding of a working definition on Internet governance. Two more meetings of the WGIG are planned to take place in April and June 2005. The final meeting will focus on developing “proposals for action, as appropriate, on the governance of the Internet” as called for by the two documents adopted by the World Summit on the Information Society held in Geneva in December 2003³. The WGIG has presented a Preliminary Report that outlines the work in progress towards the final report to be presented to the Secretary-General in July 2005⁴.

The WGIG decided to assess, as a next step, the adequacy of present Internet governance arrangements and to develop a more detailed “common understanding of the respective roles and responsibilities” of all actors⁵. Furthermore, the WGIG will continue work on the *definitions* of both the Internet and Internet governance. Papers on these issues would be posted no later than 31 March 2005, allowing all stakeholders to comment prior to the next meeting. 15 April 2005 was set as a deadline for posting comments.

Workshops and consultations leading to the establishment of the WGIG included the “United Nations ICT Task Force Global Forum on Internet Governance” (New York, March 25-26, 2004)⁶. In the framework of the meeting in Berlin (November 18-20, 2004) the ICT Task Force and the High-Level Panel of Advisors to the ICT Taskforce and its members were invited by the head of the WGIG Secretariat Markus Kummer to come forward with input to the tasks facing the WGIG.

Not only for the work of the WGIG but also in view of MDG+5 such input could be of significant importance as the Internet may be seen as the standard bearer for a broader governance reform agenda. Internet governance is intimately related to larger issues of globalization.

³ WSIS Declaration of Principles (Fn.1): WSIS Plan of Action, WSIS-03/GENEVA/DOC/5-E (12 December 2003)

⁴ Preliminary Report of the Working Group on Internet Governance submitted to the Preparatory Committee of the World Summit on the Information Society, Geneva 21 February 2005.

⁵ WSIS Plan of Action Paragraph 13 b (iii)

⁶ Don MacLean (Ed.): Internet Governance: A Grand Collaboration, ICT Task Force Series 5 (New York 2004)

The following considerations of relevance for the work of both the WGIG and the United Nations ICT Task Force pertain to

- the working definition of Internet governance;
- normative instruments (governance tools) related to governance; and
- a possible global forum or platform/global alliance for information, assessment and stimulation focussed on Internet governance - responsive to the needs of all the world's people.

I. Elements of a working definition of Internet governance

To be helpful the working definition of Internet governance must fit the problems posed by the WSIS process. The development of a working definition should not be an abstract exercise. Both the definition and the mechanisms of governance must be dynamic and responsive to technological developments and changing markets and consumer preferences. In view of the wide and pervasive integration of computers, embedded chips and electronic networks into modern society and the expression "policy issues" used in the WGIGs mandate, a broad definition of Internet governance, i.e. broader than ICANN and Internet management, but not as wide as the notion of "ICT governance" or "Information Society governance" seems appropriate.

To a large extent the international discussion so far had focused on a narrow definition of Internet governance. But there is merit in starting with a definition as broad as possible and focussing at the same time on some priority issues. Such a pragmatic approach towards a definition of Internet governance may lead to a timely consensus in the WGIG. On the other hand, it is not excluded that progress will be slow due to the complexity of the task.

I.1. Definition of the Internet: Before dealing with the elements of a working definition of *governance* as the superstructure of the Internet a preliminary question concerns the definition of the infrastructure itself. What is the Internet at a time of technological migration from circuit switched to IP based networks, i.e. in the ongoing process of progressive *convergence* of traditional telecommunications, broadcasting, information,

entertainment and Internet services towards the ubiquitous, broadband, mobile networks of the future?

From a technological perspective, the Internet may be described as the invisible, intangible world of electronic information and processes stored at multiple interconnected sites, with controlled access and manifold possibilities for interaction and delivery of both *information* (basic services) and *value* (enhanced services). A similar description would be the following: A “network of networks”, where end users communicate to each other “peer to peer” via multiple interconnected servers, linked together by the TCP/IP protocol.

I.2. Internet governance: Work on Internet governance is not starting from a white page, given the numerous existing working groups, expert panels, agencies and programmes. The work results of some of these groups are already transformed into elements of governance.

A mapping of governance levels, governance bodies (institutional mapping), governance principles and governance tools would have to answer pragmatically and comprehensively the question “Who already does what?”. In addition a sort of substantive taxonomy (substantive mapping) must be created, including notably public policy priority issues, for instance: *technology related issues*, notably network security⁷: *Ressource management*, notably the domain name system; *financial issues*, such as taxation of internet traffic, peering/interconnection costs; *content-related issues*, such as cybercrime, protection of children, privacy and information security, intellectual property rights etc..

As the WGIG started discussions on a working definition of Internet governance a convergence of views emerged, based on the following elements:

- the terms “governance” and “govern” mean more than “government activities”;
- the enabling dimension includes organized and cooperative activities between different stakeholders;

⁷ Vinton CERF in MacLean Don, Internet Governance: A Grand Collaboration, (ICT TASK Force Series 5), New York 2004, p.342: If there was a need to govern, the focus should be more on the use or abuse of the networks, and less on operation, except where technical rules dictate adherence to standards to assure the stability and integrity of the system.

- Internet governance encompasses a wider range of conditions and mechanisms than IP numbering and domain name administration.

The WGIG reiterated that useful work on the definition could take into consideration such items as the fast moving technological environment, the need to be action-oriented, the roles and responsibilities of different actors, the multi-stakeholder approach etc.

It is suggested here not only to begin with a definition *as broad and dynamic as possible (living instrument)* and then narrowing it down. At the same time the WGIG should focus on a number of priority issues. A *living definition* of Internet governance would comprise

- continuously evolving governance bodies (multi-actor analysis),
- governance levels (multi-level analysis),
- substantive governance principles and governance tools (multi-instrument analysis).

To support this, the following considerations might be helpful:

I.2.1. A “Regime”: If the Internet and the pertinent regulatory powers were similar in coverage, there would be no need for enhancing the need for international “governance bodies, governance principles and governance tools” in terms of transborder arrangements and agreements for public, private or hybrid governance. Obviously this congruency does not exist. There exists incongruity between the transnational space of global information networks and “sovereign territories”, between local values and global networks. This incongruity asks for political and legal solutions designed to avoid frictions and to optimize opportunities

Governance is not the final objective in terms of a “final regulatory regime” but a step by step progress towards an *effective* international “rule of law” (comprising also non-legal governance tools) that would contribute to international peace, stability and socio-economic development responsive to the needs of all the world’s people. In this process states still are actors of particular importance; but in governance reality the state is competing with foreign, international and private governing authorities or is joining them in hybrid efforts. At present we find ourselves in a muddled transitory situation, for which the term “governance” may be used as an exploratory notion.

Even if the expression “cyberspace”, often used as a synonym to the Internet, suggests similarities to physical space, such as land, sea, air or interstellar space it is unlikely that a specific Internet governance or a special “regime” for global information networks will be found. The analogy of “cyberspace” to other “spaces” is misleading. As illustrated by the Internet, the “space” created by global information networks is different in nature from physical phenomena. It is true that like in the case of maritime transportation, where ships, cargos, ports and their facilities have owners, component parts of cyberspace such as communications links, satellites, computers, storage devices, data centers, telephone exchanges etc. also have identifiable owners. However, the seas constitute a physical space or substrate, and a special legal regime the Law of the Seas applies. *As to Cyberspace there is no such physical substrate and no legal regime applying to the particular space.*

That does not mean that there are no elements of governance to be applied to cyberspace. The current governance of cyberspace is divided among many groups, some composed of volunteers such as the Internet Engineering Task Force (IETF), some like the World Wide Web Consortium (W3C) or ICANN, composed by hundreds of private and public sector entities, others entirely run by the private sector, as are many domain name registration bodies. International Organisations deal with basic policies affecting the access to cyberspace for instance in the field of e-commerce (WTO), liberalisation of services and cultural identity (UNESCO), intellectual property (WIPO) and technical standards (ITU, ISO and IEC).

Thus, even if there is no full fledged regime for cyberspace there exist fragments of international governance in terms of *governance principles, governance bodies, governance levels and governance tools.*

It might be helpful to visualize that there exists a historical process from the sovereignty-centred so called Westphalian international “law of coexistence” towards the modern “international law of cooperation”, that begun to materialize towards the end of the first part of the 19th Century. The International Telecommunications Union (ITU) is the world’s oldest intergovernmental organization (dating back to 1865) is an excellent example for the international law of cooperation. Public international law of

cooperation means creating positive transborder synergies (e.g. rules and arrangements for interconnection); its minimum standard signifies that any state taking a measure that impacts on other partners territories or interests must responsibly calibrate such impact in terms of balancing his interests with the interests of his partners. That means international actors (notably states) in addition to safeguarding their interests and the interests of their constituencies also must safeguard the “international common good” (bonum commune) in terms of a “dédoublement fonctionnel”⁸. Will this process from the international law of coexistence through to the international law of cooperation and the the present transitional phase called ‘governance’ lead at some stage to a “constitutionalisation”⁹?

I.2.2. Governance bodies, levels, principles and tools: As indicated a distinction might be made between governance *bodies* (multi-actor analysis), governance *levels* (multi-level analysis) and governance *principles and tools* (multi-instrument analysis):

I.2.2.1. Governance bodies (multi-actor analysis): Public national governance is the classic form of (state) governance. The basic reason for accepting, fostering or demanding in addition “alternative” governance authorities other than the state, is the expectation that there will be a greater problem solving capacity. In the taxonomy of governance bodies one may thus distinguish between private and public, national and foreign/international governance. Hybrid governance mixing public and private elements (regulated regulation or co-regulation) may help overcome conflicts between the governance body and the social actors who hold veto positions.

An example of public foreign governance would be the extra-territorial application of antitrust law to a merger in a third territory. “Private national governance” is exercised for instance by the German Green dot organisation, whose prime business is price regulation for the disposal of packaging waste. The electronic tools used by AOL are one example of “private foreign governance”; they are meant to prevent children from accessing all websites that are not deemed to be “family friendly” and to prevent

⁸ George Scelle: Précis de droit des gens, (Paris: Pedone 1934)

⁹ A “normative umbrella” for governance bodies , governance levels and governance principles and tools, Ernst-Ulrich Petersmann: How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society, Michigan Journal of International Law 20/1 (1998), 1s.; Klaus W. Grewlich: Konstitutionalisierung des “Cyberspace”: Zwischen europarechtlicher Regulierung und voelkerrechtlicher Governance, (Baden-Baden: Nomos 2001), 53s.

spammers from reaching the AOL audience¹⁰. Hybrid international governance may mix the national and the international or the international and the private element, as for instance in the case of oil concessions or licence contracts.

I.2.2.2. Governance levels (multi-level analysis): At what level should governance bodies, to be as effective as possible, impact on social behaviour of addressees?

To be as effective as possible, action should take place at the “appropriate level” - i.e. local, provincial, national, regional/multiregional, international/global. Ideally, in accordance with the principle of *subsidiarity* the higher level should become active only to the extent that the lower is unable to deal with the issue at hand. Subsidiarity is an assignment principle that organises multi-level governance and is used, so to speak, to determine the optimal level at which various governance tasks (notably regulatory and de(re)regulatory) should be performed.

I.2.2.3. Governance principles und governance tools (multi-instrument analysis): It seems that for the near future there will remain a multiplicity of governance instruments impacting on the “Internet multi-stakeholder constituency”. Such instruments having an impact on social behaviour may be classified as governmental/imperative, contractual, self-regulatory or hybrid (“regulated self-regulation”). In any case Internet governance mechanisms must be designed in such a way that they promote the new medium’s continued growth and technical innovation and - while promoting a stable, open and inclusive Internet - ensure free flow of knowledge.

Having *governance principles* implies that stakeholders are bound by principles that have been previously agreed, even if the respective stakeholders did not know in advance the outcome of the observance of principles in specific present or future cases where (not foreseeable) vital interests may be at stake. This is the essence of effective multilateralism. The recourse to unilateralism in terms of safeguarding vital interests must be limited to extreme cases.

Internet governance in terms of *principles* would draw together and possibly refine

¹⁰ <http://www.aol.com/info/onlinesafety.html>

-first, existing general principles¹¹ such as cooperation; fairness; comity; non-discrimination; national treatment; most favoured nation treatment; estoppel and particularly proportionality¹² and subsidiarity;

- **second, evolve additional *specific substantive principles* for governments and other stakeholders relating to both “access” and “public interest”:**

= Principles relating to “access” would notably comprise: the notion of a digital solidarity and cooperation in building enabling frameworks and capacities to overcome the digital divide; fair use zones and public domain; consumer needs relating to trust and digital signatures; intellectual property rights; cryptography and confidentiality; domain names; infrastructural development; the art and quality of regulation. (Remember: A competitive market place distinguished by access and inclusiveness cannot exist without free flow of information. Reversely, strong data and privacy protection (Human rights) promotes confidence in vibrant e-commerce markets).

= Principles relating to “public interest” would cover for instance: human dignity and privacy/data protection; combating misuse/protection of minors; security and cryptography; development; cultural identity/diversity.

The WGIG distinguishes “horizontal issues” (higher level “cross-cutting” issues such as economic and social aspects of the Internet based upon the key WSIS principles) and “key public policy issues”. The latter may include:

(i) “*infrastructural issues*”/management of critical Internet resources (including the administration of the domain name system and IP addresses, the administration of the Root server system, technical standards, peering and interconnection, telecommunications infrastructure including innovative and converged technologies, as well as “multi-lingualization”);

¹¹ e.g. D. Carreau: *Droit International*, (Pedone: Paris 1991); A.F. Lowenfeld (ed.): *International Economic Law*, (Matthew Bender: New York 1975-1979 7 vols.); A. Verdross: *Die Quellen des universellen Voelkerrechts*, (Rombach: Freiburg 1973); H. van Houtte: *The Law of International Trade*, (Carswell: London 1995); Alina Kaczorowska: *Public International Law*, (Old Bailey Press: London 2002)

¹² The principle of „proportionality“ obliges the government to use the least intrusive measure, given the legitimate aim. This test calls for a comparison between the measure actually chosen and hypothetical alternative measures.

(ii) *issues relating to the use of the Internet (including spam, network security and cybercrime)*;

(iii) *issues which are relevant to the Internet, but with much wider impact than the Internet such as IPR or international trade; and finally*

(iv) *issues relating to the developmental aspects of Internet governance (capacity building)*.

While issues (i) und (iii) are taken care off by specialized International Organizations, in the case of issues (ii) and (iv) global cooperation required is not well defined.

While the WGIG has covered a great number of issues pertaining to Internet governance, it did not in some depth deal with governance tools (normative instruments). However, it may be difficult to achieve successfully the objectives of the WGIG without a solid understanding of existing governance tools (*multi-instrument analysis*).

II. “Governance tools”

There exists in national and international socio-economic and legal reality a continuum, a whole variety of normative instruments/governance tools such as treaties and conventions, contracts, charters, codes and guidelines, incentives or moral suasion purporting to *affect or change behaviour of addressees*.

There is governance by law and governance without law but also governance in areas of emerging law. Governance by law is not fashionable; modernists call it pejoratively “command-and-control regulation”.

II.1. Governance by law: Legal governance is text-bound. Legal treaties, conventions and contracts incorporated in texts are well defined binding legal instruments.

On the other hand, many governance tools/instruments such as so-called charters (of course not the UN-Charter), codes, and guidelines are soft-law instruments that are meant to be primarily moral undertakings. However that does not mean, that such instruments are not influential. In reality non-binding instruments may deploy considerable effect.

Multilateral treaties and conventions are often related to *institutions*. In this respect the following distinction could be established:

- A *first* set of distinctions would refer to the difference between rule-setting or rule-making *institutions* such a WTO or the IMF and development-oriented institutions such as the UNDP or UNICEF.
- *Second*, there is a distinction between treaty-based inter-governmental organizations, which constitute the United Nations system and informal consultative groups of countries within, or even outside, the United Nations system.
- *Third*, there is a distinction between intergovernmental organizations and non-government or private sector institutions.

II.2. Private governance and legitimacy: Governance without law in terms of private governance substituting or complementing public governance may become more important. However, it seems that the perceived effects of the Internet on the regulatory power of public governance bodies are exaggerated. States and courts still maintain their traditional power of governance by law. They are able to enforce law, especially in situations where actors maintain assets in the jurisdiction in question. But the nation state no longer possesses a *governance monopoly* that is unchallenged. Globalisation and the Internet in particular create a situation of monopolistic competition among nation states. The frictions created by the co-existence of divergent national policy orientations in a networked world weaken the competitive advantage of public over private governance. Government still has sovereign powers, but in using them the expected action of other governments must be taken into account. The technically and economically global character of the Internet increases the potential for international conflict. The Bavarian Compuserve case illustrates this development: To hinder access of minors to pornography, a Bavarian criminal court convicted the Compuserve manager for Germany. Violent protests notably from libertarians in the U.S. were triggered by this conviction¹³.

Effectiveness and legitimacy of governance are core issues for the present governance debate in general and particularly in the framework of the WGIG: “What is the basis for the legitimacy of governance?”

¹³ On the Compuserve case see Gunar Bender: Bavaria vs. Felix Somm. The Pornography Conviction of the Former Compuserve Manager, in: International Journal of Communications Law and Policy 1981/1, 1-4.

The question of legitimacy pertains to all forms of governance – not only to governance by law. As explained, the regulatory scene is characterized by both alternative regulatory approaches and alternative actors. Alternative regulatory approaches notably include explicit self-regulation, implicit governance by technical code and self-help.

There exist basic differences between public and private governance: If *government itself governs*, a constitutional lawyer may take its power to impact on society for granted. The power derives from sovereignty, i.e. from the constitution itself.

This is not true for private governance, i.e. for “*governance without government*” where government reduces its direct influence to the minimum of “formal government”, that however never fully disappears. The classic case of self-regulation is an industry, which agrees on a quality standard, that may be imposed on all members. The true conflict in such a scenario may arise between the management of the association and some members. Private governance is characterised by four classes of primary actors: government, private regulators, addressees and protectees of regulation.

To govern, the private regulator must subdue addressees to its governance activities. The legitimacy of regulating and enforcing private law sanctions is based on consent. However, there are limits to the legitimacy of private action. Even consent could not under all circumstances legitimize serious discrimination or private intrusions into freedom¹⁴. Fundamental freedoms/human rights do not only protect individuals and groups from interference by government. Governments may also be constitutionally obliged to protect one group of private actors from *other private actors*’ intrusions on their freedom. In case of court action, civil courts may be empowered to construe statutory provisions in light of the constitution.

As to *hybride governance*, issues pertaining to constitutional legitimacy may be easier to answer because private governance is exercised in the “shadow” of constitutional authority.

¹⁴ Reference is made to modern “Antidiscrimination laws”, that exist in a number of countries: Public authorities deriving their power from the constitution as guarants of the enforcement of constitutional fundamental rights between private parties.

II.3. Effective governance: The notion of effective Internet governance may imply two main issues:

- *first*, is governance authority allocated effectively within the international system and between different players?
- *second*, that a multiplicity of governance tools/instruments (Treaties, Custom, Jus cogens, Soft law, Self-regulation/”cooperative self-regulation”, Private international law, “Code”) act *in combination*.

It is primordial to establish the right mix of instruments in view of objectives to be reached. The following governance tools (public, private, hybrid and other) seem to be of primary importance:

II.4.1. Treaties: These represent a source of international governance, the importance of which is ever increasing. Based on treaties are various acts of international governance bodies in terms of “secondary law” such as rules and regulations, directives, decisions/adjudication measures. As to treaties as a primary sources of law, a distinction is sometimes made between law-making (or law harmonizing) treaties, i.e. those treaties which lay down rules of general or universal applications, and treaty contracts, e.g. a treaty entered into between or only a few partners. The binding force of the treaty comes from the consent of the parties, not from the subject matter or form of the treaty.

II.4.2. Custom: Custom is constant and uniform usage accepted by law, i.e. those areas of state practice which arise as a result of the belief by states that they are obliged by law to act in the manner described. Custom may be either general or regional . General custom are those customary rules binding upon the international community as a whole. Local or regional customs are those applicable to a group of states or just two states in their relations inter se. Custom is listed as a source of international law in Art. 38 of the Statute of the International Court of Justice (ICJ).

II.4.3. Jus cogens: Some rules of international law are fundamental or of higher order as being imperative and peremptory rules of international public order (jus cogens). Other rules may be derogated from under certain circumstances (jus dispositivum). The consequence of breach of peremptory rules is nullity¹⁵.

¹⁵ See also Art. 53 Vienna Convention on the Law of Treaties

II.4.4. *Soft law*: It has been submitted that international law consists of norms of varying degrees of force. Some of them, for instance rules in international treaties are binding while others – for instance certain acts of international organisations – contain standards of behaviour or ideals which the international community aspires to achieve but are not binding. Non-binding rules are called “soft law” whilst binding rules are considered as “hard law”.

General Assembly resolutions (GARs) under the provisions of the UN-Charter the majority of General Assembly resolutions have no direct legal effect and are qualified as “soft law” (unlike decisions of the Security Council which, under art. 25 of the UN-Charter, are binding). However it is clear that some resolutions embody a consensus of the international community.

“Soft law” has many advantages. It allows states and other actors to participate in the creation of new rules without the necessity of implementation into national law. Soft law may function as a laboratory test for ideas and behaviour.

In many areas, such as the protection of the environment or the possible evolution towards a framework for ICT, governance bodies are not ready to accept binding obligations at a particular time but are gradually taking measures to conform with international standards.

II.4.5. *Self-regulation and hybrid, cooperative or regulated “self-regulation”*: (i)

Regulation boils down to one simple question “Who asks whom effectively for what?” Internet was seen for some time and by quite a number of observers as an “unregulated, independent space”, as a self-regulatory entity, controlled by no government. The Internet emerged in the egalitarian culture of American university computer labs. As long as the Internet was the play-ground for scientists and the “Internet grass root-community”, the perception of an unregulated space could grow. However, this did never completely correspond to reality, since most countries and the international community have well-established elements of governance and governance bodies that, irrespective of the medium used, regulate and impact on the expression of opinion and commerce.

The term self-regulation is an oxymoron¹⁶. Obviously, if all affected persons and entities agree to a set of rules, there will no longer be any socially harmful behaviour to be

¹⁶ Christoph Engel, *The Role of Law in the Governance of the Internet*, Reprints Max Planck Institute for Research on Collective Goods, Bonn 2002, 4s.

altered¹⁷. The notion of self-regulation will only become understandable if one unpacks the concept of “consent”. Inherent to this concept is that at least some actors have subdued to some sort of group pressure. Alternatively, the whole “regulating” group may have given in to outside power from the other side of the market or from government¹⁸. The Internet is particularly apt for self-regulation, because the governing body may rely on effective “technical enforcement mechanisms”: Those not abiding by the rules may be banned from further traffic. The governance body may even unleash ‘killer software’ against electronic trespassers¹⁹. Finally private governance bodies may rely on social norms as in the case of the famous “netiquette”.

Regulation without law, i.e. pure private regulation exists, but it is rare. What is becoming more and more frequent, however, are hybrid forms of governance, or mixes with public and private elements. The basic idea of the suggested hybrid, cooperative or regulated self-regulation system is derived from the observation that in the Internet effective control possibilities are not in the hands of national, regional or international regulatory public governance bodies but in the practical sphere of influence of those who administrate, on a technical level, the various network elements and content provision.

As part of a policy of effective governance it would be expedient that stakeholders agree on principles for the quality of self-regulation and cooperative self-regulation. The latter notably refers to schemes of governance where voluntary self-regulation of non-governmental governance bodies is complemented by regulatory law measures of public governance bodies²⁰. A middle ground between informal self-regulatory mechanisms and restrictive, hard regulation must be found.

The following three forms of hybridisation might be distinguished²¹:

¹⁷ Out of the rich literature on regulation and self-regulation Neil Weinstock Natanel: Cyberspace Self-Governance – A Sceptical View from Liberal Democratic Theory, in: California Law Review 88 (2000) 395-498; Peter P. Swire: Markets, Self-Regulation and Government Enforcement in the Protection of Personal Information, H<http://www.acs.ohio-state.edu/units/law/swire.htm>H; Klaus W. Grewlich: Governance in “Cyberspace” – Access and Public Interest in Global Communications (Law and Electronic Commerce vol. 9, Kluwer: The Hague 1999).

¹⁸ Christoph Engel, The Role of Law in the Governance of the Internet, Reprints Max Planck Institute for Research on Collective Goods, Bonn 2002, 4s.

¹⁹ For details see Henry H. Perritt: Cyberspace Self-Government. Town Hall Democracy or Rediscovered Royalism?, in Berkeley Technology Law Journal 12 (1997) 413-481 (437)

²⁰ Klaus W. Grewlich: Governance in Cyberspace; Access and Public Interest in Global Communication, (Kluwer: The Hague/London/Boston 1999), 292s.

²¹ Christoph Engel: A Constitutional Framework for Private Governance, Reprints Max Planck Institute for Research on Collective Goods, Bonn 2001/4, 35s.

- in the first case, the private actor is so close to the government, that it might be considered being practically part of it;
 - in the second case, the government becomes a member of a joint public-private regulatory body;
 - in the third case, the private regulatory body remains an independent private entity.
- However, formal government still does have an influence on its activities, e.g. by the threat of onerous, unilateral public rules.

Hybrid regulation may help finding in specific instances the proper balance between the role of government, reliance on technology and individual choice. Hybrid regulation may help reducing for instance tensions between security and civil liberties. In the area of intellectual property rights (IPR), governance by hybrid regulation may help finding the balance between the need to protect IP assets and undue limitation of access to intellectual goods through too strict regulation.

II.4.6. Private international law: Few observers now believe that the Internet will radically undermine conventional forms of law, as was predicted by some in early debates. Instead scholars increasingly discuss the implications of the Internet for the interdependence between different jurisdictions. In so far as the Internet creates new forms of communication and interaction across borders, it may lead to uncertainties and ambiguities where it is unclear whether the law of one, or the law of another, jurisdiction should govern a particular transaction. The perception was that virtual locations in the Internet bore no necessary relations to physical geography and that no single territorially based public governance body was capable of effectively asserting jurisdiction over the Internet. In addition the ability to easily relocate activities seemed to enhance the power of private actors vis-à-vis territorial governance bodies by creating opportunities for “regulatory/governance arbitrage”. This situation was seen to lead to conflict between jurisdictions, and potentially to new kinds of institutions designed to resolve jurisdictional conflicts.

However the novelty of the Internet should not distract us from the fact that these issues involve relatively well-established problems for lawyers, in particular the problems known from old debates in the field of so called “Private International law” over “Choice of law” or “Conflict of laws” which now re-emerge under a new guise.

Private international law is a misnomer. This normative body is in fact not an “international law” but a normative assignment mechanism to determine in specific cases involving private parties

- the law to apply and
- the court having jurisdiction.

At the same time Private international law may also act as a governance mechanism:

While actions of private law subjects are ruled by national private law systems and the national system for the settlement of disputes, the existing international co-ordination of laws, civil legal procedures and recognition of adjudication/enforcement may in many cases contribute to provide effective governance for the Internet.

However, the most important restriction on this depends – like so often – on money. The private law system depends on the participation of private protagonists which to them represents a financial burden. Until they possibly obtain a judgement in their favour and have it enforced, they have to accept considerable advance expenditures. Because of cost risks a holder of a right may abstain from pursuing his rights. Here possible instruments like legal action by an association or “class actions” following American models may help²².

II.4.7. Code: Researchers interested in Internet governance have been much attracted by what looked like a fundamentally new regulatory technique: rules embedded in technical code²³. As to this “regulatory method” there exist predecessors in technical standardisation and telecommunications regulation. Code is different from other forms of regulation in a number of respects. It is normally not made explicit that Code has a governance effect, as code just seems “the natural way things are”²⁴. However, Code may act as a powerful self-enforcing governance tool. In fact code may “hard-wire” technical, legal and social solutions. Code is typically developed by technicians who are mainly interested in technical efficacy. Thus governance effects of code may even not so rarely be unintended.

²² Henry Perrit: Will the Judgement-Proof Own Cyberspace?, *The International Lawyer* 32 (1998), pp.1121 (1123,1132)

²³ Most prominent are Lawrence Lessig: *Code and Other Laws of Cyberspace*, New York 1999; Joel R. Reidenberg: *Lex Informatica – The Formulation of Information Policy Rules through Technology*, in: *Texas Law Review* 76 (1998) 553-593; Serena Syme/L.Jean Camp: *Code as Governance. The Governance of Code*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=297154.

²⁴ Paul Schiff Berman: *Cyberspace and the State-Action Debate. The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, in: *University of Colorado Law Review* 71 (2000) 1263-1310 (1265)

Close to the concept of “code” but not fully identical are the so-called “*technical solutions*”, - in particular filtering technologies. These might help solving a number of public interest issues, such as the protection of minors. At the same time virtual borders in Cyberspace might negatively affect the development potential of the Internet. An ongoing balancing of the interests involved is necessary.

Lessig pointed to how the Internet - and the forms of communication it allowed – were fundamentally dependent on the underlying technical architecture, which shaped possibilities for action in the new medium. If architecture was reshaped than these possibilities may become fundamentally different or disappear: “Code is Law” – Code becomes so to speak a “governance body”. Two sets of actors, Lessig argues, were particularly well-placed to reshape these architectures: Governments and business actors. Governments, now that they had understood the importance of Internet might reassert control. Business actors might have an incentive to limit the power of other actors, notably private, in areas such as content control, copyright and privacy. - It is argued that these architectures of control might effectively vitiate the rights of individuals and thus, that it was necessary to reassert governance by reasonable forms of “collective control”.

III “A global multi-stakeholder entity

If in accordance with the “WSIS Declaration of Principles” *effective governance* (underpinned by multi-actor, multi-level and multi-instrument analysis)

- ensuring an equitable distribution of Internet resources,
- facilitating access for all,
- ensuring a stable and secure functioning of the Internet

is the objective, a truly innovative and efficient *multistakeholder* entity for information, assessment and stimulation focussed on Internet governance - responsive to the needs of all the world’s people – might become essential.

Such an open, global, and inclusive multi-stakeholder platform should become not only a high level “think tank” for cross-sectoral policy debate. The platform should in addition to its role as a think tank become an innovative way for fostering and

monitoring progress on governance objectives of common interest and concern, - promoting a people-centred and development-oriented information society at international policy level. The envisaged entity should not be established as quasi-international organisation and only be supported by light and flexible but well equipped unit, building on existing organisations, networks and processes. It should not have prescriptive tasks but it could issue recommendations. The entity could identify suitable institutions/organisations to deal with the respective issues that are related to Internet governance. It could possibly even recommend assignment of roles to various stakeholders ensuring as wide participation as possible. It could collect and make available knowledge and identify existing gaps but also best practices. Possibly the multi-stakeholder entity might even label sources of excellence.

Some insights from public economics may be helpful to better understand the need for a global high level entity dealing with the promotion of *public goods* pertaining to Internet governance: At the national level – in markets and societies – it is the role of governments to provide *public goods* such as public education, public parks or security, and also to regulate *public bads* such as actual threats for health, privacy and information integrity, pollution or unfair competition. The economic characteristics of *public goods* (non-excludable and non-rival in consumption) are the same, irrespective whether the public goods are local or global. Obvious examples are global environment, global security, global economic stability, global health and knowledge. The openness, interdependence/interconnection and integration associated with globalization and notably the Internet mean that somehow the tasks of monitoring to what extent *public goods* are provided and *public bads* regulated would have to be undertaken not only at the local but also the global level. The provision of *public goods* is a central part of the logic for international “collective action”²⁵.

Having considered the mechanisms of multi-stakeholder, multi-level and multi-instrument action (policy mix of governance tools), an open, transparent and inclusive multi-stakeholder approach to issues pertaining to governance is vital, bringing in also stakeholders that are not as yet sufficiently involved in policy making today such as the content community and the marginalized. Ensuring sustainable and neutral financing from public sources (core funds) and sponsors possibly from industry, NGOs or private

²⁵ Deepak Nayar and Julius Court: Governing Globalization: Issues and Institutions, UN University World Institute for Development Economics Research (UNU/WIDER), Policy Brief No. 5, Helsinki 2002, 7s.

parties (activity funds) and designing an appropriate business model and operational governance structure will be crucial. The envisaged global multi-stakeholder entity would operate from a set of principles that would be drawn from the WSIS-Geneva two key documents, i.e. the Declaration of Principles and the Plan of Action.

The year 2005 presents an opportunity to move decisively in this direction. In September 2005, world leaders will come together in New York to review progress made since the United Nations Millenium Declaration²⁶; the World Summit on the Information Society will take place in Tunis in November 2005.

²⁶ United Nations General Assembly resolution 55/2; see Report of the United Nations Secretary General: In larger freedom: towards development, security and human rights for all, U.N. General Assembly A/59/2005 (New York, 21 March 2005)