

**University of Kent**

**Internet Governance: In the Footsteps of Global Administrative Law**

**by**

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## **Abstract**

This paper suggests that the principles of accountability and legitimacy should comprise the basic tenets of Internet governance. A framework convention has been proposed as the only traditional international legal instrument with the potential to meet this goal; however, despite the flexibility it offers, a framework convention has significant shortcomings that would make employing it in the area of Internet governance difficult. Instead, the paper suggests that solutions for Internet governance should be sought within the emerging theory of Global Administrative Law, which describes a decentralized governance scheme based on common trends and characteristics in other multistakeholder, multilevel, international issue areas and one capable of promoting the rule of law in hybrid governance structures.

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## Introduction

On September 20, 2005, at the third preparatory committee meeting to the World Summit on the Information Society (WSIS), the Brazilian delegate read a statement on Internet governance, articulating what was on the minds of many people in the room, and around the world: “On Internet governance,” the statement read, “three words tend to come to our mind: lack of legitimacy.<sup>1</sup>” The delegate was referring to the unique relationship between the United States government and the Internet Corporation for Assigned Names and Numbers, ICANN, the organization in charge of three crucial areas for the operation of the Internet: the domain name system, IP addressing and the so-called A-root server.<sup>2</sup> “In what concerns Internet governance,” Brazil continued, “[...] only one nation decides on behalf of us all.” Internet governance, of course, is a much wider concept than the management of domain names; nevertheless, the statement touches on many issues that any approach to Internet governance must resolve if it is to be sustainable.

The Brazilian delegate’s speech reflects the need for legitimacy and accountability not only in ICANN, but in all aspects of international Internet governance. In fact, often cited as an example of an international, quasi-judicial,<sup>3</sup> hybrid-governance structure itself, ICANN has performed its three functions efficiently enough that all WSIS delegates ultimately recognized the importance of threading carefully around

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<sup>1</sup> For the full statement, see Appendix A.

<sup>2</sup> A Domain Name System matches Internet domain names (such as, for example, www.bsis.be) to IP addresses, which are strings of numbers computers use to direct traffic to the corresponding website (such as, 193.109.184.236).

<sup>3</sup> See “Comments by the Government of Canada on the Continued Transition of the Technical Coordination and Management of the Internet Domain Name and Addressing System” Department of Commerce, National Telecommunications and Information Administration, Docket No. 060519136-6136-01, read at the July 26, 2006 meeting on The Continued Transition of the Technical Coordination and Management of the Internet Domain name and Addressing System, held by the National Telecommunications and Information Administration in Washington, D.C.

the issue of increasing its legitimacy through the internationalization of its oversight.<sup>4</sup> In November 2005, at the final WSIS meeting in Tunis, they decided that, for the time being, there should be no interference in ICANN's administration of the domain name system, IP numbers and the root server database.<sup>5</sup> Despite this agreement, participants felt that many questions of Internet governance remained outstanding, and asked the UN Secretary General to convene a new forum for multi-stakeholder policy dialogue on Internet governance.<sup>6</sup> The debate reflected a much wider concern about the changing nature of international governance and a marked deficiency of accountability and legitimacy in various existing and emerging global structures, sometimes justified on the grounds of efficiency.<sup>7</sup> It is fair to mention that this paper has been inspired by the mentioned WSIS debates, especially those concerning innovative approaches which are based on the hybrid management solutions already at work in Internet governance.<sup>8</sup>

We are increasingly surrounded by and dependent on Internet technologies for going about our daily activities, especially those of us who are on the connected side of the digital divide. The steadily growing numbers of applications and users attest to

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<sup>4</sup> In a 'worst case' scenario, destabilizing ICANN could result in the creation of alternative Internets, perhaps indistinguishable to the user. As James Boyle explains, splitting the root would destroy the Internet and produce different and incompatible domain name systems, resulting in confusion comparable to what the Tower of Babel meant for comprehension across linguistic groups. See Boyle, James. "A Nondelegation Doctrine for the Digital Age?" *Duke Law Journal*. 50. 5 (2000): 8-9.

<sup>5</sup> One of the main arguments for making no changes to ICANN's current role is that it serves as a successful model of private-sector led development involving all relevant stakeholders. See paragraph 55 of WSIS (World Summit on the Information Society) Executive Secretariat (Ed.) "Tunis Agenda for the Information Society." Document WSIS-05/TUNIS/DOC/6(Rev.1)-E. Geneva, ITU, 2005. ("Tunis Agenda" in further text.)

<sup>6</sup> See paragraphs 67 and 72 of the Tunis Agenda.

<sup>7</sup> For instance, see Berners-Lee, Tim. Weaving the Web: The original design and ultimate destiny of the World Wide Web by its inventor. New York: HarperCollins Publishers, 1999. p. 92.

<sup>8</sup> See Grewlich, Klaus. "Internet Governance: Definition; Governance tools; Global Multi-stakeholder entity." Paper Written for the Eight Meeting of the UN ICT Task Force. New York: UN ICT Task Force, 2005, p. 3.

the volume of innovation and creativity no one could have foreseen just a few years ago. At this point, we cannot predict what kinds of Internet technologies and applications the world will see in the coming decades, just like we could not have known ten or twenty years ago how profound the changes broadband Internet would bring to the way we communicate, teach, learn, write, work and live, today. As Keith E. Maskus and Jerome H. Reichman write in relation to intellectual property rights (IPRs), the Internet age poses many unanswered questions that demand a lengthy period of ‘trial and error’ experimentation.<sup>9</sup> The Internet as a whole is in similar need of managed experimentation.

Like the networks comprising the Internet itself, legal and technological aspects that fall under the concept of Internet governance are so numerous and complex that holistic analysis is hardly possible, even without the given time and space limits. The goal of this paper is therefore limited in scope. The paper aims to indicate the interconnectedness of multiple legal and technological issues and then establish a need for the development of overarching administrative principles in international Internet governance. The utmost diversity of activities taking place over the ‘Net and their growing impact on a variety of international issues suggests that one should identify certain basic regulatory principles capable of orienting legal practice in individual cases. The conclusion that such a need exists will be made if the following conditions are found: one, that there is a need for overall international coordination in the case of transnational, border-crossing phenomena which cannot be dealt with either within a state’s borders or in terms of bilateral or multilateral agreements or

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<sup>9</sup> Maskus, Keith E. and Jerome H. Reichman. "The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods." Journal of International Economic Law 7. 279. (2004): 312-313., p. 34.

existing international treaty formats (for instance, in environmental governance); and two, that evidence exists of the need for specific principles to promote a system of public power checks and balances in current Internet governance entities, including ICANN and the World Wide Web Consortium. The assumption here is that overarching principles can promote a system of checks and balances in an issue area that requires decentralized but coordinated governance.

## **Internet Governance Background**

### **Internet: Definition and History**

As a network of networks spanning the globe, the Internet links many groups of interconnected computers and devices located in many jurisdictions. Since the network relies on a combination of public and private components, there is no single owner of the Internet as a whole and “nobody can turn it off.”<sup>10</sup> As it crosses borders, no single government or other type of entity has sole power over its functioning.<sup>11</sup> Further, the underlying technology on which it rests does not require centralization of any of the network’s functions, with the exception of the highest level database of internet addresses, the so called “root.” The Internet, which has connected over 20 percent of the world’s population<sup>12</sup> in under a decade, is considered by many to be the global infrastructure of the information society,<sup>13</sup> the

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<sup>10</sup> See Carpenter, Brian. (ed.) “Request for Comments (RFC) 1958—Architectural Principles of the Internet” (June 1996) at s. 2.4. Last accessed August 18, 2006. <http://www.ietf.org/rfc/rfc1958.txt>.

<sup>11</sup> Mayer-Schoenberger, Viktor and Malte Ziewitz. “Jefferson Rebuffed: The United States and the Future of Internet Governance.” Faculty Research Working Paper Series, Harvard University, May 2006. p. 4.

<sup>12</sup> According to the CIA Handbook, and Worldwatch Institute’s report “Vital Signs 2006 – 2007” the Internet population reached 1.06 billion in 2005.

<sup>13</sup> Personal conversation with Wolfgang Kleinwächter, Professor of International Communication Policy and Regulation, University of Aarhus, Thursday, June 8, 2006.



most critical piece of the economic, social and cultural foundation of our time. The potential of the Internet to serve as the primary infrastructure for mass and point-to-point communication has led some to underline the need to protect its status as a global public good;<sup>14</sup> however, the Internet's is not only a public good. It is also a marketplace, a communications facility for academia and the military, a platform for the provision of education and health services, a depository of knowledge and sometimes a cloak for criminals. By definition, it is multifunctional, and this multifunctionality was built into its original architecture. At the most basic level, data packets sent over the network are treated equally, regardless of their content, origin or destination.<sup>15</sup> The ultimate law of the internet is its technical infrastructure, as Lawrence Lessig rightly explains in his book *Code and Other Laws of Cyberspace*. If it is technically impossible to censor information traveling on the network, no legislation will make it feasible. It follows, then, that technical standards are very important for Internet governance. The Transmission Control Protocol, or TCP, widely used on the Internet, is the type of technical standard that makes censorship on the Internet difficult. It does so by relying on the end-to-end principle, the concept that operations involved in communicating across the network should always occur

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<sup>14</sup> Raboy, Marc and Shtern, Jeremy.(2005). "The Internet as a global public good: Towards a Canadian position on internet governance for WSIS phase II". In Dugré, Pauline (ed). *Paver la voie de Tunis-SMSI II*. Ottawa: Canadian Commission for UNESCO. 126-132. p. 129.

<sup>15</sup> In "Network Neutrality, Broadband Discrimination," Tim Wu describes that a neutral network is one that does not favor one type of content (like web pages), over others (like email messages). Network neutrality allows technical innovation through intense competition between different applications, allowing customers to choose services, features and restrictions available to them. The explosive growth of the Internet is most often attributed to the fact that the basic technology, the Internet Protocol (IP), is indifferent both to the communications medium "below" it (like telephone wires, satellite signal or fiberoptic cable), and the applications running "above" it (like web, email and streaming media). See Wu, Tim, "Network Neutrality, Broadband Discrimination." Journal of Telecommunications and High Technology Law. 2. 141 (2005): 141-179.

on its ends, close to the source of the information being communicated.<sup>16</sup> In other words, users communicate with one another and the exchange of information happens on either end, instead of at a point between them where interception and censorship would be easier.

Effective regulation of the many functions of the Internet requires the recognition of their interdependence. In other words, the Internet requires a complex system of governance,<sup>17</sup> perhaps more complex than any other international governance method currently available. The multifunctional nature of the Internet, the lack of centralization of any of its functions, and the uniquely wide importance of this communications medium mean that many different actors have a stake in Internet governance, and must be involved in its development and enforcement. Internet governance issues have evolved gradually, together with the technological advancement and continuous expansion of the Internet. Due to their intertwined development, it is worth briefly turning to the technical evolution of the network itself and of Internet technical policy-making, including the development, structure and functions of ICANN, one of the rare points of centralized governance on the network.<sup>18</sup>

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<sup>16</sup> The end-to-end principle was first discussed in 1984 by Jerome H. Saltzer, David P. Reed and David D. Clark, in "End-To-End Arguments in System Design." ACM Transactions on Computer Systems. Vol. 2 No. 4, November, 1984, 277-288. The article is still useful for understanding the principle and its implications on the Internet.

<sup>17</sup> For a discussion of different visions on whether the Internet needs governance and what specific areas of Internet regulation need governance, see MacLean, Don M. "Herding Schrödinger's Cats: Some Conceptual Tools for Thinking about Internet Governance: Background Paper for the ITU Workshop on Internet Governance." Geneva, 26-27 February 2004.

<sup>18</sup> See Mueller, Milton L. Ruling the Root: Internet Governance and the Taming of Cyberspace. Cambridge: MIT Press, 2003. at p 6. where he states that "[t]he root is the point of centralization in the Internet's otherwise thoroughly decentralized architecture. The root stands at the top of the hierarchical distribution of responsibility that makes the Internet work."

The explosion of users, the spread of broadband and the growth of its applications have changed surprisingly little in the underlying technologies involved in one of the Internet's predecessors, ARPANET. As one of the components which eventually evolved into the Internet, ARPANET was commissioned by the US Department of Defense Advanced Research Projects Agency (ARPA) in 1958.<sup>19</sup> The project's goal was to mobilize research resources toward building technological military superiority over the Soviet Union and in response to the first Sputnik's launch in 1957. In September of 1969, ARPANET started with one node at a single university, and grew to four nodes by December of that year, spanning the University of California Los Angeles, Stanford Research Institute, the University of California Santa Barbara and the University of Utah. The technology it used, packet switching,<sup>20</sup> remains the basis of information travel over the Internet today: data being transmitted is divided into packets, each of which is routed individually to the destination, to optimize the use of bandwidth available in a network. During the seventies and eighties, ARPANET grew through connecting with other computer networks that had appeared in the US and Europe, becoming an international utility. As it grew, the components used by the US military were branched off and the remaining network was dedicated to research.<sup>21</sup> In the 1990s, the Department of Defense decided to commercialize the research branch of the project, which was to

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<sup>19</sup> Castells, Manuel. The Internet Galaxy: Reflections on the Internet, Business, and Society. New York: Oxford University Press, 2001, p. 10.

<sup>20</sup> Packet switching was developed independently by Paul Baran at Rand Corporation, Paul Baran and Donald Davies at the British National Physical Laboratory. See Baran, Paul. "The beginning of packet switching: some underlying concepts." IEEE Communications Magazine. 40.8 (2002) : 42-8. and Davies, Donald W. "An Historical Study of the Beginnings of Packet Switching." The Computer Journal. 44. 3. (2001): 152-162.

<sup>21</sup> This was done for security reasons. See Leiner, Barry M., Vinton G. Cerf et al. "The Past and Future History of the Internet." CACM (Communications of the Association for Computing Machinery). 40. 2 4. (1997): 102 – 108.

continue growing into what we today know as the Internet.<sup>22</sup> The Domain Name System (DNS), used for management of generic top-level domains (gTLDs) such as .com, .net, and .org was introduced in 1983.<sup>23</sup> A year later, two-letter country code TLDs (or ccTLDs) like .be for Belgium and .uk for the United Kingdom were introduced, based on the two-letter country abbreviations agreed to by the International Standards Organization (ISO).<sup>24</sup>

During the development of ARPANET, governance amounted to technical decisions made through a numbered series of Requests for Comments (RFCs).<sup>25</sup> This RFC-based method continued to be used for the development of technical Internet standards and remains in place today. Since its founding in 1986, the most important organization in this arena has been the Internet Engineering Task Force. Its open participation policy<sup>26</sup> has had a significant impact on the network and on the social norms that drive Internet policy development today.<sup>27</sup> Today, the organization continues to be a leader in Internet standards development.

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<sup>22</sup> The underlying technology advanced to address the need for connecting various networks that were not technologically compatible. For a more detailed account, see Castells, p. 9-36.

<sup>23</sup> See Mockapetris, Paul (ed.) "Request for Comments (RFC) 882 - Domain Names - Concepts and Facilities" (November 1983). Last accessed August 30, 2006 at <http://tools.ietf.org/html/rfc882>. See also Mockapetris, Paul (ed.) "Request for Comments (RFC) 883 - Domain Names - Implementation and Specification" (November 1983). Last accessed August 30, 2006 at <http://tools.ietf.org/html/rfc883>.

<sup>24</sup> See Internet Assigned Numbers Authority (IANA), Procedures for Establishing ccTLDs, 19 March 2003. Last accessed August 22, 2006. [www.iana.org/cctld](http://www.iana.org/cctld).

<sup>25</sup> See, for example, Network Working Group, Request for Comments: 1, written by Steve Crocker at UCLA, 7 April 1969, on the topic of Host Software. Last accessed August 18, 2006 at <http://tools.ietf.org/html/rfc1>.

<sup>26</sup> Anyone can get involved in the IETF, attend its meetings and participate in its work done primarily through email.

<sup>27</sup> See, for example, the "FYI: What is the Internet RFC" from 1993, published by the IETF User Services Working Group. The RFC contains a helpful description of the earliest days of the Internet's turn to internationalization, commercialization and privatization. Last accessed August 22, 2006. <http://www.isi.edu/in-notes/fyi/fyi20.html>

In the early nineties, once the restrictions to commercial use were dropped, the interest in and use of the Internet grew significantly. In particular, the development of the World Wide Web (WWW) by Tim Burners-Lee at the European Organization for Nuclear Research (CERN), near Geneva, Switzerland, in 1990, caused exponential growth of the Internet. With much more data traveling on the network, there emerged a need for more governance functions, and in particular, for reorganizing the address allocation system. The system, which started as a single file named “hosts.txt,”<sup>28</sup> was first managed by one person, Dr. Jon Postel,<sup>29</sup> who continued to oversee its evolution into an organization - the Internet Assigned Numbers Authority (IANA).<sup>30</sup> By this point, in addition to Internet standards, commercial agreements began to influence how traffic is exchanged. With the growth of the network, many issues related to business, education, economic development and security began to be affected by internet activities. As a consequence, there was a growing interest in domain names and addresses, on the part of international governmental and non-governmental organizations, regulatory and technical bodies, business and civil society groups. ICANN was created in response to the need to address and involve all or most of these interests without compromising the security and stability of the

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<sup>28</sup> See, for instance, Mockapetris, Paul V. and Dunlap, Kevin J. "Development of the Domain Name System." Proceedings of SIGCOMM '88, Computer Communication Review. 18. 4. (1988): 123–133. p. 123.

<sup>29</sup> Dr. Postel was involved in the development of many of the basic Internet protocols such as the Domain Name System, File Transfer, Telnet, and the basic Internet Protocol (IP) itself. See International Telecommunications Union (ITU). “Building on Jon Postel's Internet Legacy. Information.” Note by the Secretary-General of the International Telecommunications Union. Geneva: ITU. 20 October 1998.

<sup>30</sup> In a “Tribute to Jon Postel,” Vinton Cerf, the founder of the World Wide Web calls Postel “the foundation on which our every web search and email was built, always there to mediate the random dispute, to remind us when our documentation did not do justice to its subject [...]” See Cerf, Vinton. “RFC Tribute to Jon Postel: I remember IANA.” (1998) Last accessed August 30, 2006 at <ftp://ftp.isi.edu/in-notes/rfc2468.txt>.

Internet.<sup>31</sup> Once again, the technical advancement and expansion required a new, more elaborated form of governing the Net.

### **Internet Governance: Definition and History**

The etymology of the verb “to govern” is used by some internet governance analysts to introduce the concept.<sup>32</sup> It relates to the Latin *gubernare*, meaning to steer, govern, or Greek *kybernân*, meaning to pilot a ship, direct.<sup>33</sup> The emphasis, especially in the contexts of international and global governance, is often placed on the independence of the term “governance” from a formal government. According to James Rosenau,

[G]overnment suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.<sup>34</sup>

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<sup>31</sup> In the period between 1997 and 2004, the IANA delegated IP addresses to four Regional Internet Registries (RIRs). A fifth RIR was created in 2004. The RIRs, which continue to operate in close cooperation with ICANN are the American Registry for Internet Numbers (ARIN) for North America (established in 1997), Réseaux IP Européens - Network Coordination Centre (RIPE NCC) for Europe, the Middle East and Central Asia (with a history dating back to 1989, RIPE NCC was formally established in 1997.), the Asia-Pacific Network Information Centre (APNIC) for Asia and the Pacific region (founded in 1992 as a pilot project of the Asia Pacific Networking Group and became independent by 1996), the Latin American and Caribbean Internet Addresses Registry (LACNIC) for Latin America and the Caribbean region (created in 1999), and the AfriNIC for Africa.(created in 2004; prior to that, the number resources were managed in Africa by the RIPE NCC, ARIN and APNIC.) See Karrenberg, Daniel, Gerard Ross et al. "Development of the Regional Internet Registry System." Cisco Internet Protocol Journal December 2001.

<sup>32</sup> MacLean, 2004. p. 6.

<sup>33</sup> Stein, Jess (ed.). Entry “Govern.” The Random House Dictionary of the English Language. The Unabridged Edition. New York: Random House, 1983, p. 612.

<sup>34</sup> Rosenau, James and Ernst-Otto Czempiel (eds.) Governance Without Government: Order and Change in World Politics. Cambridge: CUP, 1992. p. 4.

Robert O. Keohane also suggests that governance encompasses government, explaining governance as the “making and implementation of rules, and the exercise of power, within a given domain of activity.”<sup>35</sup> The advantage of the broader concept of governance over the narrower term (government) is its ability to involve strategic interaction among entities that are not arranged in formal hierarchies; its disadvantage is that in the absence of government, the legitimacy of governance is often questioned by those affected.<sup>36</sup> Nevertheless, there is a growing administrative space in which functions of international governance and law are executed through complicated maneuvers mixing public with private elements, domestic with international institutions, soft with hard law, and legal with non-binding rules.<sup>37</sup> As they extend in reach and expand into new issue areas, more and more public power is wielded by the hybrid approaches, partnerships, networks and institutions, causing increasing concern about their legitimacy and accountability.<sup>38</sup> Compared to the traditional approaches favouring centralization and states as the exclusive group of actors, they seem to hold the promise of greater efficiency, additional flexibility, a higher level of precision and arguably a more democratic alternative to the development of international regulation and law. In the context of Internet governance, they also promise enough flexibility to allow for unhampered evolution of this, still young, technology. At the same time, effective Internet governance demands a framework

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<sup>35</sup> Keohane, Robert. 2003. “Global Governance and Democratic Accountability” in David Held and Mathias Koenig-Archibugi, (eds.) Taming Globalization: Frontiers of Governance. Cambridge: Polity Press 130-158, p. 133.

<sup>36</sup> Keohane, Robert. 2003. “Global Governance and Democratic Accountability” in David Held and Mathias Koenig-Archibugi, eds. Taming Globalization: Frontiers of Governance. Cambridge: Polity Press 130-158, p. 133.

<sup>37</sup> Krisch, Nico and Benedict Kingsbury. "Introduction: Global Governance and Global Administrative Law in the International Legal Order." European Journal of International Law. 17. 1 (2006): 1–13. p.1.

<sup>38</sup> Krisch, p. 2.

for participation of many stakeholders at many levels, with the principles of accountability and legitimacy as the overarching standards. In December of 2003, at the end of the first phase of the World Summit on the Information Society, the Working Group on Internet Governance was formed in order to, among other tasks, develop a working definition of Internet governance.<sup>39</sup> Its definition recognized the need for a participatory, multistakeholder approach. As adopted by the WSIS governments in the Tunis Agenda,

A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.<sup>40</sup>

This definition is helpful in that it enumerates the stakeholders and some of the challenges facing Internet governance; however, it gives no indication of what an Internet governance structure may look like, and how the various issues and actors may be involved. More importantly for this discussion, while it states that shared principles, norms and rules are necessary, it gives no clue as to what they may be. In “Internet Governance: Definition; Governance tools; Global Multi-stakeholder Entity,” Klaus Grewlich stresses that Internet governance should not be thought of as

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<sup>39</sup> WSIS Geneva Declaration of Principles, paragraph 50, states that “[i]nternational Internet governance issues should be addressed in a coordinated manner. We ask the Secretary-General of the United Nations to set up a working group on Internet governance, in an open and inclusive process that ensures a mechanism for the full and active participation of governments, the private sector and civil society from both developing and developed countries, involving relevant intergovernmental and international organizations and forums, to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005.” See WSIS (World Summit on the Information Society) Executive Secretariat (Ed.) “Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium.” Document WSIS-03/GENEVA/DOC/4-E. Geneva: ITU, 2003.

<sup>40</sup> See WSIS (World Summit on the Information Society) Executive Secretariat (Ed.) “Tunis Agenda for the Information Society.” Document WSIS-05/TUNIS/DOC/6(Rev.1)-E. Geneva, ITU, 2005, paragraph 34.



a single regime, but a combination of numerous frameworks.<sup>41</sup> Grewlich further explains that we should not conceive of governance as a final strategy but a fluid process towards an effective international rule of law,<sup>42</sup> one that includes legal and non-legal governance tools alike and corresponds to the highest degree possible to the dynamic nature of the Internet. According to him, the popularity of the term “governance” may be explained by the fact that international regulation is in a transition period. While nation states retain particular importance at the global level, they face competition in regulation from other sources, including foreign governments, international organizations and private groups. The term “governance” thus allows for hybrid efforts that may include any actual combination of coordinating and/or regulatory entities.<sup>43</sup> This means that we speak about the Internet governance as a developing phenomenon, consisting of a constantly changing constellation of regulatory norms and bodies. It is in this descriptive sense, which reflects the current nature of the phenomenon itself, that the term “Internet governance” is used in this paper.

In *Internet Governance: A Regulative Idea in Flux*, Jeanette Hofmann also refers to the current period as a transitional one. She describes the process as an open-ended, collective course of searching for ways to fill, both conceptually and institutionally, a global “regulatory void”<sup>44</sup> in a legitimate way. This void arose

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<sup>41</sup> Although Grewlich does not explicitly refer to a decentralized framework based on global administrative law, his approach fits the GAL theory, discussed in Section “Operationalizing the Principles: An Approach Based on Global Administrative Law?” See Grewlich, Klaus. “Internet Governance: Definition; Governance tools; Global Multi-stakeholder entity.” Paper Written for the Eight Meeting of the UN ICT Task Force. New York: UN ICT Task Force, 2005.

<sup>42</sup> Grewlich, 2005, p. 8.

<sup>43</sup> Grewlich, 2005, p. 3.

<sup>44</sup> Hoffman, Jeanette. "Internet Governance: Eine regulative Idee auf der Suche nach ihrem Gegenstand in Gunnar Folke Schuppert (Hrsg.)Governance-Forschung – Vergewisserung über Stand und

because the principle of sovereignty, which was an essential component in international regulation of the telephone network, was not carried over to the Internet. According to Hofmann, the development of Internet governance unfolded in three distinct phases, characterized by their own specific spheres of activity, constellations of actors, policy agendas, and perceived problems. The first phase comprises the initial standards development, done primarily through the work of the Internet Engineering Task Force (IETF). The approach to Internet governance was characterized by the organizational rules, culture, tone and approach of the engineering community. Thus, for instance, in a 1993 request for comments by the IETF's User Services Working Group, the governance procedures were compared to a church with a council of elders, because there was no single authority figure for the Internet as a whole.<sup>45</sup> The church metaphor referred to the Internet Society (ISOC), a voluntary organization whose purpose is to promote global information exchange through Internet technology, while the council of elders relates to the council appointed by the ISOC members.<sup>46</sup> The following paragraph from Request for Comments (RFC) 1462 hints at the effort, prevalent at the time, to establish Internet self-governance:

If you go to a church and accept its teachings and philosophy, you are accepted by it, and receive the benefits. If you don't like it, you can leave. The church is still there, and you get none of the benefits. Such is the Internet. If a

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Entwicklungslinien, Band 1 der Reihe, "Schriften zur Governance-Forschung," (Nomos-Verlag: Baden-Baden, 2005), 277-301. Available as, "Internet Governance: A Regulative Idea in Flux." Last accessed August 18, 2006, at

<http://duplox.wzberlin.de/people/jeanette/texte/Internet%20Governance%20english%20version.pdf>.

<sup>45</sup> Krol, Ed and Ellen Hoffman, FYI on "What is the Internet?" Request for Comments: 1462. 20, May 1993, User Services Working Group of the Internet Engineering Task Force (IETF).

<sup>46</sup> Heath, Don. "ISOC in Internet Governance" ISOC January/February 1999. Available at the ISOC webiste, last accessed August 30, 2006 at <https://www.isoc.org/oti/printversions/0199prheath.html>.

network accepts the teachings of the Internet, is connected to it, and considers itself part of it, then it is part of the Internet.<sup>47</sup>

This attempt to establish Internet governance without direct involvement of government or other traditional authority marked the beginning of the second phase of Internet governance. During this period, many practitioners and academics wrote near-theatrical pieces in an effort keep governments out of cyberspace, proclaiming it was “ungovernable.” The most famous example of such a claim is Jon Perry Barlow’s “Declaration of Independence of Cyberspace,” which begins with the following:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. [...] You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.<sup>48</sup>

‘Optimists’<sup>49</sup> of the John Barlow kind are now largely dismissed. But to take proclamations such as the above at face value is to misunderstand them. Calling Barlow a utopian dreamer because we now have spam and cybercrime is not unlike calling John Lennon an unrealistic peacenik in light of increasing threat of nuclear war the world was heading to in the 1960s. Concepts like human rights continue to be important despite the fact that they continue to be violated. Society’s inability to respect fully these values does not make their validity and moral weight any smaller. Perhaps Barlow and others saw the early Internet as an opportunity to reevaluate international interaction and the effectiveness of the restrictions placed on society in

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<sup>47</sup> Krol, p. 2.

<sup>48</sup> The full text of John Barlow’s “A Declaration of Independence of Cyberspace” is available at <http://homes.eff.org/~barlow/Declaration-Final.html>

<sup>49</sup> Kurbalija, Jovan. “Internet Governance and International Law” in Drake, William J. (Ed.) *Reforming Internet Governance: Perspectives for the Working Group on Internet Governance*. New York: United Nations Information and Communication Technologies Task Force, 2005. p. 105.

the names of security and legitimacy. It is in similar spirit, but a much less emotional, law-based approach, that Lawrence Lessig wrote the book *Code and Other Laws of Cyberspace*,<sup>50</sup> pointing to the opportunity to reexamine our values and proceed in developing the Internet in a way that reinforces one set of values over others.<sup>51</sup> While often radical, these ideas continue to have sway in the Internet governance dialogue, not only among the academics and Internet engineers, but also among some governments<sup>52</sup> and private companies.<sup>53</sup> Of course, cyberspace does not exist separately from the ‘real world,’ in which governments, corporations, civil society and international institutions play important roles. In the domain name system, for example, the recognition that successful governance can only be achieved through cooperation among all of these sectors came gradually, marked by the effort of the US

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<sup>50</sup> This pioneering work is most often cited for outlining that control of the Internet can only be exercised through control over the underlying technologies, in other words, code; however, Lessig’s main point is that the struggle in Internet regulation should not be between government involvement and avoidance thereof; instead, Lessig says that “governments should intervene, at a minimum, when private action has public consequences; when shortsighted actions threaten to cause long-term harm; when failure to intervene undermines significant constitutional values and important individual rights; and when a form of life emerges that may threaten values we believe to be fundamental. See Lessig, Lawrence. Code And Other Laws of Cyberspace. New York: Basic Books, 1999. at p. 233.

<sup>51</sup> Lessig, 1999, p. 7 *et passim*.

<sup>52</sup> See WSIS (World Summit on the Information Society) Executive Secretariat (ed.) “Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium.” Document WSIS-03/GENEVA/DOC/4-E. Geneva: ITU, 2003.

<sup>53</sup> For instance, a coalition of technology companies and human rights groups, including Sun Microsystems and Pulver.com is appealing a federal court ruling that requires Internet Service Providers to adjust their technologies to enable government wiretapping. See the “Opening Brief” at <http://www.eff.org/Privacy/Surveillance/CALEA/20060126ace-opening-brief.pdf> and the “Reply Brief” at <http://www.eff.org/Privacy/Surveillance/CALEA/20060314calea.pdf>; Most recently, a Google executive has publicly said that a failure to enact laws in the US imposing Net neutrality on broadband providers would hurt entrepreneurs. See McCullagh, Declan. “Google defends Net neutrality regulations.” CNET. August 22, 2006. News.com. Last Accessed August 30, 2006 at [http://news.com.com/2100-1028\\_3-6108376.html](http://news.com.com/2100-1028_3-6108376.html)

Clinton administration to privatize the network through creating ICANN in 1998 and by the organization's subsequent reform in 2002.<sup>54</sup>

The realization that the concept of self-governance of the Internet, which by definition insists on keeping the State out,<sup>55</sup> would not work marked the beginning of the third phase. Hofmann finds that this phase, in which we are now, will be driven by the demand for an intergovernmental policy making mechanism for the Internet.<sup>56</sup> This demand was demonstrated at the World Summit on the Information Society (WSIS) which will be remembered for two accomplishments. First, WSIS broke ground by formally involving civil society in the Summit process. Second, it placed negotiations around internet governance squarely on the international agenda. The final WSIS meeting in November of 2005 in Tunis saw the creation of the Internet Governance Forum (IGF), a 'multistakeholder' space aimed at crossing what Akash Kapur calls gaps in culture and vocabulary – and therefore in underlying priorities and goals— between sectors.<sup>57</sup> Set to meet for the first time in October 2006, the IGF is not envisioned as a decision-making body; but the dialogue it enables may well affect any of the issue areas described above, including the future of ICANN. The 'conversational' nature of the forum is in fact a recognition of the need for a cautious approach to the governance of the Internet. It is important to note once again that the emphasis placed on ICANN in recent Internet governance negotiations does not necessarily reflect the order of the importance of concerns described above. Neither

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<sup>54</sup> The reform was meant to improve the existing processes and structure of ICANN. See the report of ICANN's president, "President's Report: ICANN – The Case for Reform." Last accessed 18 August 2006 at <http://www.icann.org/committees/evol-reform/links.htm>.

<sup>55</sup> Kapur, Akash. *Internet Governance: A Primer*. Elsevier: UNDP-APDIP, 2005. p. 29.

<sup>56</sup> Hofmann, 2005, p. 2.

<sup>57</sup> Kapur, p. 30.

is it a result of the sometimes controversial decisions taken by ICANN, outlined in the section on “Accountability and Legitimacy Problems within ICANN.”

### **Internet Governance Issues Today**

The Internet poses a variety of legal, policy and business challenges throughout the realms of international trade, the use of common resources, development of technology, networks and services, and efforts for global development,<sup>58</sup> concerning, for instance, international taxation, cybersecurity, consumer protection, ubiquitous networks, management of knowledge, etc. The most relevant of the current issues concerning these challenges are presented in Table 1.

<b>International trade</b>	<b>Use of common Internet resources</b>	<b>Development of technology, networks and services</b>	<b>Applications for equitable, sustainable global development</b>
<ul style="list-style-type: none"> <li>➤ E-commerce</li> <li>➤ Taxation</li> <li>➤ Revenue Sharing</li> <li>➤ Internet Exchange Points (IXPs)</li> </ul>	<ul style="list-style-type: none"> <li>➤ Domain Name System (DNS)</li> <li>➤ Registries and registrars</li> <li>➤ Regional root servers</li> </ul>	<ul style="list-style-type: none"> <li>➤ Financing infrastructure</li> <li>➤ Mobile broadband, ubiquitous networks</li> <li>➤ Internet Protocol version 6 (IPv6)</li> </ul>	<ul style="list-style-type: none"> <li>➤ Financing services and applications</li> <li>➤ National e-strategies</li> <li>➤ E-education, e-government</li> </ul>

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<sup>58</sup> MacLean, 2004, p. 13.

<ul style="list-style-type: none"> <li>➤ Intellectual Property Rights (IPRs)</li> <li>➤ Cyber-security and data protection</li> <li>➤ Cyber-crime</li> <li>➤ Internet &amp; International Telecommunication Regulations (ITRs)</li> </ul>	<ul style="list-style-type: none"> <li>➤ Multi-lingual domain names (addition of non-ASCII characters)</li> <li>➤ Management of country code Top Level Domains (ccTLDs) and generic Top Level Domains (gTLDs).</li> <li>➤ Private vs. public legal instruments.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Migration to IP-based networks</li> <li>➤ Universal access</li> <li>➤ Internet content regulation</li> </ul>	<ul style="list-style-type: none"> <li>➤ Network-based applications</li> <li>➤ Knowledge repositories</li> <li>➤ Consumer Protection (privacy, spam, fraud)</li> </ul>
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**Table 1: Internet related issue areas**

The table updated here for the needs of this paper was presented in an article by Don MacLean, a member of the Working Group on Internet Governance.<sup>59</sup> The group was set up by the UN Secretary General to assist delegates to the World Summit on the Information Society by developing a working definition of Internet governance, identifying the public policy issues involved and to suggest how the various stakeholder groups (namely governments, intergovernmental and international organizations, civil society and the private sector from around the world) can work together.<sup>60</sup> Among other things, the group identified the following highest-priority issues, differences in opinion, and problems which illustrate well the interconnectedness of technological, legal, cultural and political aspects of the Internet’s multifunctionality. One, the group states that for historical reasons the

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<sup>59</sup> See MacLean, 2004, p. 14. The changes made to MacLean’s table include additions of the words “and data protection,” “addition of non-ASCII characters,” “and gTLDs,” “content” in Internet content regulation, “e-education” and “e-government.” Acronyms ISPs, IXPs, ITRs, ccTLDs, gTLDs, and IPv6 were resolved.

<sup>60</sup> MacLean, 2004, p. 1.

existing DNS management system involves only the US Government in the authorization of changes to the root zone file. Multilateral control is preferred by some commentators, while no government control is preferred by others. The current status - unilateral administration of the root zone files and system - is unacceptable by most stakeholders.<sup>61</sup> Two, the Internet backbones are the main 'trunk' connections of the Internet. They consist of a many interconnected commercial, governmental, academic and other high-capacity data routes that transfer data around world. Most of them are based in developed countries. There is no appropriate and effective global mechanism to address the question of interconnection costs. Currently, Internet service providers (ISPs) located in developing countries bear disproportionate costs of the international circuits compared to their counterparts in developed nations. When those costs are passed onto consumers, access barriers are increased and the growth of the internet is suppressed, contributing to the digital divide.<sup>62</sup> At this time, no agreement that could help resolve the issue exists. Three, there is a lack of multilateral mechanisms to ensure stability of the network and security of infrastructure services and applications. Further, no efficient tools exist to allow countries to prevent cybercrime and prosecute crimes committed in other jurisdictions. Four, there is no global consensus on a definition of spam and no global agreement on how the matter could be addressed or national anti-spam laws made effective. Countries are instead working on a growing number of bilateral and

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<sup>61</sup> Working Group on Internet Governance (WGIG). Report of the Working Group on Internet Governance. Château de Bossey: UN, 2005., p. 5. Last accessed August 18, 2006 at [http://www.itu.int/wsis/documents/doc\\_multi.asp?lang=en&id=1661|1662|1663|1664](http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1661|1662|1663|1664).

<sup>62</sup> See Working Group on Internet Governance (WGIG). Background Report. Château de Bossey: UN, 2005., p15. Last accessed August 18, 2006 at [http://www.itu.int/wsis/documents/doc\\_multi.asp?lang=en&id=1661|1662|1663|1664](http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1661|1662|1663|1664).



plurilateral agreements to harmonize anti-spam laws and cooperate in finding solutions. Five, there are significant barriers to multi-stakeholder participation in governance mechanisms. Traditionally, international governance is characterized by a lack of transparency, openness and diversity of stakeholders involved. Participation costs are often prohibitive for those from remote areas, developing countries, civil society organizations and small and medium-sized enterprises. Access to materials produced by intergovernmental and international organizations is frequently restricted. For governments from developing countries, an additional concern is the lack of a global mechanism through which to get involved in multi-stakeholder decision making related to the Internet. Six, adequate resources have not been available for capacity building in various relevant areas, preventing effective participation for some stakeholders, especially from developing countries. Seven, there is a need for further development of policies and procedures for allocation of generic top-level domain names (gTLDs). Eight, there are concerns over allocation policies for IP addresses.<sup>63</sup> Nine, there are questions about the appropriateness of the use of the current intellectual property rights system in an online environment. A very wide range of opinions exists regarding the balance of Intellectual property rights (IPR) between the rights of the holders and the rights of the users.<sup>64</sup> Ten, there is concern that undue restrictions on freedom of expression may result from measures to fight crime or maintain security. Eleven, there is a lack of existence or inconsistent

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<sup>63</sup> The currently available quantity of IPv4 addresses is unevenly distributed for historical reasons. The issue has already been addressed by the regional Internet registries (RIR) and the transition to a new system, with an almost unlimited amount of IP addresses is under way. Many countries have underlined the importance for allocation policies for IP addresses to ensure even geographic distribution under the new system.

<sup>64</sup> Working Group on Internet Governance (WGIG), 2005a, p. 7.

application of privacy and data-protection rights.<sup>65</sup> Twelve, there is a lack of global standards for consumer rights over the Internet.<sup>66</sup> And thirteen, insufficient progress has been made towards multilingualization of the Internet, especially with respect to the development of internet standards<sup>67</sup> and local content.<sup>68</sup> Examining each of these questions in detail is beyond the scope of this paper. The point is that the issues are as diverse as the parties involved.<sup>69</sup> Besides, new questions and topics of discussion will appear over time. As the so-called “Internet age” matures, the inevitable and necessary experimentation with technologies and applications will require careful, although flexible, guidance. Developing this guidance, direction and “governance” should aim to achieve a balance between the necessary room for experimentation and the broader societal values humanity has held for centuries, if we are to allow for sufficient testing room to enable innovation, creativity and growth, while ensuring that concepts like human rights and the public interest are safeguarded throughout the trialing process.

### **Internet Governance Actors and Stakeholders**

As already cited in the section on definition and history of the Internet governance, the Tunis Agenda identifies five groups of stakeholders in the technical and public policy issues related to the management of the Internet. While recognizing the role of the private sector in the continued development of technical and economic aspects, Paragraph 35 specifies that states have a sovereign right to act as the authority for

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<sup>65</sup> Id.

<sup>66</sup> Working Group on Internet Governance (WGIG), 2005a, p. 8.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Paragraphs 38-60 of the Tunis Agenda describe the thirteen points above.

Internet-related international public policy areas. In the Agenda, civil society is noted for its “important role on Internet matters, especially at the community level.” The coordination role is identified as the domain of intergovernmental organizations, and international organizations are cited as important in the technical standards and relevant policies.<sup>70</sup> It is not possible, however, to make a completely clear division of labour. The Agenda acknowledges this by, for example, referring to the technical community and academia as valued contributors to all of the roles described.<sup>71</sup>

Specific issue areas may involve different combinations of stakeholders, whose interests do not coincide. For example, Milton Muller specifies the diversity of actors involved as one of the major barriers to the resolution of the property rights conflicts in the DNS system.<sup>72</sup> The actors in that particular debate include the Internet technical community, existing domain name and address registries, prospective domain name registries and registrars, trademark and intellectual property interests, Internet service providers and other corporations, civil liberties groups concerned with the balance between freedom of expression and intellectual property rights, intergovernmental organizations and a few key national governments. The makeup of the stakeholder combinations may vary according to each issue but what remains constant in Internet governance is the need to involve a variety of people who may have diverging expectations, contradictory interests, and different behavioural codes. One of the challenges for the upcoming Internet Governance Forum will be to provide a space through which such diverse actors can find a common language. If it is to be enforced and binding on all the relevant parties, any agreement made through

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<sup>70</sup> See paragraph 35 of the Tunis Agenda.

<sup>71</sup> See paragraph 36 of the Tunis Agenda.

<sup>72</sup> See Mueller, p. 68.

this “multistakeholder dialogue,” will surely require innovation in the international system, including international law.<sup>73</sup>

## **The Need For Overarching Principles in Internet Governance**

The goal of this section is to establish the need for overarching administrative principles in Internet governance based on two factors: one, the need for principled global cooperation, analogous to the one voiced by Maria Ivanova and James Rosenau in the context of environmental governance; and two, the need for checking and balancing power in the Internet governance context on a principled rather than an *ad hoc* basis. Maria Ivanova establishes three categories of issue areas requiring principled global cooperation:<sup>74</sup> (1) the administration of “global public goods;” (2) the occurrence of externalities; and (3) the presence of ubiquitous problems with worldwide implications.<sup>75</sup> The Internet can be described in terms of all three. Unlike private goods, public goods are non-excludable and non-rivalrous,<sup>76</sup> meaning that their concurrent usage does not result in exhaustion of the resource.<sup>77</sup> In economic terms, something can be considered a public good if its consumption by one

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<sup>73</sup> Kurbalija, Jovan. Personal conversation, May 21, 2006.

<sup>74</sup> Ivanova, Maria H. “Partnerships, International Organizations, and Global Environmental Governance. Progress or Peril? Partnerships and Networks” in M. Witte, C. Streck and T. Benner (eds.), Global Environmental Governance. The Post-Johannesburg Agenda. Washington, D.C. / Berlin: Global Public Policy Institute, 2003, p. 9-36.

<sup>75</sup> See Haas, Peter M. International Environmental Issues: an ACUNS Teaching Text. Hanover, NH: Academic Council on the United Nations System, 1991. and Esty, Daniel C., and Maria H. Ivanova. “Revitalizing Global Environmental Governance: A Function-Driven Approach.” In: Daniel Esty and Maria H. Ivanova (eds.) Global Governance: Options & Opportunities. New Haven, CT: Yale School of Forestry & Environmental Studies, 2002.

<sup>76</sup> Kaul, Inge, Isabelle Grunberg and Marc A. Stern (eds.). Global Public Goods: International Cooperation in the 21st Century. Oxford: Oxford University Press, 1999.

<sup>77</sup> Bechky, Beth. “Sharing Meaning Across Occupational Communities: The Transformation of Understanding on a Production Floor.” Organization Science. 14. 3. (2003): 312-330. p. 4 *et passim*.

individual does not reduce the amount of the good available for consumption by others, and if the costs of restricting consumption outweigh the benefits of not doing so. Marc Raboy writes that the Internet qualifies as a global public good, since it is both non-rivalrous and non-excludable.<sup>78</sup> Researchers, students, scientists, journalists, consumers and advertisers can use the Internet at the same time, without the utility of the medium changing for any one of them. In fact, a student looking for scientific information on a subject via the Internet only benefits if such information has been produced and made available by a scientist through the medium, while a scientist only finds it useful to publish research findings online if an interested audience can access it. The benefit to society of multiple users accessing knowledge in this way may be significant. On the other hand, preventing users from interacting with each other on the Internet would be expensive, not to mention that doing so would infringe on human rights such as freedom of expression and the right to education. Restricting access to the Internet (by legislating and enforcing restrictions) in a way that would prevent users' interaction would have significant political, economic and social costs. As a global resource connecting users from around the world, and perhaps across future and present generations, the Internet is and should remain a *global public good*.<sup>79</sup>

Many public goods, including natural resources like water and air, are not 'perfect' in the sense that there exists a limit to their non-exhaustibility. In "The Tragedy of the Commons," Garrett Hardin notes that the challenge public goods pose

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<sup>78</sup> Raboy, Marc and Shtern, Jeremy. "The Internet as a global public good: Towards a Canadian position on internet governance for WSIS phase II". In Dugré, Pauline (ed). Paving the Road to Tunis – WSIS II. Paver la voie de Tunis- SMSI II. Ottawa: Canadian Commission for UNESCO, 2005. p. 126-132.

<sup>79</sup> Ibid, p. 130.

is that left unchecked, they have a tendency to elicit individually rational but collectively suboptimal or even disastrous behaviour.<sup>80</sup> In the case of natural resources, for example, overfishing by one group of the resource users can lead to everyone being worse off. In the case of the Internet, spam is an appropriate example: senders pay very little to circulate spam, and most of the costs are borne by the recipients and the network carriers. According to MessageLabs.com, over the last 12 months (August 2005-July2006), 58.5 per cent of all email messages sent around the world was spam, with statistics for Asia-Pacific and Africa slightly higher -- around 60 per cent.<sup>81</sup> By overburdening networks, spam can directly contribute to the high cost of access, which is especially relevant for those countries where monopolistic pricing keeps access costs already high.<sup>82</sup> Ivanova writes that a successful effort to eliminate such “free riding” on the benefits provided by global public goods entails principled international cooperation by the various stakeholders. Her call for shared cooperation and coordination by the various users of a common resource is in line with Rosenau’s observation that the old paradigm locating authority exclusively in states is insufficient in a ‘multi-centric’ world. Characterised by a great variety of collectivities, our world “has come to rival the long-standing, anarchical state-centric system.”<sup>83</sup>

The second category of issues requiring international cooperation, externalities, occur when the decision-maker does not bear all of the costs or reap all

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<sup>80</sup> Hardin, Garret. "The Tragedy of the Commons." *Science*. 162 (1968):1243-1248.

<sup>81</sup> See [http://www.messagelabs.com/Threat\\_Watch/Threat\\_Statistics](http://www.messagelabs.com/Threat_Watch/Threat_Statistics) for a dynamic display of spam statistics published by MessageLabs. Last Accessed August 19, 2006.

<sup>82</sup> Organisation for Economic Co-operation and Development. *Internet Traffic Exchange: Market Developments and Measurement of Growth*. Paris: OECD, 2006a. p.31.

<sup>83</sup> Rosenau, James N. "Globalization and Governance: Bleak Prospects for Sustainability" in Rosenau James N., Ernst-Ulrich von Weizsäcker and Ulrich Petschow (eds.), *Governance and Sustainability*. Sheffield: Greenleaf Publishing, 2005. p. 21.

of the gains from his or her actions.<sup>84</sup> Political, economic and social costs of restricting Internet use to certain segments of population are examples of such externalities. In a recent report, Human Rights Watch has called for international laws that would stop Yahoo, Google and other companies involved in censoring Internet content accessible in China by filtering search results that may contain politically sensitive information.<sup>85</sup> By creating China's "Great Firewall" the government and these private companies jointly stifle online free speech around the world. For instance, Skype software<sup>86</sup> for the Chinese market censors words defined as sensitive by the Chinese government without informing the user. In other words, if a Skype user in the UK speaks with a Skype user in China, the direction, content and scope of the conversation is unavoidably influenced by the censorship performed by the Chinese version of the software. In this case, the decision-makers, namely the Chinese government and the companies facilitating censorship practices, bear very little burden of their policies, since they are aware of and have access to the content being censored. While a regulatory agency may be effective in ensuring cooperation among private and public actors domestically, the lack of a supranational authority makes it difficult to prevent externalities, which may occur over space and over time.

The third category consists of ubiquitous problems encountered nationally that have wider ramifications. It is similar to the second, the difference being the addition of feedback loops that ultimately extend the costs of certain decision to all stakeholders. When it comes to natural resources, deforestation and desertification

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<sup>84</sup> Ivanova, p. 11.

<sup>85</sup> Human Rights Watch. Race to the Bottom - Corporate Complicity in Chinese Internet Censorship. New York: Human Rights Watch, 2006. p. 2.

<sup>86</sup> Skype is a program used for live text-based conversation or "chat messaging" between users.

practices in one country may have an overall effect of a decrease in rainfall and loss of biodiversity around the world.<sup>87</sup> Similarly, ineffective domestic Internet governance can have an effect on the entire network. For instance, lack of competition among internet service providers in a country can keep the cost of access high, a problem prevalent in some countries located in the global South.<sup>88</sup> Policies prohibitive of universal affordable access contribute to widening the various digital divides and affect present as well as future generations, who will lack training and exposure earned through early experimentation with the technology. Cybercrime havens in jurisdictions with absent or ineffective anti-cybercrime laws are another example.<sup>89</sup> Since the Internet does not stop at national borders, it is possible to conceive of locations that could harbor international criminals. Their potential activities could not only endanger Internet users in other countries, but also in their own. Lack of effective international coordination in this case could lead to fragmentation of the Internet. In an attempt to reassert their borders in cyberspace some countries already legislate changes to the technical layer of the Internet to allow for better control.<sup>90</sup>

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<sup>87</sup> Ivanova, p. 12.

<sup>88</sup> This problem is compounded by the lack of international multistakeholder management of interconnection costs leads. There is some debate regarding how these two factors combine to result in higher overall interconnection costs. One argument is that regions far away from the Internet backbone, which is denser in the global 'North,' end up paying more for traffic exchange due to the smaller number and higher congestion of available channels. The other argument discounts this proposal and instead suggests that it is the lack of competition, and the high prices charged by monopolistic regimes, that keep certain regions on the underconnected side of the digital divide. On this point, see Organisation for Economic Co-operation and Development. Internet Traffic Exchange: Market Developments and Measurement of Growth. Paris: OECD, 2006a.

<sup>89</sup> Zekos, George. "Internet or Electronic Technology: A Threat to State Sovereignty." Commentary. The Journal of Information, Law and Technology. 3. (1999) Last accessed August 2, 2006. [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999\\_3/zekos/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/zekos/)

<sup>90</sup> For instance, in addition to China, governments of Bahrain, Burma, Iran, Saudi Arabia, Singapore, Tunisia, and the United Arab Emirates are among those named identified by the Open Network



All three instances (global public goods, the occurrence of externalities and the presence of ubiquitous problems with worldwide implications) require cooperation through partnerships,<sup>91</sup> where the partners have stakes in the regulation at hand. Internet governance analysts have too called for multistakeholder participation, and it can be argued that the World Summit on the Information Society succeeded to some degree in engaging various types of interested entities and individuals.<sup>92</sup> Nevertheless, practical coordination is politically difficult, costly and susceptible to being pulled into traditional political tensions. According to Rosenau, the major challenge for international governance, and thus for international law, is that we have not adjusted our conceptual equipment to facilitate the analysis of how authority gets exercised in a decentralized world. Relying on the example of environmental regulation, Rosenau writes:

Our generation lacks the orientations necessary to sound assessments of how the authority of governance can be brought to bear on the challenges posed by the prevailing disarray. We are still deeply ensconced in a paradigm that locates authority exclusively in states and environmental challenges exclusively in their shared problems---the so-called tragedy of the commons.<sup>93</sup>

The challenge consists precisely of our inability to apply established principles such as accountability, transparency and legitimacy to these decentralized structures. In the field of environmental protection, transboundary issues have been of interests to industrialized countries while developing countries are more concerned with

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Initiative to be engaging in Internet filtering (a collaboration between the universities of Harvard, Cambridge, Oxford and Toronto) See <http://www.opennetinitiative.net>.

<sup>91</sup> Ivanova, p. 12.

<sup>92</sup> See Raboy, Marc. "The World Summit on the Information Society and its Legacy for Global Governance." *Gazette: the International Journal of Communication Studies*, 66, 3-4 (2004): 225-232.

<sup>93</sup> Rosenau, James N. "Globalization and Governance: Bleak Prospects for Sustainability" in Rosenau James N., Ernst-Ulrich von Weizsäcker and Ulrich Petschow (eds.), *Governance and Sustainability*. Sheffield: Greenleaf Publishing, 2005. p. 11.

ubiquitous issues.<sup>94</sup> Similarly, in the Internet debate, countries in the global North are more concerned with harmonization of national laws such as those concerning intellectual property rights, while countries in the South tend to focus on issues related to digital divide and other economic development concerns. In addition to the examples discussed, a myriad of precise and diverse issues is contained within the three categories cited above. Each of these requires specific attention. Because problems are so numerous and new in form, and because their future is so unpredictable, it is necessary to establish a principled approach to solving them. Following any agreed governance principles will require a strategy that respects the decentralized nature of the network. The complexity of interdependencies between issues and stakeholders makes the centralized governance mechanisms characteristic of the 20<sup>th</sup> century, based on shared principles that promote cooperation among a wide variety of stakeholders, inappropriate for Internet governance.<sup>95</sup> Furthermore, as Klaus Grewlich argues, the need for agreement on some common overarching principles is present because the Internet and the pertinent regulatory powers are dissimilar in coverage.<sup>96</sup> Discrepancies exist between the transboundary nature of global information networks and territorially sovereign entities, and between local principles and global infrastructures. The gaps in coverage demand innovative governance solutions to maximize the opportunities Internet brings, while managing effectively the existing and new tensions. Grewlich is aware of the difficulties involved in the identification and articulation of overarching principles within the

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<sup>94</sup> Ivanova, p. 12.

<sup>95</sup> Personal conversation with Wolfgang Kleinwächter, Professor of International Communication Policy and Regulation, University of Aarhus, Thursday, June 8, 2006

<sup>96</sup> Grewlich, 2005., p. 8.

context of hybrid governance that combines different actors, different levels of analysis and different instruments (principles and tools) of governance. Adding players to the conventional state governance format is driven by the assumption that the approach will provide solutions to complex problems containing variables which states alone cannot control: specifically, it is assumed that governance mixing international and national, public and private elements will help overcome conflicts between the governance body and the social actors who hold veto positions.<sup>97</sup>

### **Accountability and Legitimacy**

Even though they are closely related, the two principles should be distinguished from one another. Accountability refers to the obligation to demonstrate and take responsibility for performance in light of agreed expectations, and answers the question: Who is responsible to whom and for what?<sup>98</sup> When the processes and structures for the exercise of power are distributed and the obligations to demonstrate and take responsibility are delegated or shared, accountability takes on a dual nature: horizontal accountability is created among partners, while vertical accountability is created through a relationship with a higher governing body.<sup>99</sup> Legitimacy is related to the concept of accountability, although distinguishing them is necessary. Instead of referring to the identity of authorities and the relationships between them, legitimacy focuses on the nature of the particular social or political arrangement.<sup>100</sup> Legitimate institutions and rules persuade actors to voluntarily

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<sup>97</sup> Grewlich, 2005, p. 10.

<sup>98</sup> Fitzpatrick, Tom. Horizontal Management: Trends in Governance and Accountability. Canadian Centre for Management Development Ottawa: Treasury Board of Canada, 2000. p. 6.

<sup>99</sup> Ibid, p. 7.

<sup>100</sup> See Risse, Thomas. "Transnational Governance and Legitimacy Conference" Paper presented at the ECPR Standing Group on International Relations Conference, The Hague, Sept. 9-12, 2004.

comply with behavioural prescriptions.<sup>101</sup> There are different types and sources of legitimacy. Fritz Scharpf notably distinguishes between “input” legitimacy, which corresponds to levels of consensus and participation in the deliberative process preceding the adoption of laws or rules<sup>102</sup> and “output” legitimacy, referring to creating a balance between obstructing public power abuse and promoting efficiency in problem-solving.<sup>103</sup> Sources of legitimacy differ across governance types. Legal governance derives legitimacy from sovereignty, or the constitution of a state, while the legitimacy in private governance relies on consent. The legitimacy of private governance must be supplemented to an extent, for two reasons: because different groups of private actors must sometimes be prevented from trampling on the freedom of other such groups, and because there are certain actions and situations which cannot be legitimized even if everyone affected gives consent (for instance, when fundamental rights and freedoms are threatened).<sup>104</sup>

Although addressing the problems of Internet governance may require innovation in international law and policy making due to its decentralized nature, the call for a system of checks and balances among governance entities is old. In domestic institutions, principles of accountability and legitimacy are important in the creation of such mechanisms. In the international context, the design may considerably differ – because there is no single global authority – but these same principles are equally important. According to the Netherlands Organization for Scientific Research, there is a long history of recognition of the importance of these

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<sup>101</sup> Risse, p. 7.

<sup>102</sup> Scharpf, 1999, p. 7.

<sup>103</sup> Ibid., p. 13.

<sup>104</sup> Id.

principles for centralized governance structures, such as states. But “it is striking how much work still remains to be done in developing thinking on the ways in which issues of accountability, legitimacy and responsibility can be addressed in international or transnational governance, and how that might be operationalized in practice.”<sup>105</sup> In many transnational issue areas, including some already mentioned: taxation, standards, environmental protection, trade and communications, there exists a need to develop common rules based on these principles. The reason is that while many of the Internet bodies perform primarily technical functions, their decisions also affect the public and thus take on some characteristics of public policy. Particularly relevant for Internet governance is David Trubek’s observation that we have had to “confront the fact that the technical is the political” and that “it could be argued that [technical] work is as, if not more, important than the more formal law making”<sup>106</sup> Hans Klein aptly writes that Internet governance bodies require a level of legitimacy and accountability commensurate with their decision-making powers.<sup>107</sup> The advantage of hybrid Internet governance is that it allows for private governance to be exercised in the ‘shadow’ of constitutional authority, which is one source of legitimacy.<sup>108</sup> In today’s structure of Internet governance, the shadow is perhaps not big enough because the existing mechanisms related to accountability and legitimacy

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<sup>105</sup> Netherlands Organization for Scientific Research Shifts in Governance. Problems of Legitimacy and Accountability. The Hague: Netherlands Organization for Scientific Research, 2004. p. 8.

<sup>106</sup> Salzman, James E., "Decentralized Administrative Law in the Organization for Economic Cooperation and Development." Law and Contemporary Problems. 68. 3-4. (2005): 191-227.

<sup>107</sup> See Klein, Hans. “Legitimacy and Global Internet Governance.” Response Paper 3. Social Science Research Council (SSRC) Information Technology & International Cooperation Program. Research Network of ICT Governance and Transnational Civil Society. SSRC Website, 2004. Last accessed August 4, 2006.

[www.ssrc.org/programs/itic/publications/knowledge\\_report/memos/kleinmemo3.pdf](http://www.ssrc.org/programs/itic/publications/knowledge_report/memos/kleinmemo3.pdf)  
October 31, 2004.

<sup>108</sup> Grewlich, 2005, p. 15.

are insufficient and various stakeholders struggle to define roles and responsibilities.<sup>109</sup> For instance, if a user sends an email violating domestic laws, it is not clear whether the Internet Service Provider, or ISP, could be held accountable.<sup>110</sup> In the case of the “Chinese Firewall” it is not clear what political or social arrangement would prevent Google, Yahoo, etc. from pleasing the current Chinese government. If dilemmas like these are to be solved, accountability and legitimacy must be established as overarching principles of Internet governance. Two often cited examples of institutions, ICANN and the World Wide Web Consortium, or W3C, clearly point out that today we are struggling to incorporate accountability and legitimacy into Internet governance frameworks.

### **Accountability and Legitimacy Problems within ICANN**

ICANN has received much attention in the internet governance debate, and it is worth explaining here briefly its function, structure and place in the IG context. In 1998, the US government published a so-called white paper in which it sought "international support for a new, not-for-profit corporation formed by private sector Internet stakeholders"<sup>111</sup> to take over the management of the Internet's names and addresses.<sup>112</sup> Following the publication, a series of meetings was held in the US, Switzerland, Argentina and Singapore, making up the International Forum on the White Paper. Shortly after those meetings, attended by the business, academic and

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<sup>109</sup> Tongia, Rahul, Eswaran Subrahmanian and V.S. Arunachalam. Information and Communications Technology for Sustainable Development: Defining a Global Research Agenda. Washington, DC: Carnegie Mellon University, 2003. p. 35.

<sup>110</sup> Tongia, p. 37.

<sup>111</sup> Mueller, p. 3.

<sup>112</sup> The IANA function is described in the section “Internet: Definition and History” above.

technical communities,<sup>113</sup> ICANN was born as a non-profit organization constituted under Californian law.<sup>114</sup> According to its own website, ICANN is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. A self-described private-public partnership, ICANN proclaims dedication to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission. ICANN describes its mission as founded on two key concepts, acting in the public trust, and developing decisions through a bottom up, consensus based process<sup>115</sup>. Issues of concern to Internet users such as the rules for financial transactions, Internet content control, unsolicited commercial email (spam), and data protection are outside the range of ICANN's mission of technical coordination; however, technical policy decisions made within ICANN do have an impact on many non-technical areas, from privacy issues, to questions of national sovereignty, to the potential for realizing the right to freedom of expression.

The organization is governed by a board of 15 voting and six non-voting directors, for a total of 21 members. The voting members include the CEO, six directors chosen by supporting organizations, or SOs, and eight directors named by a

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<sup>113</sup> Mueller, p. 3

<sup>114</sup> See the Memorandum of Understanding (MOU) between ICANN and the U.S. Department of Commerce, in effect since Nov. 25, 1998. Last accessed August 1, 2006. <http://www.icann.org/general/icann-mou-25nov98>.

<sup>115</sup> ICANN's Website, <http://www.icann.org>

nominating committee. Four non-voting directors are chosen by three advisory committees and two are appointed by the technical liaison group.<sup>116</sup> In other words, the majority of the voting directors are chosen by the nominating committee, whose members are appointed by the “Supporting Organizations and other ICANN entities.”<sup>117</sup> The individual Nominating Committee members, however, are not accountable to their appointing constituencies (the Supporting Organizations and other ICANN entities) but are instead “accountable for adherence to the Bylaws and for compliance with the rules and procedures established by the Nominating Committee.”<sup>118</sup> In effect, through electing the majority of the voting board members, the nominating committee could choose to pass decisions about its own operations and actions, raising questions about the accountability of the ICANN board to Internet users and about transparency of the entire structure. When it was founded in 1998, ICANN considered its role to be a purely technical one: the management of online addresses and names that would contribute to the network’s stability. The decisions made by the organization’s board since then, however, have had consequences beyond the technical. Despite this criticism, ICANN manages to perform its technical function with considerable reliability and efficiency. It serves over 1 billion users worldwide<sup>119</sup> and facilitates approximately 18 billion resolutions per day. So, while it

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<sup>116</sup> Currently, the members are from Australia, Brazil, Bulgaria, Canada, China, France, Germany, Ghana, Japan, Kenya, Korea, Mexico, the Netherlands, Portugal, Senegal, Spain, UK, and USA.

<sup>117</sup> ICANN Nominating Committee Official Webpage. Last accessed August 31, 2006.  
<http://www.icann.org/committees/nom-comm/>.

<sup>118</sup> Id.

<sup>119</sup> See note 12 above.



is not perfect, the system does seem to work, and it does so “in the same way for all users of the Internet.”<sup>120</sup>

From the moment it was founded, ICANN has been envisioned as an organization that would eventually sever ties with the US government and rely instead on private sector leadership in for further development of the naming and addressing system.<sup>121</sup> Even though moving ICANN away from the direct influence of the US government would constitute a step towards preventing unilateral control of the domain name system, the move would also have certain shortcomings because it would further blur the way in which the principles of accountability and legitimacy apply under the circumstances. Lawrence Lessig, for example, criticizes the US government’s approach favouring the private sector, complaining that “we are creating the most significant jurisdiction since the Louisiana purchase, and we are building it outside the review of the Constitution.”<sup>122</sup> Lessig’s concern refers to ICANN’s mandate being outside of the US constitution. As he explains in *Code and Other Laws of Cyberspace*, Lessig fears that unchecked privatization has the same potential to squash civil liberties as overregulation.<sup>123</sup> Even among entities who have

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<sup>120</sup> Presentation “Implementing the WSIS Action Plan” given by Anne-Rachel Inné, ICANN’s Policy Analyst/Liaison, Nairobi, 25-26 March 2004.

<sup>121</sup> As Milton Mueller explains in *Ruling the Root*, Ira Magaziner, then Presidential Senior Adviser overseeing the consultation process leading up to ICANN’s creation, defended the approach. Policies for global resources such as the Internet names and numbers are typically organized through recognized institutions of international law, including governments, treaties, and international organizations); however, Magaziner claimed that

the Internet as it develops needs to have a different type of coordination structure than has been typical for international institutions in the industrial age. [G]overnmental processes and intergovernmental processes by definition work too slowly and somewhat too bureaucratically for the pace and flexibility of this new information age.

See Mueller, p. 4.

<sup>122</sup> Mueller, p. 3.

<sup>123</sup> In the preface to *Code*, Lessig writes: “How do we protect liberty when the architectures of control are managed as much by the government as by the private sector? How do we assure privacy when the ether perpetually spies? How do we guarantee free thought when the push is to propertize every idea?”

traditionally cooperated with ICANN quite closely and successfully, there is growing recognition of the lack of mechanisms to ensure legitimacy and accountability within the organization.<sup>124</sup> Why is this happening now?

Wolfgang Kleinwächter explains that in the early days of ICANN's existence, governments had expected that they could engage in consensus building facilitated by ICANN, through a process which would also involve the operators of the naming and addressing system,<sup>125</sup> such as the regional Internet registries, and that this practice would eventually lead to the retreat of the US government from its dominating role.<sup>126</sup> High hopes were placed on ICANN because the organisation was perceived as an innovative corporation unlike any other. It appeared to many that it was the world's government of the Internet,<sup>127</sup> despite the fact that ICANN had neither the mandate nor the ability to execute decisions that would be considered relevant under any convention of international law. Right now, the goal for increased internationalisation remains one of the highest priorities, along with an increase in accountability and legitimacy of the body.<sup>128</sup> While a hopeful organization in theory,

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[...] The answer is not in the knee-jerk antigovernment rhetoric of our past. [...] Governments are necessary to protect liberty, even if also sufficient to destroy it. But neither does the answer lie in a return to Roosevelt's New Deal. Statism has failed." Lessig directs "the second generation" to ask questions that avoid dead-ends and move beyond them.

<sup>124</sup> For instance, see the Open letter to the Internet Corporation for Assigned Names and Numbers (ICANN) from the Canadian Internet Registration Authority (CIRA), dated March 17, 2006. Last accessed August 30, 2006, at <http://www.cira.ca/news-releases/171.html>.

<sup>125</sup> Kleinwächter, Wolfgang. "Internet Co-Governance: Towards a Multilayer Multiplayer Mechanism of Consultation, Coordination and Cooperation (M3C3)." Paper presented to the Informal Consultation of the Working Group on Internet Governance (WGIG), Geneva, September 20 – 21, 2004. Last accessed August 30, 2006. <[www.un-ngls.org/kleinwachter.doc](http://www.un-ngls.org/kleinwachter.doc)>

<sup>126</sup> Id.

<sup>127</sup> Kleinwächter explains that, in 2000, during global public elections for ICANN Board Directors representing individual Internet users, the German magazine *Der Spiegel* referred to the process as the election of the "World Government of the Internet". See Kleinwächter, p. 9.

<sup>128</sup> These concerns were the main topics of the July 26, 2006 consultation hosted by the US Department of Commerce's National Telecommunications and Information Administration (NTIA) on the transition of the domain name and addressing system to the private sector. See the NTIA website at <http://www.ntia.doc.gov/forums/2006/726dns/index.htm>.

ICANN has demonstrated the need for explicit incorporation of legitimacy and accountability principles in its work in a number of ways. First, national governments currently communicate with the ICANN board through the Governmental Advisory Committee (GAC). In the organization's 2002 reform,<sup>129</sup> the Government Advisory Committee's ability to make only non-binding recommendations to the Board was upgraded to something Kleinwächter calls a "political Veto-Right" for ICANN decisions related to public policy. Still, this upgrade did nothing to increase capacity of governments to make decisions. Besides, membership in the Government Advisory Committee is limited to 40 active participants,<sup>130</sup> and its meetings are largely ignored by non-OECD countries.<sup>131</sup> As a result, even though it is generally acknowledged that ICANN is indispensable, many governments feel that it operates outside of international law in an area legally relevant to all nations, and that its legitimacy and accountability are highly disputable. Let us explain these feeling by some examples related to the practical functioning of the organization.

ICANN has the ability to introduce new top-level domains like .biz and .info and thus has the ability to regulate the size and scope of the domain name marketplace. ICANN has been criticized for failing to meet demand for new domain name extensions without good reason. ICANN also manages country-code top-level domains like .be and the new .eu without governmental oversight. States are therefore concerned over the power of ICANN to influence what happens with these domains

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<sup>129</sup> See ICANN: A Blue Print for Reform. 20 June 2002. Last Accessed August 30, 2006 at <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm>.

<sup>130</sup> According to the Government Advisory Committee's official website, the GAC currently has 100 members, about 40 of which are active participants. See [http://gac.icann.org/web/about/gac-outreach\\_English.htm](http://gac.icann.org/web/about/gac-outreach_English.htm)

<sup>131</sup> See Kleinwächter, Wolfgang. "From Self-Governance to Public Private Partnership: The Changing Role of Governments in the Management of the Internet's Core Ressources." Loyola Law Review of Los Angeles. 36. 3 (2003): 1103-1126.

and the impact on their countries' sovereignty. Second, although it is reportedly working on it, ICANN has been very slow to establish multi-lingual domains that would allow, for example, Chinese characters to be typed into the address bar of a browser. Third, there has been controversy over ICANN's "whois" policy, which dictates how much personal information of parties who register a domain name is available to the public. Fourth, ICANN's Universal Domain Name Dispute Resolution Policy attempts to require domain name registrars to abide by it when they are confronted with a disputed claim over a domain name.<sup>132</sup> It has reportedly been used to shut down websites in a way that infringes on free speech.<sup>133</sup> Further, the UDRP relies on US trademark law and is applicable if disputants or the domain names in question are based in the US.<sup>134</sup> In other cases, when either the disputants or the domain names are registered in the US,<sup>135</sup> non-US law may apply, resulting in a potential conflict with US trademark law, and causing resistance among domain name registrars outside of the US to comply with UDRP recommendations.<sup>136</sup> Needless to say, this creates much ambiguity regarding how ICANN would react in a

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<sup>132</sup> See "Uniform Domain Name Dispute Resolution Policy [UDRP]" Last Accessed August 30, 2006 at <http://www.icann.org/dndr/udrp/policy.htm>.

<sup>133</sup> See Geist, Michael. "Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP." Last accessed August 30, 2006 at <http://aixl.uottawa.ca/~geist/geistudrp.pdf>. Geist, Micheal. "Fundamentally Fair.com? An Update on Bias Allegations and the ICANN UDRP." Last accessed August 30, 2006 at <http://aixl.uottawa.ca/~geist/fairupdate.pdf> and "The UDRP by All Accounts Works Effectively - Rebuttal to Analysis and Conclusions of Professor Michael Geist." by the International Trademark Association (INTA) Internet Committee, International Trademark Association, May 6, 2002.

<sup>134</sup> Viktor Mayer-Schoenberger and Malte Ziewitz write that US trademark law and the related UDRP process may not be familiar to registrants outside of the US, but that, at the very least, they have arguably consented to US jurisdiction and legal principles. See Mayer-Schoenberger, p. 8.

<sup>135</sup> The "Whois" database identifies the owner and the IP address of a domain. The amount of information provided about the owner has been the subject of heated privacy debates in the context of Internet governance.

<sup>136</sup> Mayer-Schoenberger, p. 9.

case of UDRP and local law conflict.<sup>137</sup> Fifth, the debate surrounding the proposal for establishing the domain name .xxx has attracted strong controversy. In early 2004, ICM, a domain name registry in the US, and the International Foundation for Online Responsibility, based in Canada, made a proposal for a new .xxx extension, aimed at “clearly and unequivocally” indicating a site with “adult material of a sexual nature.”<sup>138</sup> By mid-2005, ICANN had entered into commercial negotiations to create the domain; however, after alleged pressure from the US government, the ICANN board voted in a split decision (nine to five) against the establishment of the domain. This incident reinforced the position of many critics who warn that the US Department of Commerce retains final authority over decision making in ICANN through the Memorandum of Understanding<sup>139</sup> The perceived bowing to US government pressure in the .xxx question has resulted in strong criticism of ICANN’s partisan activity from many groups, including the European Union who called it “a clear case of political interference.”<sup>140</sup> The process and ultimate decision on the issue brought to the forefront the lack of transparency within and independence of the organization. Seventh, the organization's lack of transparency and accountability have come under heavy fire from the EU and developing countries at the Tunis Summit, as the opening paragraph to this paper illustrate. In the US, Congressman Rick Boucher

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<sup>137</sup> For example, see *Pebble Beach Company v. Caddy* decision, last accessed August 31, 2006 at <http://caselaw.findlaw.com/data2/circs/9th/0415577P.pdf> in which the 9th Circuit Court of Appeals upheld a lower court decision declining to assert jurisdiction over a UK based owner of pebblebeach-uk.com. The court ruled that the actions of the out-of-country owner were not expressly aimed at California or the United States.

<sup>138</sup> See ICANN. “New sTLD RFP Application: .xxx” Last accessed August 21, 2006. <http://www.icann.org/tlds/stld-apps-19mar04/xxx.htm>.

<sup>139</sup> The MOU, originally due to expire in September 2006 was renewed on August 16, 2006. See Shannon, Victoria. “ICANN Renews its Deal to Supervise Internet.” International Herald Tribune. August 16, 2006.

<sup>140</sup> See, Waters, Richard. “Dispute over porn domain name veto.” Financial Times, 13 May 2006. Last accessed July 25, 2006. <<http://www.ft.com/cms/s/91eab4dc-e13e-11da-90ad-0000779e2340.html>>

asked for a Congressional investigation into ICANN and its decision to settle litigation with VeriSign, which manages the profitable dot-com registry.<sup>141</sup> To protest the lack of accountability, transparency and fair process in ICANN, the Canadian Internet Registry Authority recently withdrew its contributions to ICANN. It has also put a freeze on new contracts or the hosting and sponsoring of ICANN-related events. Eighth, Public Interest Registry, the dot-org domain administrator has insisted that ICANN take responsibility to prevent the lucrative practice of redirecting known domain names elsewhere when their registration expires, and before the original registration is renewed. In one instance, a rape crisis centre domain name was directed to a site with pornographic material shortly after its original registration expired.<sup>142</sup>

ICANN exemplifies some IG challenges in general, and many lessons could be taken from its failures as well as successes<sup>143</sup> precisely because concerns about legitimacy and accountability are not uncommon in other types of institutions, including in the domestic and international legal systems. In other words, not only would it be inappropriate to conclude that any problems ICANN has faced stem solely and automatically from its particular structure and role, but the ICANN case

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<sup>141</sup> The decision has been widely criticized for effectively awarding VeriSign permanent control over the dot-com domain. See Geist, Michael. "Democracy needed in governing Web." *The Toronto Star*, April 3, 2006. Online Edition. Last accessed August 31, 2006. <[http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article\\_Type1&c=Article&cid=1144015810403&call\\_pageid=968350072197](http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1144015810403&call_pageid=968350072197)>

<sup>142</sup> Micheal Geist's Law Bytes column published weekly in the daily newspaper, *The Toronto Star* has provided a commentary on all of the issues mentioned in this section. Some of the entries are available at <http://www.michaelgeist.ca/>.

<sup>143</sup> Hofmann, Jeanette. "Globalization and Democracy – Lessons from the field of Internet regulation." Plenary address delivered at the World Library and Information Congress: 69th IFLA General Conference and Council 1-9 August 2003, Berlin. Last accessed August 2, 2006. <<http://www.netzwissenschaft.de/sem/pool4.htm>>

may be useful for a wider analysis of international bottom-up, multistakeholder processes.

### **Accountability and Legitimacy within the World Wide Web Consortium**

To Internet users, the World Wide Web (i.e. the collection of websites accessible through browsers) is possibly the Internet's most important application, next to email. The World Wide Web Consortium (W3C) is responsible for the development of technical standards for the World Wide Web. In his analysis of W3C's Patent Policy, Andrew Russell identifies legitimacy as a key factor in ensuring that Internet governance reflects the broad values of all stakeholders. Russell writes that the W3C has been able to achieve legitimacy by experimenting with its policies until it arrived at an optimal level of centralized governance countered by grassroots participation. According to Russell, Tim Berners-Lee, the creator of the World Wide Web, has had an enormous influence in shaping both the Web and the W3C. The founding values reflected the academic traditions from which the Web and the Internet were created, including the need for open code and the "explicitly non-commercial" work culture.<sup>144</sup> However, as we will see, WWW and W3C face problems analogous to those that surround ICANN.

Berners-Lee's approach to programming Web browsers included the decision to keep the source code open in order to encourage cooperation and improvements by his colleagues. This logic had already been popularized by the open source guru

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<sup>144</sup> Russell, Andrew L. "The W3C and its Patent Policy Controversy: A Case Study of Authority and Legitimacy in Internet Governance." Conference Paper presented at TPRC 2003- 31st Research Conference on Communication, Information, and Internet Policy, September 19-21, 2003. Last accessed August 5, 2006. <http://intel.si.umich.edu/tprc/papers/2003/207/alr-tprc2003.pdf>.

Richard Stallman's GNU project (where GNU, oddly enough, stands for "GNU's Not Unix"). Transplanted into the World Wide Web context, it inspired the participatory decision-making of the Web's technical standards development. This logic is also what allowed the Web to proliferate and evolve so quickly: browser code could be acquired, implemented, improved and customized without significant costs. Around 1993, with the appearance of many browsers, the need to standardize Web protocols appeared, so that different browsers could access all of the available content. To facilitate more participatory standards-making, with the help of Micheal Dertouzos, Director of MIT's Laboratory for Computer Science, Berners-Lee created W3C in 1994. As he writes in *Weaving the Web*, his intent was to create "a mirror of real life; [...] a part of the very fabric of the web of life we all help weave."<sup>145</sup>

The W3C decision-making structure rests on the participation and consensus of W3C Members who make Recommendations on Web standards.<sup>146</sup> W3C membership is restricted to organizations who pay annual dues: the corporate rate is \$50,000, while non-profits (including academia and government organizations) pay \$5,000.<sup>147</sup> Although the Recommendations do not create formal standards, since there is no way to enforce them, they are the closest "moral authority [...] the Internet has to law."<sup>148</sup> Developed through a series of Working Drafts, they are passed by the Advisory Committee. The Director, Burners-Lee, judges whether the level of

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<sup>145</sup> Berners-Lee, Tim. *Weaving the Web: The original design and ultimate destiny of the World Wide Web by its inventor*. New York: HarperCollins Publishers, 1999., p. 84-85.

<sup>146</sup> See the World Wide Web Consortium Process Document, 19 July 2001, Paragraph 1.2 where it is stated that the "Director is the lead technical architect at W3C and as such, is responsible for assessing consensus within W3C for architectural choices, publication of technical reports, and new Activities." Last accessed August 22, 2006 at <http://www.w3.org/Consortium/Process-20010719/process.html>.

<sup>147</sup> This is in sharp contrast with membership in similar technical bodies. As this paper has mentioned, for instance, participation in the Internet Engineering Task Force (IETF), which coordinates Internet standards, is open to anyone and free of charge.

<sup>148</sup> Russell, p. 12.



consensus among Members warrants their final approval. Although Berners-Lee has insisted that his approval is only ceremonial,<sup>149</sup> the final authority lies with the Consortium's staff, who are chosen by Berners-Lee. It is the staff members who control the internal review process through which all Recommendations must pass. Based on this information, a few legitimacy questions arise: Does Berners-Lee's leadership in W3C essentially amount to a dictatorship? While membership is open to any organization, how is the financially prohibitive cost of participation justified? And how is consensus among the members built?<sup>150</sup>

To answer these questions, Russell uses the example of the W3C's patents policy debate. For the purposes of this paper—which is intended to describe not only some of the issue areas surrounding Internet governance, but also the speed with which new questions are imposed by new technologies—it is crucial to pay attention to the short time span within which the patent policy developed.

### *The W3C Patent Policy*

Up to around 1999, software patents were unusual.<sup>151</sup> Between 1999 and 2003, pressure from corporate members within W3C to charter a patent policy amounted to the creation of a working group dedicated to the issue. The first Working Draft issued by the Patent Policy Working Group (PPWG), contained a proposal for patent rights in Web standards. It also contained the commitment to formally archive, report and address all substantive issues – regardless of whether they were raised by members or non-members – in the ensuing discussion. This commitment had been introduced as a

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<sup>149</sup> Ibid., p. 13.

<sup>150</sup> Ibid, p. 14.

<sup>151</sup> Berners-Lee, p 196.

procedural requirement mere months before the appearance of the Working Draft. Previously, dissenting non-members or a minority of members had no specified recourse to make suggestions to draft recommendations. The approach for licensing was based on a Royalty-Free (RF) basis, in line with open source standards. After the initial dialogue, in August 2001, the next Working Draft concluded that W3C should revise its policy to include Member patents on a “Reasonable and Non-Discriminatory” (RAND) basis, meaning that standards could be patented in a way that would prevent other standards developers from using them, or improving them, through their own work.<sup>152</sup> There were several other proposed changes, including the obligation to declare the basis of licensing, the requirement for the disclosure of Member patent claims among other membership and the automatic licensing patent claims in W3C Recommendations on a RAND basis with a required “opt-out” procedure for licensing on RF terms. The proposal created unprecedented controversy around the W3C. The RAND framework was attacked by many as being anti open-source and contrary to all of the foundational principles of the Internet and the World Wide Web. In a formal response to public comments, the Chair of the Patent Policy Working Group, concluded that the RAND framework had the potential to split the Web in two (one defined by RF and the other by RAND principles). This was followed by another response asking for additional time for deliberations. On October 12, 2001, it was announced that outside invited experts would be brought into the working group as equal members, and that all documents, summaries of meetings and records of online discussions would be posted on a public website. The move toward greater transparency and participation resulted, as was planned, in

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<sup>152</sup> Russel, p. 17.

greater legitimacy of the organization and acceptance by the general public. In less than six months, the increased participation and transparency led to a Working Draft for a Royalty-Free patent policy, publicized “as a legally binding commitment for anyone participating in W3C Recommendations to make any patents they have involved available on a royalty-free basis.”<sup>153</sup> The final community consensus decided a result that was in direct opposition with the initial RAND proposal. The Patent Policy Working Group’s experience between 2001 and 2003 made groundwork for increased openness and participation of non-members in W3C’s work. The policies adopted across the organization as a result of the dispute have increased accountability and legitimacy of the Consortium.<sup>154</sup>

While the Patent Policy Working Group has laid the foundation for reaching that goal – by prompting W3C to create an inclusive forum and to seriously reflect on opinions of outsiders - some elements prohibitive of participation remain. These include the financially restrictive cost of membership and the barring of individuals from membership. As Russell concludes, the W3C process combines grassroots participation in the shape of members’ input with the top-down influence by Berners-

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<sup>153</sup> Russell, p. 23.

<sup>154</sup> The importance of procedure for the creation of legitimacy laws is a topic explored in Micheal Froomkin’s “Habermas@discourse.net: Toward a Critical Theory of Cyberspace.” As Russell points out, the W3C experience with its patents policy fits well into Fromkin’s analysis of legitimacy of Internet Standards processes based on Habermas’ concept of discourse ethics. According to Froomkin’s understanding of Habermas, procedurally sound discourse is a prerequisite to a legitimate output. Thus, if the W3C’s goal is to construct legitimate laws, it must do so through a procedurally sound dialogue. Whether a perfectly sound discourse is ever achievable in practice is questionable. Froomkin writes that since “we are aware of the limitations of our knowledge and rationality, even if we find ourselves participating in a discourse that seems procedurally adequate, we should be ready to question that belief about the process. While the Patent Policy Working Group has laid the foundation for reaching that goal – by prompting W3C to create an inclusive forum and to seriously reflect on opinions of outsiders - some elements prohibitive of participation remain. These include the financially prohibitive cost of membership and the barring of individuals from membership. Froomkin, A. Michael. "Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace", Harvard Law Review. 116 3. (2003): 751—871.

Lee and the W3C staff, to create “a complex, almost organic structure, formalized in a living written constitution, the ‘World Wide Web Consortium Process Document.’”<sup>155</sup> The experience of the Patent Policy Working Group at the World Wide Web Consortium is an example of how principles supported by a respected source of authority in a top-down way and participatory, bottom-up dialogue can come together to result in governance that is effective and legitimate.<sup>156</sup> However, urgent as they are, questions revolving around the accountability and legitimacy of IG cannot be solved once and for all on any other basis but that of principled approach to every particular and often unprecedented case.

The links between legitimacy and accountability in transnational governance are analyzed by Jonathan Koppel, who finds no all-embracing solution to the ‘puzzle.’ He concludes that although all entities with transnational governance responsibilities are discussed under the same term, this collection is unquestionably heterogeneous, and that therefore no single solution is applicable.<sup>157</sup> The next section explores an approach based on global administrative law, which may offer certain clues to application of customized solutions for respecting the principles of accountability and legitimacy in Internet governance.

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<sup>155</sup> Russell, p. 13.

<sup>156</sup> Russell, p. 15.

<sup>157</sup> Koppel, Jonathan The Legitimacy-Accountability Connection and Transnational Global Governance. Draft paper cited with author’s permission. Prepared for the 20th World Congress of the International Political Science Association, July 8-13, 2006, Fukuoka, Japan. 27. Last accessed August 24, 2006. <[www.governance.qub.ac.uk/qub2005/KoppelPaperUpd.pdf](http://www.governance.qub.ac.uk/qub2005/KoppelPaperUpd.pdf)>

## Operationalizing the Principles: An Approach Based on Global Administrative Law?

Traditionally, law was either domestic, enforced at the national level, or international, enforced through collective action facilitated by states cooperating with one another. Today, governing human relations is more complicated. Due to new technologies, even actions of private citizens transcend the national and interstate spheres and involve individuals, groups and nations across borders and at different levels of regulatory authority.<sup>158</sup> The recognition of the need for innovation in international law and global governance isn't brand new. In 1970, Warren Bennis predicted that "adaptive, problem-solving, temporary systems of diverse specialists, linked together by co-ordinating and task-evaluating specialists in an organic flux" would replace bureaucracy as we knew it.<sup>159</sup> At the start of the 1992 Earth Summit in Rio de Janeiro, confirming this prediction, Geoffrey Palmer, then prime minister of New Zealand observed that

the methods and techniques now available to fashion new instruments of international law to cope with global environmental problems cannot meet the challenge. The emerging issues are so big and so all-embracing that current ways of doing things will not solve these problems. The institutional mechanisms within the United Nations system are not capable of handling the issues. The time has come for something more innovative, for a conceptual leap forward in institutional terms.<sup>160</sup>

Similar sentiments have echoed throughout the IG debate. According to Jovan Kurbalija, there is a need for an innovative international treaty format, one that would allow for asymmetrical commitments made by different types of signatories (states

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<sup>158</sup> Ivanova, p. 20.

<sup>159</sup> Bennis, Warren. "Beyond Bureaucracy." In Sexton, William P. *Organization Theories*, Columbus, Ohio: Charles E. Merrill Publishing Company, 1970.

<sup>160</sup> Palmer, Geoffrey. "New Ways to Make International Environmental Law." *American Journal of International Law*. 86. 2. (1992): 259-283.

and non-state actors).<sup>161</sup> Other experts have suggested that a framework convention format can provide the room for innovation in its optional protocols.<sup>162</sup> It is worth here to briefly review the framework convention proposal as a possible approach for operationalizing principles like accountability and legitimacy in Internet Governance and to explain why an Internet framework convention would not be a suitable basis for Internet governance.

A framework convention sets out certain core principles and procedures related to an issue. Additional optional protocols can subsequently be added to cover specific dimensions of the problem. Like any other treaty, a framework convention evolves into a binding international legal instrument once it is signed and ratified by the necessary number of states. A framework convention is often used when agreement is needed on a basic set of issues, with optional protocols added later.<sup>163</sup> When it comes to internet governance, many substantive issues remain highly contentious, as the Working Group on Internet Governance has described.<sup>164</sup> The proposal for an Internet Governance Framework Convention has been repeatedly put forward by the academic research group called the “Internet Governance Project,” based at the Syracuse University and involving an international network of researchers.<sup>165</sup> Most recently, the Project’s members discuss the potential of a framework convention in their concept paper *Quo Vadis: An Institutional Option for*

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<sup>161</sup> Personal conversation, May 21, 2006.

<sup>162</sup> See, in particular, “A Framework Convention: An Institutional Option for Internet Governance.” Concept Paper by the Internet Governance Project. Last accessed August 31, 2006 at <http://www.internetgovernance.org/pdf/igp-fc.pdf>

<sup>163</sup> WHO, p. 2.

<sup>164</sup> WGIG 2005a and WGIG 2005b.

<sup>165</sup> According to its website, “The Internet Governance Project (IGP) is an interdisciplinary consortium of academics with scholarly and practical expertise in international governance, Internet policy, and information and communication technology.”

Internet Governance. The authors state that one of the first goals of a framework convention negotiations process would be “to agree authoritatively on principles and norms.” They write that

Framework conventions in areas like climate change have allowed States, with the input of non-State actors, to reach agreements that will provide a legally-binding context for subsequent efforts to deal with issues. Negotiating a framework convention would provide a focus for policy analysis and discussion through a new multi-stakeholder forum– but would also provide a specific *objective* for the discussions.<sup>166</sup>

The authors envision the negotiations process toward an Internet governance framework convention taking place either within an existing institution, or on an ad hoc basis, reducing the costs. Once in effect, periodic meetings of States parties to the convention would comprise the forum for dialogue on specific issues. According to the Internet Governance Project, an advantage would be the creation of intergovernmental oversight “without the creation of a more complex and definitive structure, unless, [...] such a structure was found necessary at some future time.”<sup>167</sup>

While increased government involvement in Internet governance has the potential to increase legitimacy and accountability of the structures and organizations involved, a framework convention may also create new legitimacy problems on its own. The most frequent argument against a framework convention is that centralizing government control over the Internet is in direct opposition to the strategies – based on the end-to-end principle – that have allowed the technology to flourish in the past. Creating a single intergovernmental body that would have oversight of the Internet

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<sup>166</sup> Mathiason, John and Milton Mueller. “Internet Governance: Quo Vadis? A Response to the WGIG Report.” Concept paper. Syracuse: Internet Governance Project, 2005. p. 4.

<sup>167</sup> Ibid, p. 5.

could be a fatal design flaw,<sup>168</sup> because the Internet is not a single entity, but a collection of networks, equipment, software, applications and technologies owned, operated or used by a multitude of private, public, individual and institutional users. A framework convention would undermine the existing governance strategies, which have grown along with, and which are uniquely suitable to the network. As Stephanie Psaila notes, the Internet's design reflects the consensus-based approach to standards development and the conscious efforts to place innovation and control at the edges.<sup>169</sup> A framework convention involves only the states as the parties to the agreement. For this reason, it does not provide for equal participation of non-governmental stakeholders in the creation, implementation and enforcement of overarching principles, which is necessary for the continued evolution of the Internet. But the most relevant objection relates to the discrepancy between the time span needed to establish a framework convention and the quick pace of the evolution of the Internet. Treaties take a long time develop. Considering the slow and drawn out process surrounding WSIS, it would not be unreasonable to expect negotiations on a framework convention to take up to a decade. On the other hand, the Internet has evolved at an unprecedented speed. One measure of that growth is the number of networks and servers connected into the Net. In the first decade (1980-1990), the number of networks changed from four to 2218, a multiplication by a factor of 554.<sup>170</sup>

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<sup>168</sup> Center for Democracy and Technology (CDT). ICANN and Internet Governance: Getting Back to Basics. Washington, DC: CDT, 2004. Last accessed August 31, 2006. [www.cdt.org/dns/icann/20040713\\_cdt.pdf](http://www.cdt.org/dns/icann/20040713_cdt.pdf).

<sup>169</sup> Psaila, Stephanie. A Reality Check Against the Proposals - Against an Internet Convention. Internet Governance Research Programme: Protection of Public Interest on the Internet. Malta: DiploFoundation, 2005. Last Accessed August 25, 2006. <http://textus.diplomacy.edu/Textusbin/portal/Ghome.asp?IDspace=86>.

<sup>170</sup> Defense Data Net Network Information Center (DDN NIC) Website. Last Accessed August 6, 2006. <http://kb.iu.edu/data/aasa.html>.



In the following decade, the number surpassed 50000 networks. In July 2006, there were 439,286,364 hosts/servers online according to the DNS survey.<sup>171</sup> These numbers do not encompass personal computers, Internet aware phones, PDAs, or other devices capable of connecting. The ways in which the Internet has been used have changed as more possibilities were found. From simple transfer of text, to voice-over-IP, to state-of-the-art gaming and, most recently, the explosion of video content on websites like You Tube, the changes have continued to bring new regulatory and legal challenges. There is the danger that an international legal instrument like a framework convention would become obsolete quickly, and that this type of instrument would not be able to address the pressing issues, like spam, multilingualism and interconnection costs due to the long development time.<sup>172</sup> Finally, some commentators are concerned that a framework convention could be used for political ends. While most would agree with the benefits of a framework convention with a focus on the respect of human rights and development, others are uneasy about the potential for developed countries' concerns to prevail and shape the content.<sup>173</sup>

In sum, the concerns about employing an international treaty like a framework convention to regulate the Internet amount to the danger that the negative effects may outweigh the positive influences. Such an instrument may be useful for defining overarching principles; however, the familiar format, where only governments are signatories, would compromise the potential for "genuine and transparent

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<sup>171</sup> Internet Systems Consortium Website. Last accessed August 6, 2006.  
<http://www.isc.org/index.pl?/ops/ds/>

<sup>172</sup> Gelbstein, Eduardo and Jovan Kurbalija. *Internet Governance. Issues, Actors and Divides*. Msida and Kuala Lumpur: DiploFoundation and Global Knowledge Partnership, 2005. p. 70.

<sup>173</sup> Norbert Barlow, personal communication, August 25, 2006.

multistakeholder accountability” and the creative freedom for the Internet’s development.

### **Global Administrative Law**

Grewlich argues that no single entity, and not even a single regime, can be devised to regulate the Internet, simply because “cyberspace” is not really a “space” in the usual sense of the term. Compared to other spaces, like sea, air, land or the cosmos, cyberspace is a communications network consisting of electronic parts through which only data can travel. Since it occupies no single territory, comparing internet governance to a legal regime like the Law of the Seas is misleading. Instead of a single strategy, Internet governance consists of many components and groups.<sup>174</sup>

Some of these groups include the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C) or ICANN. Others are composed by hundreds of private and public sector entities, and many are run by small private groups. Many institutions that precede the Internet are also involved in its governance, including the WTO, whose rules affect electronic trade and commerce, UNESCO, which considers cultural, scientific and educational issues online, WIPO, which deals with intellectual property rights in cyberspace, and well established technical bodies like the ITU and the ISO.<sup>175</sup> An umbrella convention or agreement unifying the work of these institutions may not be appropriate or necessary, although ensuring improved communication and an accountable and legitimate approach to cooperation between them is of paramount importance.

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<sup>174</sup> Grewlich, 2005, p. 9.

<sup>175</sup> Ibid., p. 10.

The need for accountability and legitimacy in a flexible, multistakeholder framework is not confined to the field of Internet governance. One emerging academic field that attempts to study this need is Global Administrative Law (GAL). Commentaries about the rise of international administrative law date as far back as the late 1800s.<sup>176</sup> The rise of international unions in the areas of navigation, telecommunications and postal services -- sometimes with legally effective rulemaking power instituted without national ratification<sup>177</sup> -- inspired further work on the administrative aspects of international issues in the early 19<sup>th</sup> century.<sup>178</sup> In the foundational piece of today's GAL, "The Emergence of Global Administrative Law," Benedict Kingsbury, Nico Krisch and Richard Stewart argue that GAL addresses some of the modern challenges of international law, namely those presented by the multitude of actors and levels at which international interaction occurs. Unlike domestic administrative law, GAL acknowledges the informality of global administration, the diffusion of decision making in a multi-level system and the strong influence of private elements in global administration.<sup>179</sup> Global Administrative Law is a synthesis of traditional administrative law and international law. It encompasses innovative systems of administrative procedures, review mechanisms, and principles that aim to promote accountability in decision-making across a great variety of emerging global regulatory administrative bodies. Examples of these bodies include formal intergovernmental organizations, informal networks of

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<sup>176</sup> Ibid, 19.

<sup>177</sup> Id.

<sup>178</sup> For instance, see Reinsch, Paul S. "International Administrative Law and National Sovereignty." *AJIL* 3. 1 (1909); and Négulesco, Paul . "Principes du droit international administratif" *Recueil des Cours* 51.579 (1935), mentioned in Kingsbury, Benedict, Nico Krisch and Richard Stewart. "The Emergence of Global Administrative Law." *Law and Contemporary Problems*. 68 (2005): 15-61. p. 19.

<sup>179</sup> Kingsbury et al. p53.

domestic officials, national bodies charged with implementing international legal obligations, hybrid public-private regulatory partnerships and private international regulators. GAL experts are interested in innovative administrative law arrangements across these bodies, and in their normative aspects.<sup>180</sup> Unlike traditional international law, GAL attempts to provide accountability mechanisms at the global level through participation of individuals, groups and states and through review undertaken by independent international bodies. GAL is meant to enable the different levels of participation and review to remain in a flexible relationship, “allowing each to challenge the others on the basis of their own normative principles and standards.”<sup>181</sup> What gives impetus to the latest GAL advancement is a certain degree of convergence of principles and development of commonalities that can be noticed across the growing number of transgovernmental administration and regulation schemes developed in response to globalization of security, finance and banking, environmental management, trade, law enforcement, labour standards, international migration, trade and telecommunications.<sup>182</sup> Like Ivanova, Roseanau, Kurbaliija, Kleinwächter and others, Kingsbury, Krisch and Stewart find that the issues posed by the changes in these fields create a need for innovative transnational systems of regulatory cooperation. This need is being met through an almost ad-hoc international system, one in which many regulatory decisions and implementation duties are transferred from the national to the transnational.<sup>183</sup> Because states, whether through their domestic legal systems, treaty commitments or other current

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<sup>180</sup> Global Administrative Law Project website. Last Accessed August 11, 2006.

[http://www.iilj.org/global\\_adlaw/](http://www.iilj.org/global_adlaw/)

<sup>181</sup> Kingsbury et al., p. 58.

<sup>182</sup> Ibid, p. 15.

<sup>183</sup> Ibid., p. 16.

agreements, cannot directly guide these decisions and also because these decisions affect private parties, other states or designated groups, an accountability and legitimacy deficit in this type of regulation can be perceived. Global administrative law is defined as one type of response to the accountability and legitimacy deficit in transnational governance. It comprises “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect” the accountability and legitimacy of global administrative bodies,<sup>184</sup> in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.<sup>185</sup>

### **Global Administrative Law as Multistakeholder, Multilevel, Multi-issue Governance**

Even though they may occasionally overlap, five types of multistakeholder global administration can be conceived. The first type concerns administration by formal international organizations, such as the UN Security Council and its committees, the UNHCR, the WHO, the Financial Action Task Force, and the World Bank’s “good governance” standards as conditions for financial aid. The second type embraces administration by transnational networks and coordination, where formal structures are replaced by informal cooperation among state regulators, with or without a treaty framework. Although non-binding, these agreements can be very effective. Examples include the Basel Committee, which gathers heads of central banks without a treaty,

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<sup>184</sup> These include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.

<sup>185</sup> Kingsbury et al., p. 17.

and WTO law which requires “horizontal cooperation” by validating regulations of one member state in all others. The third type is related to distributed administration conducted by national regulators under treaty, network, or other cooperative regimes, in which domestic regulators make decisions of global concern. An example is found in the exercise of extraterritorial regulatory jurisdiction. Such regulation is sometimes restrained by internationally established limitations.<sup>186</sup> The fourth type of global multistakeholder administration is slightly more complicated than the first three. Much variation exists in the nature of bodies that make up the fourth category, hybrid intergovernmental–private administration. An example is the Codex Alimentarius Commission, which adopts standards on food safety through NGO - governmental cooperation, and produces Sanitary and Phytosanitary Measures (SPS) Agreement standards recognized under WTO law.<sup>187</sup> ICANN can also be considered under this category. The fifth category is administration by private institutions with regulatory functions. An example is the International Standardization Organization (ISO) which has developed over 13,000 standards that harmonize product and process rules around the world. Kingsbury, Krisch and Stewart “cautiously suggest that the margins of the field of global administration be extended to the activities of some of these non-governmental bodies.”<sup>188</sup> They cite the ISO, for instance, which exerts influence through the economic impact of its decisions and their integration with treaties such

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<sup>186</sup> Kingsbury et al. give the example of WTO Appellate Body’s 1998 ruling in *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)*.

<sup>187</sup> Kingsbury et al. posit that, although ICANN is an NGO by design, “government representatives [...] have gained considerable powers, via [...] ICANN’s Governmental Advisory Committee.” In truth, the ‘considerable powers’ were never allotted to governments, and this continues to be a point of contention in the debate, as the earlier sections of this paper indicate. As Kingsbury et al underline, the involvement of state actors, subject to national and international public law constraints, with private actors with possibly conflicting interests produces specific and important challenges to any administrative law development.

<sup>188</sup> Kingsbury, p. 22.

as the GATT. The authors also point out that the breaking down of the domestic-international distinction leads to the addition of private actors as subjects of international law, and that many international schemes, such as those in the field of regulation of pollution or financial practices formally address individuals as “moral agents and economic and social actors”<sup>189</sup> and collective entities like corporations and NGOs.<sup>190</sup> They cite certification of CDM projects by the Kyoto Protocol Clean Development Mechanism, UNCHR determinations of individuals’ refugee statuses, and ECOSOC<sup>191</sup> certification of NGOs by UN agencies as some examples. Despite these new developments, states remain the primary subjects of global regulation in many areas, especially where they protect or benefit distinct groups of individuals, private market actors, or social interests. The subjects of global administrative regime vary according to subject area, the objectives of regulation, and specifics of the particular problem. The global administrative space overlaps with but remains different from those governed by international law and domestic administrative law. Kingsbury, Krisch and Stewart conclude that in this space the increasingly powerful decision making entities require the development of “new and distinct principles and mechanisms of accountability through a global administrative law.”<sup>192</sup>

Global administrative law recognizes accountability and legitimacy as necessary overarching principles. GAL also points out that current international legal instruments are not adequate mechanisms for providing the implementation of the two principles primarily because procedural participation in and transparency of

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<sup>189</sup> Ibid., p. 24.

<sup>190</sup> Id.

<sup>191</sup> ECOSOC certification allows NGOs to participate in some UN proceedings.

<sup>192</sup> Kingsbury et al., p. 27.

international decision making processes are very limited. Effective participation depends on access to information and transparency. Both participation by affected parties and transparency contribute to accountability through exposing administrative decisions and relevant documents to the public. GAL therefore calls for an increased procedural participation in and transparency of all international decision making bodies, as well as for reasoned decisions and entitlement to review at various level, domestic and international. Justified as they are, these demands are difficult but—as examples from practice testify—not impossible to meet. Thus, for instance, international bodies like the World Bank, the IMF, and the WTO have increased public access to internal documents in response to criticism of secretive deliberations. Again, these practices are voluntary and not uniform. Rarely is transparency provided by international agreements like the Aarhus Convention which provides for access to environmental information.

## **Global Administrative Law and Internet Governance**

Internet governance already exhibits some characteristics of global administrative law. ICANN has been recognized as an example of GAL at work by scholars, but it is not the only one. IETF, W3C and ISOC, to cite only the already mentioned organizations, are also employing some techniques and exhibiting characteristics that fall under GAL. The purpose of this section is to examine two examples of how practices embraced by global administrative law theory help operationalize overarching principles in non-Internet contexts, and to suggest that analogous techniques could be used in Internet governance. The wide range of issues and actors points to a complex picture in the field of Internet governance that many people have



tried to systematize.<sup>193</sup> Some have suggested a constitutional-like approach to problem solving, while others have called for an internet governance framework convention. Many of these suggestions have helped clarify the problems but none have produced a clear path to finding solutions. Andrew L. Shapiro suggests that the reason for this is the tendency of lawmakers to pose the “metaphor” or analogy question.<sup>194</sup> Overwhelmingly, the approach taken involves comparing the Internet with previous technologies, whether they be printed material, radio, television, telephones, telegraphs or mail, or previous international issues like climate change, law of outer space or law of the sea.<sup>195</sup> As Shapiro, Raboy<sup>196</sup> and others point out, the Internet can be compared to a combination of those systems, suggesting that some existing rules may be applicable, and also as something quite different than any of them, suggesting that devising new rules may be necessary. Parallels have also been drawn between internet governance and international environmental governance, as this paper has done by using Maria Ivanova’s theory of requirements for international cooperation. Regardless of the analogy used to help us dissect the issues, one can contend that the value in making such comparisons is only present if the focus is on identifying what Shapiro terms “principles-in-context.” The idea is that lawmakers should seek to extract the underlying principles of existing laws and rules and to then modify laws so that those principles can be respected in the current context.<sup>197</sup> Let us

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<sup>193</sup> See MacLean 2004, Gelbstein et al, and WGIG 2005a, among others.

<sup>194</sup> Shapiro, Andrew L. “The ‘Principles in Context’ Approach to Internet Policymaking.” Columbia Science and Technology Law Review 1.2 (2000): 1-10.

<sup>195</sup> See, for instance, Lukasik, Stephen J. “Protecting the global information commons.” Telecommunications Policy. 24. 6-7 (2000): 519-531.

<sup>196</sup> Raboy, 2005. p. 127.

<sup>197</sup> Shapiro, p. 10.

therefore look at two examples which support the claim that GAL principles are already at work on the global level.

### **Example 1: Olympics Anti-Doping Regime**

The field of sport is intrinsically international. The Olympics involves amateur and professional athletes competing as representatives of their countries. Both the Olympics and other large international competitions like the Football World Cup are intensely political events, evidenced by the considerable importance countries attach to successfully organizing and participating in them. The economic impact of sports is enormous: athletes are traded for millions of dollars, euros and pounds, often giving them status of neo-royalty. And sport is the most popular corporate sponsorship medium,<sup>198</sup> reflecting its power to affect consumer behaviour. Sport is also a socio-cultural phenomenon: with media paying as much attention to famous athletes as to royalty and high-level public-servants, the impact on society and culture is noticeable around the world.<sup>199</sup> Finally, sport is closely connected to the area of public health, from its role in disease prevention to anti-doping regulation. In other words, the realm of sport mixes private and public interests at the individual, domestic, regional and international levels, and in that way, faces some common governance challenges with the Internet. By contrast, the level of interdependence between various shapes and forms of sport is nowhere near the degree of dependency between various

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<sup>198</sup> See empirical studies by Witcher, Craigen, Culligan and Harvey, 1991; Shanklin and Kuzma, 1992; Sunshine, Backman and Backman, 1995; Thwaites, Aguilar-Manjarrez and Kidd, 1998, mentioned in Tripodi, 2001.

<sup>199</sup> See, for example, Brown, William J., Micheal, D. Basin and Mihai C. Bocarnea. "The Influence of Famous Athletes on Health Beliefs and Practices: Mark McGwire, Child Abuse Prevention, and Androstenedione." *Journal of Health Communication*. 8. 1 (2003): 41 – 57 where the authors explain how parasocial interaction with an athlete regarded as a public role model can lead to audience identification with the athlete, and thus promote attitudes, beliefs and behaviour.

Internet components and issue areas. The purpose of this example is not to make a close comparison between the two and conclude that resemblance of the subject areas warrant similarities in their governance, but to explain some of the techniques related to global administrative law used by the Olympics movement anti-doping regime and suggest whether – and how – they may be useful for building international agreement around Internet issues such as the management of spam.

Anti-doping is the focus of Alec Van Vaerenbergh's article analyzing the features of administrative law of the Olympic movement. Van Vaerenbergh first outlines the international sports and anti-doping regulatory structures, noting the presence of non-governmental and mixed bodies, including the International Olympic Committee (IOC) at the top of the hierarchy, controlling International Federations (one for each sport), National Olympic Committees and National Governing Bodies, among others.<sup>200</sup> The World Anti-Doping Agency (WADA) has been set up as a special Anti-Doping body by the IOC to develop international standards, publish them in the IOC's Anti-Doping Code, conduct tests, observe doping control and fund research. These have gradually become established as authorities for decision making in the Olympics,<sup>201</sup> and even recognized by non-Olympic sports bodies over time. In some countries, national equivalents of the WADA have been established. A Court of Arbitration for Sports, which has ad-hoc divisions at the Olympics, is a non-governmental arbitral tribunal for sports-related matters, managed by the International Council of Arbitration for Sport, an independent foundation registered in Lausanne

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<sup>200</sup> Van Vaerenbergh, Alec. "Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-Doping Regime." Global Administrative Law Series. IILJ Working Paper 2005/11. New York: Institute for International Law and Justice, 2005., p. 2-3.

<sup>201</sup> See the Olympic Charter, available on the official Olympic Website. Last accessed August 19, 2006. [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf).

under Swiss law. Many countries have legislation prohibiting substances and doping practices and may execute their own tests at national sports events; however, most countries delegate selection procedures for testing and sanctioning authority to sports federations, which are required to guarantee minimal effectiveness and due process.<sup>202</sup> In France, the national governing body is incorporated into the administrative law system and open for review by administrative courts.<sup>203</sup> Intergovernmental negotiations are underway for a comprehensive International Anti-Doping Convention, under the auspices of UNESCO and monitored by WADA.<sup>204</sup>

Although the average recreational athlete or sports products consumer has little interaction with the anti-doping system, its ultimate purpose – leveling the playing field for competition – does have a normative message that resonates throughout the world of sports. Similarly, the average Internet user on the connected side of the digital divide does not lose sleep over, for instance, spam regulation. Filters make email management easy: at the individual level, fighting spam amounts to spending a few minutes each day deleting unwanted messages. On the global level, however, spam is an enormous problem. The primary reason for this is that senders pay very little to circulate spam, and most of the costs are borne by recipients and network carriers. According to MessageLabs.com, over the last 12 months (August 2005-July 2006), 58.5 per cent of all email messages sent around the world was spam, with the numbers for Asia-Pacific and Africa slightly higher (around 60 per cent).<sup>205</sup>

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<sup>202</sup> This is the case in Belgium, where Vlaams Decreet inzake Medisch Verantwoord Sporten is responsible for the Flemish Region, for instance. See Van Vaerenbergh, note 17.

<sup>203</sup> Lapouble, Jean-Christian, *Droit du Sport*, 1999, Paris, LDGJ, p. 136-138. mentioned in VanVaerenbergh, p. 6.

<sup>204</sup> See WADA official website at <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=392>.

<sup>205</sup> See [http://www.messagelabs.com/Threat\\_Watch/Threat\\_Statistics](http://www.messagelabs.com/Threat_Watch/Threat_Statistics) for a dynamic display of spam statistics published by MessageLabs. Last accessed August 19, 2006.

By overburdening networks, spam can directly contribute to the high cost of access, which is especially relevant for developing countries where the lack of competition already keeps access costs high.<sup>206</sup>

A number of international initiatives with the aim to regulate spam are currently in place. These include the APEC Telecommunication and Information Working Group (APEC TEL), the OECD work programme on spam (expected to develop an OECD Spam Toolkit consisting of legislative, technological and self-regulatory components), the e-Privacy Directive of the EU (2002/58/EC), whose ban on spam is monitored by the Contact Network of Anti-Spam Enforcement Authorities (CNSA), the Safer Internet Plus programme of the European Commission, and workshops and surveys by the International Telecommunications Union (ITU). Finally, the *London Action Plan* (LAP) to combat spam is an initiative by 26 agencies from 19 countries and 11 private sector representatives, which aims to improve international enforcement and cooperation against illegal spam. Membership is open to any relevant enforcement agency or private sector representative. There is some coordination between these initiatives, although much of it is expressed through bilateral and multilateral trade agreements. The Working Group on Internet Governance has called for increased cooperation while stressing the importance of avoiding duplication of existing cooperative work, the protection of legitimate use of email, and the recognition of spam's unique effect on developing countries.<sup>207</sup>

Evidently, there is agreement that spam is an important regulatory issue; however, like with most other regulatory issues, anti-spam regimes could create

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<sup>206</sup> OECD 2006a, p. 31.

<sup>207</sup> WGIG 2005a, p. 27-31.

potential for abuse. It is not difficult to imagine, for example, a scenario in which spam regulation could cross the line between consumer protection and censorship or other freedom of speech violations; or, that classifying specific types of electronic marketing as spam could create the potential for favouring certain commercial interests over others, and so on. Anti-doping regimes are faced with similar potential for abuse. Testing and sanctions against an athlete arguably interfere with the person's right to privacy and right to work. It is not difficult to imagine a motive for falsifying a positive doping test: especially in highly lucrative professional situations, such a finding could result in significant loss of income for one athlete and an equally significant gain for another. Thus, Van Vaerenbergh underlines the importance of administrative legal principles of due process, preliminary hearing, motivation of decisions, transparency and legal security as crucial for anti-doping regulation. Similarly, a high level of due process, transparency and possibility of review are necessary in spam regulation. The international anti-doping regime has overcome many deficiencies in accountability and responsiveness by adding good governance and due process requirements enforced by the WADA. An anti-spam framework inspired by the anti-doping regime could include the transformation of the London Action Plan into a World Anti-Spam Agency (WASA), with vertical ties to national-level equivalents and lateral ties with the existing initiatives, including the OECD, ITU, and involvement of private sector constituents throughout the world.

Van Vaerenbergh concludes that efforts to embed international sport into the general state-powered structure are only feasible on the margin: through vague, general guidelines and limited review in courts. With the high level of

interdependency between issues, stakeholders and levels of Internet governance, a similar conclusion could be made about spam regulation. To paraphrase Francois Carrad, General Director of the International Olympic Committee, quoted by Van Vaerenbergh, courts should be there to deal with issues in which fundamental principles of human rights are at stake, but they should not run the Internet.<sup>208</sup>

### **Example 2: Decentralized Decision-Making at the Organisation for Economic Cooperation and Development (OECD)**

James Salzman argues that the Organisation for Economic Cooperation and Development (OECD) provides the perfect example to study a decentralized structure that employs a wide variety of GAL techniques to address the wide variety of problems. Due to its decentralized nature, the model of multistakeholder working groups and the different levels of decision-making at which it operates, the OECD is also an interesting example for the study of Internet governance. The OECD is a state-membership organization, regarded by some not only as a legislative body but also as a “management consulting firm for governments.”<sup>209</sup> As “an exclusive club whose members produce two-thirds of the world’s goods and services,”<sup>210</sup> the OECD could be compared to the collection of equally technical Internet bodies which also manage an enormous global trade. The OECD is also a research institution and a leader in the development of international legal instruments, including recommendations (non-binding), decisions (binding, but rarely enforced), and internationally agreed instruments, which are essentially treaties (binding and

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<sup>208</sup> Van Vaerenbergh, p. 39.

<sup>209</sup> Salzman, p. 4-6.

<sup>210</sup> OECD website.

enforceable)—formats which are all present in IG.<sup>211</sup> Further, recommendations and decisions are most often used to harmonize diverse practices and laws of OECD member states: harmonization is also an important legal tool for Internet governance, and it is no surprise that some of the most advanced work in the area of harmonizing information and communication technology (ICT) indicators has been done by the OECD.<sup>212</sup> Finally, the OECD brings together around 40,000 government officials and experts each year, through working groups, committees and conferences.

According to Anne-Marie Slaughter, this type of structure is an indication of a trend in transnational governance that will continue in the coming decades, replacing the rigid UN structure by a more flexible forum where transnational problem solving is carried out through a network approach, similar to that current characteristic of IG.<sup>213</sup> Beyond this forum, the specialized directorates operate under the OECD umbrella, producing issue-specific policy directions through a process connecting working groups with experts from academia, the private sector and civil society. The OECD Council of ambassador-level officials votes on the decision and recommendations.

The interesting connection to the Internet is the historical lack of administrative law brought out in Salzman's article on the OECD. By working through a consensus requirement –comparable, though not identical, to the “rough

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<sup>211</sup> See Article 5 of the Convention on the Organisation for Economic Co-operation and Development. Adopted at Paris, 14th December 1960. Last Accessed August 12, 2006.

[http://www.oecd.org/document/7/0,2340,en\\_2649\\_201185\\_1915847\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html). The sole Internet-related treaty agreed to so far is the Council of Europe Convention on Cybercrime. For a commentary, see Jones, Calvert W. Council of Europe Convention on Cybercrime. Themes and Critiques. Berkeley: School of Information Management and Systems, University of California, 2005.

<sup>212</sup> Organisation for Economic Cooperation and Development (OECD). Internet Traffic Exchange: Market Developments and Measurement of Growth. Paris: OECD, 2006a; and Organisation for Economic Cooperation and Development (OECD). Key ICT Indicators. Paris: OECD, 2006b.

<sup>213</sup> See Salzman p. 7, and Slaughter, Anne Marie. “The Real New World Order.” *Foreign Affairs*. 76. (1997): 183-197.



consensus” credo of the IETF– the OECD has kept the political profile of its decisions low in favour of operational autonomy.<sup>214</sup> However, one must remark that the levels of transparency, responsiveness and public accountability, the usual traits of administrative law, have historically been very low within the OECD, while the IETF has been open to participation to anyone, with its meetings and decision making procedures largely conducted over email, and entirely public.<sup>215</sup> Salzman notes that while the OECD has evolved “through setting standards, adopting guidelines and hosting treaty negotiations, its organizational procedures have not kept pace.” With the exception of facilitating treaty-making, Internet governance bodies seem to have gone through a similar process. And while the OECD has ended up with “administrative safeguards in flux – struggling over how much and what types of engagement with non-state actors are necessary without undermining the organization’s basic mission,”<sup>216</sup> it could be said that Internet governance safeguards are likewise in flux<sup>217</sup> – struggling over how much and what type of engagement with *state actors* is necessary without undermining the basic nature of network. There are some lessons from the OECD experience that may be applicable to Internet governance. Salzman shows that the OECD has paid a high price for failing to involve civil society during the negotiations on the Multilateral Agreement on Investment (MAI). Visible and forceful criticism of the MAI’s lack of consideration for labour, environmental, health and social welfare concerns by civil society –

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<sup>214</sup> Salzman cites Lawrence Krause and Joseph Nye’s observation that international regimes exhibit “the law of inverse salience” which dictates that political prominence of the issue is inversely related to the operational autonomy of the decision making entity.

<sup>215</sup> ICANN perhaps sits in the middle of these two extremes, with its meetings open to those who can afford to attend, but with unclear decision making procedures employed by the Board.

<sup>216</sup> Salzman, p. 9.

<sup>217</sup> Note that an article of Jeanette Hofmann’s mentioned previously in this paper is entitled “Internet Governance: A Regulative Idea in Flux.”

published on the Internet – resulted in the break in negotiations around the Agreement on December 3, 1998, three years after their commencement. The OECD on the whole had to reconsider its relationship with civil society, and it did so by locating effective techniques for engagement of civil society employed internally in some of its directorates and scaling them up throughout the organization.<sup>218</sup> Up until the final Summit, the WSIS process faced a similar danger of abandonment of negotiations, with many divergent view on Internet governance issues among governments, the technical community, corporations and civil society organizations<sup>219</sup> pulling in opposite directions; delegates eventually succeeded at negotiating four useful documents (Geneva Declaration, Geneva Action Plan, Tunis Commitment and Tunis Agenda), which can serve as a basis for further negotiations on information society issues. This was due in no small part to civil society participants who have been credited with keeping the process moving forward in many areas, including Internet governance.<sup>220</sup>

By contrast with the MAI process, the OECD strategy with Common Approaches on Environment and Officially Supported Export Credits involved a close monitoring and outside pressure by civil society organizations from the start. As a result, the final document - Common Approaches - calls on Export Credit Agencies (ECAs) to identify projects with likely environmental implications, conduct an environmental review, evaluate and make information available for review, and report

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<sup>218</sup> Salzman, p.15.

<sup>219</sup> See, for example, Micheal Geist's November 16, 2005 column reporting the final days of negotiations in Tunis in the Toronto Star, "US Must Share More Say in How Internet's Run, Last Accessed on August 19, 2006 at [http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article\\_Type1&c=Article&cid=1131922209521&call\\_pageid=971794782442&col=971886476975](http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1131922209521&call_pageid=971794782442&col=971886476975)

<sup>220</sup> Raboy, 2004. p. 225.

on national level activities. The standards were adopted unilaterally by all member states, although a previous effort to have them adopted by the Council had failed due to disagreements from Turkey and the US. Salzman sees the outcome as a direct result of NGO pressure, resources expended to develop the document and the consensus building activities within the Council. The Common Approaches document requires that an Environmental Impact Statement is available for comment for thirty days before a final policy commitment is made about a project. It also stipulates transparency during review and public notices for consultation with stakeholders. In lieu of an accountability mechanism, members produce annual progress reports and ECAs are obliged to provide notification details of sensitive projects. Organizations that were created to influence the negotiations of the Common Approaches continue to exist and criticize certain activities of the ECAs (like failing to define minimum international environmental standards for projects), using the same administrative process born out of the initial deliberations.

Anne-Marie Slaughter points out that the OECD has the potential to serve as a model for future international networks. The kind of cooperative problem-solving by global networks of state and non-state actors employed by the OECD will probably become more widespread as the need to engage many stakeholders for transnational problem solving grows. As Slaughter says, “transgovernmentalism is rapidly becoming the most widespread and effective mode of international governance.”<sup>93</sup> The advantages of an OECD-inspired framework include the provision of a space for sharing research and experiences (not unlike the one envisioned by the Internet Governance Forum), and for informal preparations for consensus building among

stakeholders. Further, such a framework would involve groups of experts who could provide strategic analysis of specific policy and legal challenges, set standards and provide coordination among domestic regulators and enforcement agencies.<sup>221</sup> While the actions of the OECD are not explicitly labeled as “lawmaking,” their impact may have an equal effect on agency activities. In creating standards, shaping ideas, conducting research and creating networks of experts, similar organizations can exercise, as Slaughter puts it, a “subtle but significant form of advocacy.” The example of OECD shows how administrative law can be implemented in a decentralized and dynamic way and adapted according to specific issues. Carol Harlow notes that agreement of ultimate values and objectives at the macro-level does not denote the absence of substantial variance at the micro-level. She contends that, while values and principles do not always coincide across levels, the primary function of administrative law is to subject power to the rule of law.<sup>222</sup> Thus, the appropriateness of the global administrative law methods, as diverse as they may be, should be measured by their effectiveness in furthering the rule of law.

## Recommendations

The essence of effective multilateralism lies in agreeing to predetermined principles, even when situations in which stakeholders’ vital interests are at stake may not be foreseeable.<sup>223</sup> Commitment to such principles allows the recourse to unilateralism to

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<sup>221</sup> Salzman, p. 28.

<sup>222</sup> Harlow, Carol. “Global Administrative Law: The Quest for Principles and Values.” European Journal of International Law. 17. 1. (2006): 187-214, p.191.

<sup>223</sup> Grewlich, 2005, p. 3.

be limited to extreme cases of vital interest protection.<sup>224</sup> The legitimacy of domestic and international courts in the Internet context is disputed because states lack the governance monopoly over the issues. That monopoly is now challenged by other governments, and also by technically savvy individuals and organizations, economically powerful corporations, and the myriad of organizations that challenge the traditional conception of state sovereignty. As a result, locating the ultimate authority is difficult and accountability and legitimacy of public power are compromised.

Based on the analysis presented here, the approach outlined by contemporary GAL is promising for a decentralized system of governance, such as in the sphere of the Internet. Procedural participation and transparency, reasoned decision and review should be built into Internet governance bodies in order to ensure that the principles of accountability and legitimacy are respected. The five types of stakeholders, enumerated in the Section “Global Administrative Law as Multistakeholder, Multilevel, Multi-issue Governance” of this paper should be represented in all IG bodies. The solutions for individual cases should be articulated according to the cited principles, by IG bodies, in an open-ended legislative process capable of adjusting itself to the speedy developments and innovations characteristic of the Internet. The

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<sup>224</sup> Grewlich views international legal instruments as a continuum, with private, or “governance without law,” on one side, public, or “governance with law” on the other, and hybrid governance, a combination of private and public, between them. The instruments found on this continuum may range from moral suasion, professional codes of conduct, contracts, charters, conventions and treaties, but their purpose is uniformly to cause changes in behaviour of addressees. While “legal governance” is text-bound, there is little evidence that legal treaties, conventions and textual contracts are appropriate and persuasive legal instruments in every situation. Many non-binding and soft-law instruments, which may lie in the middle of the continuum have considerable influence. Private and self-regulation have received much attention in the field of internet governance. As this paper mentioned, the second “phase” of internet governance was marked by a belief that the internet is free from legal oversight by governance. While governance by private actors is undeniably important in some respects, public governance bodies continue to be fully capable of what Grewlich calls governance by law. See Grewlich, 2005.

first opportunity to discuss how these principles can be best incorporated into existing and new IG structures presents itself at the inaugural meeting of the Internet Governance Forum in October 2006.

## **Conclusion**

Information technologies challenge the concepts of both globalization and sovereignty. Nevertheless, the current context of IG is much wider than the technical issues related to the Internet. The challenges are felt not only by governments, but also by industry, civil society organizations and individuals around the world. This paper suggests that instead of immediately building new rules around exhumed principles, the principles, such as those of accountability and legitimacy, should be spelled out as the umbrella principles around which new rules – which must be allowed flexibility to evolve along with the technology – should be made. The paper has also suggested that the organizational designs for integrating these principles into Internet governance could be inspired by other models making up the emerging field of global administrative law. During the “second phase” of Internet Governance, a number of commentaries appeared positing that regulating human interaction in cyberspace was so radically different, and constrained by new functions of the electronic environment, that a brand new approach to law in cyberspace would be necessary. It is difficult to say how seriously these commentaries took their own theories, and it may be that they were simply attempts at outrageous statements designed to draw attention to legal questions in cyberspace. It is interesting that almost every subsequent analysis of legal approaches to internet governance mentions

these early attempts to establish “cyberlaw” as a distinct field. This is probably an indication of the fact that Internet governance cannot be purely a matter of legal regulation, but a combination of legal and non-legal approaches, as this paper attempts to show.

## Appendix A

Brazilian Statement On Internet Governance to the WSIS Preparatory Committee Meeting III  
Geneva, September 20th, 2005

Available at: <http://mail.kein.org/pipermail/incom-1/2005-September/000803.html>

Thank you Mr. Chairman,

On Internet Governance three words tend to come to our mind: “Lack of Legitimacy”. Despite the success in ensuring high availability and Great stability to the operation of the network, the current structure for global governance of the Internet presents significant limitations and a clear lack of legitimacy. In what concerns Internet Governance, in our digital world, only one nation decides on behalf of us all.

How those in favor of this power concentration explain this awkward situation? The most common one is the well known 1984 George Orwell type of mantra, which says: “If it is not broken, do not fix it”. Even if we agree that there is nothing to be fixed – which is not the case for Brazil – this indoctrination argument makes no sense. It makes no sense for a simple reason: we are not debating industrial mass production through assembly lines; we are trying to build a democratic, transparent and multilateral decision making process in our digital world.

In order to see things from another perspective, Brazil proposes a new mantra based on an often quoted Stein's Law, a principle enunciated by the late Herbert Stein, chairman of the Council of Economic Advisers during the Nixon administration: "Things that can't go on forever, don't."

Mr. Chairman, the WGIG Report calls our attention to a number of issues related to Internet Governance that cannot go on forever. Allow me to quote a few of them:

- a) On administration of the root zone files and system, the unilateral control by one government, as well as the lack of formal relationship with root server operators.
- b) On Interconnection costs, an uneven distribution of cost and an absence of an appropriate and effective global Internet governance mechanism to resolve the issue.
- c) On Internet security, a lack of multilateral mechanisms to ensure network stability and security of Internet infrastructure services and applications and a lack of efficient tools and mechanisms to be used by countries to prevent and prosecute crimes committed in other jurisdictions using technological means that might be located within or outside the territory where the crime caused the negative effect.



- d) On Spam, no unified, coordinated approach.
- e) In what concerns participation in global policy development, there are significant barriers to multi-stakeholder participation in governance mechanisms. There is often a lack of transparency, openness and participatory processes.
- f) On Allocation of domain names, there is a need for further development of policies and procedures for generic top-level domain names (gTLDs).
- g) On IP addressing, concerns over allocation policies for IP addresses.
- h) In what concerns Freedom of expression, restrictions on freedom of expression.
- i) In relation to Consumer rights, there is a lack of global standards for consumer rights over the Internet. The recent case of triple X domain name is a good example of lack of accountability.

Mr. Chairman, we cannot ignore reality; neither should we expect magic solutions. The WGIG Report proposes a number of ways out of this dilemma. The first one is the creation of a Global Forum – a place of dialog and decision, with all stakeholders. Let me stress the word “decision” – otherwise it will be seen as nothing but a kindergarten. The second proposal is the creation of a Global Public Policy Oversight Function System. Three of the four models proposed by the WGIG report are worth being implemented.

In this regard, Brazil is of the opinion that the WGIG’s report shall be a base for our work here at Prepcom III. It’s a good and sound step forward.

In conclusion, Mr. Chairman, Brazil supports a new organization model for Internet Governance. One that is democratic, transparent and multilateral, as we all have already agreed upon in the Declaration of Principles, at the Geneva Summit, two years ago. Current policies on Internet Governance are unsustainable. We can't go on like this indefinitely. And things that can't go on forever, don't.

Thank you, Mr. Chairman.

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