Articles

Principles of International Internet Law

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Abstract

Legal principles are an essential element of jurisprudence. They help to systemize, to comprehend and to further develop a legal order. Although International Internet Law is quite a new legal subject, some principles begin to evolve. The article addresses five emerging core principles of International Internet Law: (1) the principle of internet freedom, (2) the principle of privacy, (3) a modified principle of territorial jurisdiction adapted to cyberspace, (4) the principle of interstate cooperation, and (5) the principle of multi-stakeholder cooperation.

A. Introduction

International Internet Law (IIL) is a fairly new subject. Although the origins of the internet date back to the 1960s, its political and economic importance only became visible at the beginning of the 1990s. By that time, legal scholars had become interested in questions of internet governance. IIL is the common denominator for all rules of public international law pertaining to the functioning and use of the internet. Furthermore, IIL is a cross-sectional matter which comprises, inter alia, questions of human rights, and of international economic and institutional law. Some problems have already given rise to intensive legal debate on this subject. The most prominent example is the administration of the Internet Domain Name System (DNS) by the Internet Corporation for Assigned Names and Numbers (ICANN).

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3 See Robert Uerpmann-Wittzack, Internetvölkerrecht, 47 ARCHIV DES VÖLKERRECHTS (AVR) 261, 263-274 (2009).

located on servers abroad is no less controversial. E-commerce is an important topic for the World Trade Organization (WTO) and other international organizations. As the internet penetrates all areas of human life, IIL virtually touches upon all fields of international law. Debates on cyber war, for instance, involve questions of *ius ad bellum* and international humanitarian law. Due to its cross-sectional approach, IIL might appear heterogeneous or even incoherent. However, some underlying principles are noticeable. This article deals with the emerging principles of IIL.

Legal principles have at least two different functions. First, they help to systemize and, by that, to explain a set of legal rules. By virtue of this function, an incoherent mass of legal rules turns into a legal order. This does not necessarily imply an idea of completeness. The international legal order is still fragmentary because international law is only needed where existing problems cannot be solved satisfactorily by domestic law. Principles may be laid down in legal texts like Article 2 United Nations Charter or they may be recognized by states in international declarations. In the absence of such recognition, legal doctrine may propose legal principles which seem appropriate to systemize a set of legal rules.

Secondly, principles are an element of legal reasoning. They help to construe given rules of international law and to elucidate their object and purpose. Thus, international treaties may be interpreted in the light of their underlying legal principles. Legal principles may also influence the evolution of international customary law. While it is true that international custom essentially relies on state practice, state actors may recur to legal principles in

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1 See Uta Kohl, Jurisdiction and the Internet (2007).
order to justify a corresponding rule of international custom. Frequently, international courts and scholars also advance legal principles within a reasoning based on international custom. The well established rule that state jurisdiction requires a genuine link even refers directly to ideas of reasonableness and to certain legal principles.

These legal principles are different from the concept of general principles of law, which is laid down in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ). The latter being derived from domestic law, and are used to fill gaps in international law which occur e.g. with regard to the judicial process. By contrast, this article covers legal principles originating from international law. Some of these principles may have parallels in domestic legal orders, whereas others refer exclusively to the international sphere. Unless these principles are laid down in international treaties or derive from customary law, they are close to the subsidiary sources of Article 38(1)(d) ICJ Statute. They are part of legal doctrine. When applying sources of international law, courts and legal scholars may argue in terms of legal principles.

Although IIL is still a young field of legal scholarship, some principles are evolving. This article addresses five core principles: (1) The principle of internet freedom, (2) the principle of privacy, (3) a modified principle of territorial jurisdiction adapted to cyberspace, (4) the principle of interstate cooperation, and (5) the principle of multi-stakeholder cooperation. The concluding section shall analyze how these principles regulate the interrelationship between different actors with regard to the internet.

B. The Principle of Internet Freedom

The freedom of internet communication, which is firmly rooted in international human rights law, is at the core of internet freedom. Yet, it is questionable whether internet freedom also comprises commercial internet freedoms. This section shall address (I) freedom of internet communication, and (II) freedom of internet business.

11 See Stefanie Schmahl, Zwischenstaatliche Kompetenzabgrenzung im Cyberspace, 47 AVR 284, 313 (2009).
12 See IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (7th ed., 2008); DUPUY (note 10), para. 331.
I. Freedom of Internet Communication

Freedom of expression is the essential freedom of the internet. Article 19(2) of the Covenant on Civil and Political Rights (CCPR) guarantees this freedom on a universal level. In Europe, a corresponding right is enshrined in Article 10 of the European Convention on Human Rights (ECHR). Article 19(2) CCPR expressly refers to expression “through any ... media of his choice”. Although Article 10 ECHR is silent on this point, it is clear that the European Convention equally protects expression through the internet. Information and ideas expressed on a webpage fall within the scope of Article 10 ECHR. In *Times Newspaper Ltd. v. United Kingdom*, the European Court of Human Rights recently found that internet archives fall within the scope of Article 10 ECHR. As freedom of expression comprises freedom of information, it entitles not only content providers but also simple internet users. Although neither Article 19 CCPR nor Article 10 ECHR mention freedom of the press, the European Court of Human Rights has emphasized the importance of the press for a democratic society and its role as public watchdog. This is also true for the electronic press. In *Fatullayev v. Azerbaijan*, the European Court of Human Rights explicitly assimilated a popular internet forum to the printed media in terms of effect. It is worth while noting that both texts guarantee freedom of expression “regardless of frontiers”. This is particularly important for the internet, which defies national borders.

Unlike rules, principles do not require strict observance. Due to their broad scope, they easily collide with other principles or interests. In this case, the principle has to be realized as far as this is possible under the given legal and factual circumstances. Regarding

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18 Eur. Court H.R., Times Newspapers Ltd v. United Kingdom (nos. 1 and 2), Judgment of 10 March 2009, Application 3002/03 and 23676/03, para. 27.

19 Id.


internet freedom, the European Court of Human Rights admitted the importance of state control in *Megadat.com v. Moldova*. Articles 19(3) CCPR and 10(2) ECHR reflect this structure. They contain lists of legitimate aims which may justify an interference. These aims include principles and interests such as the rights of others, national security, public order and morals. In case of conflict, a fair balance must be struck between the competing interests. This is realized by the necessity test laid down in Articles 19(3) CCPR, 10(2) ECHR and requires the interference to be proportionate to the legitimate aim pursued.

**II. Freedom of Internet Business**

Internet freedom is more than freedom of expression. The internet as a means of communication depends on the functioning of its infrastructure. Therefore, internet freedom should comprise the freedom of internet providers, at which point commercial freedoms come into play. International human rights law hardly grants commercial freedoms. Rather, these are a concern of World Trade Law. This section shall look at (1) human rights law, and (2) World Trade Law.

**1. Human Rights Law**

In contrast to national constitutions, international law neither guarantees the freedom to choose an occupation nor the freedom to conduct a business. However, internet providers enjoy freedom of expression even if their activities are of a commercial nature, and may therefore invoke freedom of expression against interferences with regard to content. For instance, in *Times Newspaper Ltd.*, the European Court of Human Rights concluded that ceaseless liability for defamatory article content in an internet archive interfered with the company’s freedom of expression. Such interference is not illegal *per se*, but it requires a special justification.

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Although the ECHR does not protect commercial activity as such, an internet provider may in extreme cases rely upon its right to property enshrined in Article 1 of the First Protocol to the ECHR. In *Megadat.com* the European Court of Human Rights held that a license for providing internet services was a possession within the meaning of Article 1 First Protocol, and that the termination of the license amounted to interference. Registered domain names are another example of internet property rights protected by this article. However, the ECHR remains far from granting an overall protection to internet service providers.

Protection is even weaker under the Covenant on Civil and Political Rights which contains no right to property. Companies do not even have standing before the Human Rights Committee under Articles 1 and 2 of the CCPR Optional Protocol No. 1 of 19 December 1966. While Article 34 ECHR permits complaints by non-governmental organizations, *i.e.* legal persons, the CCPR Optional Protocol restricts the right of standing to individuals.

2. *World Trade Law*

Freedom of transnational internet commerce might find a basis in World Trade Law. By prohibiting quantitative restrictions on import and export, Article XI General Agreement on Tariffs on Trade (GATT) grants free market access. As far as trade in services is concerned, Article XVI General Agreement on Trade in Services (GATS) provides market access as a specific commitment. Trade in internet hardware like servers and personal computers falls within the ambit of GATT. By contrast, internet economy does not deal with the exchange of goods, *i.e.* physical products, but consists of trade in services, which is governed instead by GATS.

It is not easy to derive a principle of market access from GATS. Article XVI of GATS does not grant market access automatically. Rather, market access depends on the decision of states to include certain categories of services into their lists of specific commitments under Article XX of GATS. It is hardly possible to establish a principle of market access


31 UNTS, vol. 55, 188, 224-228.


unless most countries have undergone corresponding specific commitments. Moreover, services are defined in a way that is technically neutral. For instance, market access for internet gambling services depends on whether a state has given a specific commitment for gambling and betting services.35 Supplying online does not constitute a distinct category of services.36 In the absence of an overall category of internet services, it is difficult to establish a principle of internet market access.

Another objection relates to the legal character of market access under GATT and GATS. Ernst-Ulrich Petersmann37 is a strong proponent of a constitutional approach which qualifies GATT and GATS guarantees as individual rights. However, his position is contested.38 For a debate on principles, the question may remain open. A principle of market access may also exist if it can only be invoked by states and not by individuals.

Like any principle, market access is not a strict obligation. It can collide with other principles, and a fair balance must be struck. This is laid down in the general exceptions clauses of Article XX of GATT and Article XIV of GATS. Both articles enumerate competing principles such as the protection of public morals and order.39 Although the WTO Appellate Body40 applies the necessity test in a different way than the European Court of Human Rights, both judicial bodies weigh and balance the restrictive effect of a measure against its benefit. Therefore, the WTO Appellate Body held in US – Gambling that the protection of morals could in principle justify a restriction of, and even a total ban on, the freedom of internet gambling and betting services.41

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39 See Article XX(a) GATT, Article XIV(a) GATS.
C. The Principle of Privacy

The principle of privacy is equally enshrined in international human rights law. Article 17 CCPR protects one’s privacy, family, home, correspondence, honour and reputation. Article 8 ECHR addresses private and family life, home and correspondence. Both articles have a broad scope of application which has been specifically developed by the European Court of Human Rights. It may be taken for granted that emails are protected correspondence within the sense of these articles. Other data which is transmitted by the internet or which is accessible through the internet belongs to a person’s private life, unless it is destined for public access. In Copland v. United Kingdom, the European Court of Human Rights had no problem qualifying an employee’s use of the internet as part of her private life and correspondence. In consequence, state control over private internet use and content including emails amounts to an interference. The same is true for an obligation of internet providers to store internet data as laid down in Article 3 of the European Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services. Even a person who does not use the internet may be compromised by the internet publication of information relating to him or her. If public authorities publish such information, or if legislation imposes a duty to publish it, the state interferes with private life, as the European Court of Human Rights rightly stated in Wypych v. Poland. Legality therefore depends on a special justification.

Internet privacy is not only threatened by public authorities but also by private persons and enterprises. Enterprises and social community platforms store large amounts of private data which may compromise and harm an individual if they are stolen or otherwise misused. Moreover, a person may be affected by the internet publication of information relating to him or her. Online ratings of professionals such as teachers and physicians illustrate this. In such cases, states are under a positive obligation to protect privacy. This obligation becomes particularly clear in CCPR Article 17(2), according to which everyone has the right to legal protection against interference with his or her privacy. Even though

42 See Eur. Court H.R., Liberty et al. v. United Kingdom, Judgment of 1 July 2008, Application 58243/00, para. 52; Kennedy v. the United Kingdom, Judgment of 18 May 2010, Application 26839/05, para. 118, where the Court makes, however, no distinction between private life and correspondence.


the ECHR does not contain a similar specification, the European Court of Human Rights has derived positive obligations from Article 8 ECHR.46

It would be wrong, however, to focus exclusively on privacy. In the cases at hand, protection of privacy comes into conflict with internet freedom. Here, two separate principles of IIL collide. Whereas freedom of expression may be restricted in favor of the rights of others and in particular the right to privacy, any restriction must be proportionate to the aim pursued. States have to strike a fair balance between privacy on the one hand and internet freedom on the other hand.47 If an individual is seriously compromised, the state must even envisage criminal sanctions.48 In K. U. v. Finland, an unknown person had placed an announcement on an internet dating site in the name of a 12 year old boy. At that time, the service provider could not be compelled under Finnish law to reveal the identity of the person who had placed the advertisement. Any prosecution was therefore excluded. In the view of the European Court of Human Rights, Finland had failed to abide by its positive obligation to protect the private life of the boy.50

D. The Principle of Territorial Jurisdiction

The negative obligations arising out of human rights norms limit public authorities in their scope of action. They create and guarantee an area of individual freedom, which is protected against state intervention. Jurisdiction, by contrast, deals with the relationship between states. Under a regime of sovereign equality, as laid down in Article 2(1) United Nations Charter, the jurisdiction of one state finds its limits in the jurisdiction of others. In consequence, the exercise of jurisdiction requires a genuine link. A state may exercise territorial jurisdiction over its state territory and personal jurisdiction over its citizens.51


47 See, mutatis mutandis, Eur. Court H.R., von Hannover (note 25), paras. 57-58, for a conflict between privacy and freedom of the press.


49 K. U. v. Finland (note 48).

50 K. U. v. Finland (note 48), paras. 40-50.

51 Bernard H. Oxman, Jurisdiction, in MPEPIL (note 22, 2007), para. 11.
The principle of territorial jurisdiction is well established in public international law. However, two modifications can be discerned with regard to Cyberspace. First, the effects doctrine giving jurisdiction over foreign acts provided that they produce effects within the own territory must be adapted to the ubiquitous nature of the internet. Second, jurisdiction expands to a state’s country code Top Level Domain which becomes cyber territory. This section shall explore the qualified effects doctrine, and (II) the Country Code Top Level Domain as Cyberterritory.

I. A Qualified Effects Doctrine

Article 22 of the European Convention on Cybercrime (ECC) of 23 November 2001 confirms the traditional principle of territorial jurisdiction. According to Article 22(1)(a) ECC each contracting party establishes jurisdiction over offences committed on its territory. It is well established that an offence is committed at the place where the perpetrator acted. If a person places harmful content, such as pornography on a web site, the state where the person has actually worked on the computer may intervene. Traditionally however, it is accepted that an offence is also committed on the territory where the effects of a criminal act occur. This objective territorial principle comes close to the effects doctrine which is established in antitrust law. The Council of Europe Committee of Ministers confirmed the effects doctrine in its comment on Article 22 ECC. According to the Committee, a state should not only "assert territorial jurisdiction if both the person attacking a computer system and the victim system were located within its territory", but also "where the computer system attacked is within its territory, even if the attacker is not." In this case there would indeed be a genuine link between the attack and the state where the victim’s system is located because the targeted computer system exists in that country. The situation is less clear when harmful content is published through the internet. A webpage is in principle accessible from any point of the world. Under a wide effects doctrine,


54 Oxman (note 51), para. 16.


jurisdiction would be established by the mere fact that a prosecutor views a webpage with harmful content from his or her office desk. In *Perrin*, British courts convicted a French national of publishing obscene material on a US website because a police officer had viewed it in a London police station. In *Toeben*, German courts convicted an Australian national of Holocaust denial on an Australian website. In *Yahoo*, the Tribunal de Grande Instance de Paris (Paris Regional Court) found that offering Nazi memorabilia on a US server violated French criminal law.

If no restriction was made, World Wide Web content would have to comply with the legal orders of more than 190 states. Due to the transnational character of the internet, the simple possibility to view a webpage in any country cannot be sufficient in order to establish a genuine link between the webpage and the prosecuting state.

This view is widely accepted by courts and scholars. Therefore, different attempts have been made to restrict the effects doctrine in a way which takes the ubiquitous nature of cyberspace into account. US courts rely on a reasonable effects doctrine. Although court practice throughout the world is not uniform, there is a strong tendency to use several criteria in order to determine whether a webpage has a sufficient link to a given country. These criteria include the language as well as the content or publicity which refers to a specific country. If web content is intended to be retrieved from a specific country, this country has a good claim to jurisdiction.

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61 See the analysis given by KOHL (note 4), 47-65; from a perspective of private international law see ISABEL ROTH, *DIE INTERNATIONALE ZUSTÄNDIGKEIT DEUTSCHER GERICHTE BEI PERSÖNLICHKEITSVERLETZUNGEN IM INTERNET* 243-289 (2007).


63 See *Tribunal de Grande Instance de Paris*, *Yahoo* (note 60).

64 See also Bundesgerichtshof, Judgment of 2 March 2010, case VI ZR 23/09, 63 NEUE JURISTISCHE WOCHENSCHRIFT 1752 (2010), para. 22 (also available through http://www.bundesgerichtshof.de/), where the German Federal Court emphasized that readers of the New York Times online edition could choose Germany in a list of countries of residence on registration.

65 See KOHL (note 4) 97; see also Article 15(1)(c) Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 12/1, according domestic courts jurisdiction over transnational consumer contracts if the other party “directs” commercial activities such as promoting websites to that state.
In fact, jurisdiction based on an unqualified effects doctrine would not only infringe the sovereignty of other states, but it would also collide with the principle of internet freedom. Freedom of expression “regardless of frontiers”, as laid down in Articles 19(2) CCPR and 10(1) ECHR, would come to an end if content providers had to block access for foreign users for fear of being sued or prosecuted abroad.68 A fair balance must be struck between the conflicting principles of territorial jurisdiction and of internet freedom. From a human rights perspective it has been advanced that foreign jurisdiction must be foreseeable.69 A qualified effects doctrine based on the idea of reasonableness comes to similar results.

II. The Country Code Top Level Domain as Cyberterritory

In IIL, the territorial principle undergoes a second change. In principle, territory is a land or sea space on the earth including the airspace above and the subsoil.70 The internet has been assimilated to a territory where persons can act and even live. In 1996, John Perry Barlow emphatically declared the independence of cyberspace.71 Barlow used the language of sovereignty and of the social contract72 in order to argue that cyberspace was a “world” beyond state control. Meanwhile it has become clear that states are both willing and able to exercise jurisdiction over cyberspace. What is more striking is that parts of cyberspace seem to become part of state territory. Country code Top Level Domains (ccTLD) such as .uk for the United Kingdom and .pl for Poland may already be considered to be their respective states’ cyber territories.

These Top Level Domains (TLDs) were created by Jon Postel, the father of the Domain Name System, who referred to a list of country codes established by the International Organization for Standardization.73 He delegated the administration of the Top Level

67 Eur. Court H.R., Perrin (note 20), Section The Law B.
68 For a depiction of this scenario see KOHL (note 4), 279-283.
69 Eur. Court H.R., Perrin (note 17), Section The Law B; KOHL (note 4), 115-163.
70 See BROWNLE (note 12), 105; DUPUY (note 10), para. 37.
72 See the analysis given by ROLF H. WEBER, SHAPING INTERNET GOVERNANCE: REGULATORY CHALLENGES 73-88 (2010).
73 Kleinwächter (note 3), 1106.
Domains to scientific or other institutions who were willing to act as registries. Since 1998, the creation and delegation of TLDs is the task of Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization established under Californian law. This is true of both ccTLDs and generic TLDs (gTLDs), such as .com or .info. CcTLDs therefore originate from a sphere that was hardly controlled by states. The British and the German ccTLD registries are still rooted in the private sector and both states limit control to a minimum. Other states such as France, however, effectively control their registries. This is also the case for the European Union which created its own ccTLD .eu by Regulation (EC) 733/2002 of the European Parliament and the Council. The .eu registry, EURid, was designated upon a Call for Expressions of Interests by the European Commission, and it is bound by a service concession contract concluded by EURid and the European Commission. By Regulation (EC) 874/2004 the Commission adopted public policy rules for the administration of the .eu ccTLD. The European Union thus claims full jurisdiction over the administration of its ccTLD.

This claim is supported by international documents. In principle, the creation and delegation of TLDs is still within the responsibilities of ICANN. The ICANN board is advised, however, by the Governmental Advisory Committee (GAC). Although the GAC is, formally speaking, an ICANN body established under its bylaws, in reality it comes close to an international organization. Recommendations adopted by the GAC are not formally

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74 See Weber (note 72), 51-54.
79 See the draft service concession contract annexed to the Call for Expressions of Interests (note 77), at 14.
binding upon the ICANN Board, it does “duly tak[e] into account” recommendations of Governments who hold a de facto veto position. In 2005 the GAC adopted the Principles and Guidelines for the Delegation and Administration of ccTLDs. According to these Principles “[u]ltimate public policy authority over the relevant ccTLD rests with the relevant government”. State sovereignty is thus affirmed.

The final documents of the World Summit on the Information Society (WSIS), which was held in two phases in Geneva 2003 and in Tunis 2005, point in the same direction. Paragraph 63 of the Tunis Agenda for the Information Society of 18 November 2005 holds that:

Countries should not be involved in decisions regarding another country’s country code Top-Level Domain (ccTLD). Their legitimate interests, as expressed and defined by each country, in diverse ways, regarding decisions affecting their ccTLDs, need to be respected, upheld and addressed via a flexible and improved framework and mechanisms.

A draft of 30 September 2005 went even further. It recognized “that each government shall have sovereignty over its respective country code top level domains.” While all the documents refer to the administration of ccTLDs, the underlying idea may be generalized: there is a genuine link between a ccTLD and the respective state. A state may therefore assert full jurisdiction over its own ccTLD. The ccTLD becomes a state's territory in cyberspace. The United Kingdom might therefore exercise criminal jurisdiction over any offence committed under its ccTLD .uk.

In summary, cyberspace does not defeat the principle of territorial jurisdiction. Rather, the principle adapts itself to the specific situation of the internet.

83 Article I(2)(11) ICANN Bylaws (note 81).
84 Kleinwächter (note 3), 1121-1122; Uerpmann-Wittzack (note 3), 156.
86 See Weber (note 72), 31-36.
E. The Principle of Interstate Cooperation

In the field of internet governance, the need for international cooperation is above all a matter of fact. As the internet defies national borders, most problems cannot be solved by one state alone. For instance, internet fraud and other internet offences are frequently committed by offenders and through internet servers located outside the state of the victim. Prosecuting such offences requires investigations in different states which presuppose effective cooperation. The Convention on Cybercrime of 2001\(^{89}\) is a result of this phenomenon, as it is grounded on the belief “that an effective fight against cybercrime requires increased, rapid and well-functioning international co-operation in criminal matters”.\(^{90}\)

The mere need to cooperate does not entail a legal obligation to do so. Certain duties to cooperate can be derived from general international law. For example, one of the purposes spelled out in Article 1 of the United Nations Charter is “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms”. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration), which can be held to be an authoritative interpretation of the Charter,\(^{91}\) confirms the duty of states to cooperate. However, this general obligation has a high level of abstraction, and it is difficult to translate it into specific duties.\(^{92}\)

Specific duties to cooperate can be found in international treaties such as the Convention on the Rights of the Child (CRC).\(^{93}\) Article 34(c) CRC obliges states to “take all appropriate national, bilateral and multilateral measures to prevent … [t]he exploitative use of children in pornographic performances and materials”.\(^{94}\) Since pornographic materials are frequently exchanged through the internet from one state to another, any effective response must be coordinated between two or more states. Thus, Article 34(c) CRC obliges

\(^{89}\) Convention on Cybercrime, supra, note 53.

\(^{90}\) Convention on Cybercrime, supra, note 53, Preamble, para. 8.


\(^{92}\) Schreuer (note 91), 170-174; see also VAUGHAN D. LOWE, INTERNATIONAL LAW 111 (2007).

\(^{93}\) GA Res. 44/25 of 20 November 1989.

\(^{94}\) Id.
states to cooperate in combating child pornography. In consequence, the Convention on Cybercrime, which defines offences related to child pornography in Article 9, expressly refers to the CRC.95

Similar obligations may follow from other human rights instruments such as the ECHR. In Rantsev v. Cyprus and Russia the European Court of Human Rights stressed the transnational character of trafficking in human beings. Therefore, the positive obligation to investigate cases of trafficking in human beings, deriving from ECHR Article 4, was understood to encompass a duty of effective cross-border cooperation.96 The same should be true for offences through the internet which typically involve more than one state. If, for instance, in K. U. v. Finland97 the internet dating site had been run by a provider outside Finland, the duty to protect the 12 year old boy under ECHR Article 8 would have implied an obligation to cooperate with the state where the provider was located.

However, there is no consistent pattern for duties to cooperate.98 In fact, states are not even obliged to maintain diplomatic relations even though diplomacy is at the very basis of international cooperation. The final documents of the WSIS show the same ambivalence. The Geneva Declaration of 12 December 2003 concludes with a commitment “to strengthening cooperation to seek common responses to the challenges and to the implementation of the Plan of Action, which will realize the vision of an inclusive Information Society based on the Key Principles incorporated in this Declaration.”99 However, paragraph 40 of the Tunis Agenda100 merely “underlines the necessity” to promote international cooperation. Although the need for cooperation is generally accepted, states are reluctant to accept such duties.101 From a legal point of view, the principle of interstate cooperation is quite weak.

95 11th recital of the Convention’s Preamble (note 53).
97 K.U. v. Finland, supra, note 49.
98 But see Christian Tietje, The Duty to Cooperate in International Economic Law and Related Areas, in INTERNATIONAL LAW OF COOPERATION AND STATE SOVEREIGNTY (note 91), 45, 63-64: according to whom duties to cooperate are linked to issues of overlapping jurisdictions, which is indeed an important aspect; for different types of cooperation see Lori Fisler-Damrosch, Obligations to Cooperate in the International Protection of Human Rights, in INTERNATIONAL LAW OF COOPERATION AND STATE SOVEREIGNTY (note 91), 15, 24-30.
100 Tunis Agenda, supra, note 87; see also Id., paras. 47, 51, 69.
101 For a pessimistic appraisal see Kohl (note 4), 251-252.
F. The Principle of Multi-Stakeholder Cooperation

Civil society and the private sector traditionally play an important role in internet governance. Although the development of the internet was funded by the US Government, its structures were determined by the scientific community. The US Government observed the development but it stayed in the background. When it became necessary to find stable structures for the administration of the internet Domain Name System (DNS), the task was neither conferred upon a state authority nor an international organization such as the International Telecommunications Union, but upon the private non-profit organization ICANN. Nevertheless, concepts of internet governance beyond state control such as the vision of John Perry Barlow in 1996 have never become true. ICANN has been under contract of the US Department of Commerce from the beginning. Since then, the influence of other states has grown, and the Governmental Advisory Committee is now an important body of state control. Initial plans of the US Government to release ICANN into full independence have not yet been realized. The newly concluded Affirmation of Commitments by the United States Department of Commerce and the ICANN (Affirmation of Commitments) of 30 September 2009 further reduces direct US influence but enhances accountability and transparency by review procedures which involve, inter alia, the Governmental Advisory Committee. As early as in 2002 the President of ICANN called for “an effective public-private partnership, rooted in the private sector but with the active backing and participation of national governments.” This has been progressively realized.

There are clear signs that this multi-stakeholder approach is not only a matter of fact but that it is perceived as a guiding principle of IIL. In the Affirmation of Commitments, the US Department of Commerce “affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS technical coordination that acts for the benefit of global Internet users”. The subject was addressed in a broader context during

102 Barlow, supra, note 71.


106 See also Kleinwächter (note 3), 1120-1123; Erich Schweighöfer, Role and Perspectives of ICANN, in INTERNET GOVERNANCE AND THE INFORMATION SOCIETY 79 (Wolfgang Benedek, Veronika Bauer & Matthias C. Kettemann eds., 2008).

107 Affirmation of Commitments (note 104), para. 4.
WSIS. According to the Geneva Declaration of Principles of 2003, the management of the internet, which "encompasses both technical and public policy issues," "should involve all stakeholders and relevant intergovernmental and international organizations."¹⁰⁸ In this respect, the Declaration connects different actors with specific roles. Policy authority for internet-related public policy issues is ascribed to states¹⁰⁹ while the private sector shall have "an important role" in the technical and economic development of the internet.¹¹⁰ The role of civil society is less specific. It shall play "an important role on Internet matters, especially at community level."¹¹¹ Two years later, the Tunis Agenda for the Information Society reaffirmed this multi-stakeholder approach in identical wording¹¹², it recommended a multi-stakeholder approach “at all levels”,¹¹³ and it created the Internet Governance Forum as a “new forum for multi-stakeholder policy dialogue.”¹¹⁴ This multi-stakeholder approach is not limited to questions of the Domain Name System and of ICANN. Rather, WSIS adhered to a broad notion of internet governance which includes public policy issues such as the prosecution of cybercrime.¹¹⁵ In fact, cooperation between different stakeholders is a key note of the Geneva Declaration¹¹⁶ and of the Tunis Agenda.¹¹⁷

The multi-stakeholder approach is not limited to ILL. Other world conferences also show a growing importance of non-state actors.¹¹⁸ In ILL, however, the concept of multi-stakeholder cooperation is so strong that it takes the form of a well established principle.

¹⁰⁸ Geneva Declaration (note 99), para. 49.
¹⁰⁹ Geneva Declaration (note 99), para. 49(a).
¹¹⁰ Geneva Declaration (note 99), para. 49(b).
¹¹¹ Geneva Declaration (note 99), para. 49(c); on the role of civil society within the WSIS process itself see Bart Cammaerts & Nico Carpentier, The Unbearable Lightness of Full Participation in a Global Context: WSIS and Civil Society Participation, in TOWARDS A SUSTAINABLE INFORMATION SOCIETY 17 (Nico Carpentier & Jan Servaes eds., 2006).
¹¹² Tunis Agenda (note 87), para. 35.
¹¹³ Tunis Agenda (note 87), para. 37.
¹¹⁴ Tunis Agenda (note 87), para. 72.
¹¹⁷ Tunis Agenda (note 87), paras. 27(b), 39, 41, 45, 71, 83, 88-89.
G. Interrelating Different Actors

The final documents of the WSIS enumerate states, the private sector, civil society and international organizations as key actors of IIL, while individuals are the primordial actors in an order based on human rights. The five principles of IIL analyzed in this article determine the relationship between these actors.

Human rights protect individuals against interferences by public authorities. Both the freedom of communication and the privacy of individual communications are guaranteed. Whereas CCPR Article 1 Optional Protocol No. 1 only gives standing to human beings as such, European human rights may also be invoked by civil society or private sector actors formed out of individuals. This is spelled out in ECHR Article 34. The position of internet providers is further strengthened by World Trade Law.

Positive obligations deriving out of human rights norms regulate the relationship between different individuals, and by that define the position of individuals within civil society and towards the private sector. Above all, states are under an obligation to protect privacy against interferences by other individuals, civil society and the private sector. K. U. v. Finland is a good example of this.

The principle of territorial jurisdiction aims at delimitating the powers of different states whereas cooperation is needed in order to resolve problems which cannot be handled by one sovereign state alone. Interstate cooperation is quite a traditional concept of international law even though the need to cooperate between sovereign states is particularly urgent in the field of internet governance. The concept of multi-stakeholder cooperation is more innovative, and it has become a specific principle of IIL. In short, IIL is currently evolving within a triangle of individual rights, territorial jurisdiction and cooperation.

\[^{119}\] Geneva Declaration, supra, notes 108-111; Tunis Agenda, supra, note 112.

\[^{120}\] K. U. v. Finland, supra, note 48.