Publizistisches Riskmanagement heute

Sorgfaltspflichten und Organisation des «verantwortlichen Redaktors»

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***Résumé:** Dans un ATF 130 IV 121, le Tribunal fédéral s'est intéressé à la question de la gestion du risque journalistique (Riskmanagement). Cette décision rédigée en italien est surtout connue pour avoir étendu au rédacteur responsable de l'art 28 CP la preuve libératoire de vérité ou de bonne foi prévue à l'article 173 CP. La décision fixe en outre les lignes directrices du devoir de diligence du rédacteur responsable. Les grandes lignes d'une gestion globale du risque éditorial sont ainsi résumées par le Tribunal fédéral, avec des conséquences qui dépassent le droit pénal et la responsabilité de la publication. Ce jugement néglige des questions importantes comme par exemple celle de l'organisation des médias ou des liens qui les relient.*

Man muss das spannende Buch von P.L.Bernstein[1] über die Risikogeschichte gelesen haben, um mit dem Ausdruck Riskmanagement richtig umgehen zu können. Erstens begreift man damit, dass Risiko seit jeher mit jedem unternehmerischen Unterfangen verbunden ist; zweitens, dass ein ausgewogenes Risikomanagement die Entwicklung von freiem und risikofreudigem Handeln mehr fördert als hindert. Dies sollte auch im Journalismus der Fall sein, umso mehr gerade in der heutigen «Risikogesellschaft»[2] Medien ein sehr wichtiger Gesellschaftsfaktor sind. In Banken, Versicherungen oder Spitälern ist Risikoverwaltung seit geraumer Zeit ein Hauptanliegen. Selbst für das Recht ist diese Frage zentral geworden[3]. Risiken zu verwalten - neben Gelegenheiten zu ergreifen - gibt es aber auch in publizistischen Unternehmen. Riskmanagement soll demnach auch hier ein Thema sein. Darüber nachzudenken bedeutet nichts anders, als Qualitätskontrolle ernst zu nehmen und ein ausgewogenes Verhältnis zwischen Medienfreiheit und Medienverantwortung anzustreben.

Mit journalistischem Riskmanagement hat sich das Bundesgericht in BGE 130 IV 121 auseinandergesetzt. Bekannt ist dieser in italienischer Sprache verfasste Entscheid vor allem, weil der Wahrheits- und Gutglaubensbeweis i. S. von Art. 173 StGB auch auf den verantwortlichen Redaktor i.S. von Art. 28 StGB ausgedehnt wurde[4]. Mindestens ebenso wichtig ist jedoch, dass der Entscheid Leitlinien der Sorgfaltspflicht des verantwortlichen Redakteurs festlegt. Höchstrichterlich werden somit die Umrisse eines publizistischen Risikomanagements zusammengefasst, was durchaus nicht nur auf strafrechtlicher Ebene und nicht nur für den verantwortlichen Redaktor Folgen haben könnte[5]. In diesem Beitrag werde ich mich damit auseinandersetzen. Zum Teil auch kritisch, weil das Urteil m.E. wichtigen Fragen zu wenig Beachtung geschenkt hat, zum Beispiel derjenigen nach der Organisation der Medien oder ihren heutigen Verknüpfungen.

* Der Autor vertritt seine persönliche Meinung. Dieser Beitrag beruht auf meinen Text «Riskmanagement pubblicistico, controllo della qualità e organizzazione nei mass media. L'art. 322bis Codice penale e la decisione 130 IV 121 del Tribunale federale», in Diritto senza devianza, Studi in onore di Marco Borghi, Bellinzona-Basel, 2006, S. 729 f. Dank der Zusammenarbeit von Dr. F.Zeller durfte die noch im Druck sich befindende 2. A. des Basler Kommentars hier bereits berücksichtigt werden. Frau Dr. J. Hohe hat das Lektorat übernommen.

1 P.L.Bernstein, Against The Gods, The Remarkable Story of Risk, New York 1996.

2 Vgl. U. Beck, Risikogesellschaft. Auf dem Weg in eine andere Moderne, Frankfurt 1986; F. Herzog, Gesellschaftliche Unsicherheit und strafrechtliche Daseinsvorsorge, Heidelberg 1990; C.Prittwitz, Strafrecht und Risiko, Frankfurt 1993; C.Piergallini, Danno da prodotto e responsabilità penale: profili dommatici e politico-criminali, Milano 2004; A.P.Pires, la rationalité pénale moderne, la société du risque et la juridicisation de l'opinion publique, Sociologie et Sociétés, vol. XXXIII.1, 2001, p. 179 ff..

3 Vgl. Risiko und Recht, Festgabe zum Schweizerischen Juristentag 2004, Bern 2004.

4 L.Moreillon, Le rédacteur responsable peut prouver la vérité, *medialex* 4/2004; F.Riklin, Entertainement Law aus der Sicht des Medienrechts, in O.Arter/F.Jörg, Entertainement Law, Bern 2006, S. 242-243; F.Zeller, Basler Kommentar, Basel 2007, 2. A., Art. 322bis StGB, N. 7. Über den Begriff des verantwortlichen Redaktors vgl. F.Zeller, Basler Kommentar, 2. A, Art. 28 StGB, N.A. 74-75.

5 Das Bger. hat lediglich in Bezug auf die tatbestandtypische Handlung von Art. 322bis StGB argumentiert, also nur das strafrechtliche Mindestmaß an journalistischem Risikomanagement vor Augen gehabt. Man sollte sich als verantwortlicher Redakteur publizistisch wohl höhere Zielen setzen als die bloße Verhinderung von strafbaren Veröffentlichungen. Vor allem aber könnte eine mangelhafte Redaktionsüberwachung für ein Medienunternehmen durchaus auch zivilrechtlichen Folgen haben. Dazu § II.1 , N. 34.

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I. Die Sorgfaltspflicht des verantwortlichen Redaktors

1. Umfang

Laut BGE 130 IV 121 stehen in Rahmen von Art. 322bis StGB Wahrheits- und Gutglaubensbeweis auch dem verantwortlichen Redaktor zu. Dieser kann den Wahrheitsbeweis zu den gleichen Voraussetzungen wie der unmittelbar tätige Redaktor erbringen[6], der Gutglaubensbeweis dagegen nur in einer anderen Variante. Es geht nicht darum, ob er unmittelbar eine Nachricht für wahr hält[7], sondern um sein Vertrauen in die Professionalität des Redaktors, der mit der Nachricht befasst war. Mit anderen Worten handelt es sich um die Sorgfalt der redaktionellen Überwachung[8].

Oben Gesagtes hat bereits eine wichtige Folge. Wächst die dem einzelnen Redaktor bei der Überprüfung einer Tatsache abverlangte Sorgfalt[9], so erhöhen sich gleichzeitig die Voraussetzungen einer sorgfältigen Überwachung seitens des verantwortlichen Redakteurs. Überträgt man dies auf die organisatorische Ebene, ergibt sich eine erste Konsequenz. Je wichtiger das Medium, oder je heikler die Fragen, die es behandelt, umso höher sind Anforderungen an die redaktionelle Überwachung.

Des Nichtverhinderns einer strafbaren Veröffentlichung i. S. von Art. 322bis StGB macht sich demnach derjenige strafbar, der die redaktionelle Überwachung nicht nach den Umständen und seinen persönlichen Verhältnissen gemäß ausübt: gerade darin liegt seine Garantenstellung[10]. Mit dem doppelten Hinweis auf «Umstände» und «persönliche Verhältnisse» wird auf Art. 12 Abs. 3 StGB verwiesen. Der Begriff der «pflichtwidrigen Unvorsichigkeit» gilt deswegen auch bei der fahrlässigen Begehungsvariante von Art. 322bis StGB[11]. Die redaktionelle Sorgfaltspflicht bemisst sich demnach grundsätzlich nach den üblichen Sorgfaltsmustern: eine *lex specialis* für journalistische Fahrlässigkeit gibt es also nicht.

Nur eine tatsächlich wirksame Ausübung der dem verantwortlichen Redaktor anvertrauten Pflichten ist mit der von Art. 28 StGB gewollten effektiven publizistischen Verantwortungsübernahme[12] vereinbar. Dazu besteht auch die Möglichkeit, die Rolle des verantwortlichen Redakteurs auf mehrere Personen zu verteilen, welche für jeweils einen Teil der Publikation die Verantwortung übernehmen[13]. Bereits diese Tatsache unterstreicht die Wichtigkeit der Organisationsfrage innerhalb eines Massenmediums: darauf werde ich zurückkommen.

Das Bundesgericht erinnert in seinem Entscheid auch daran, dass in Bezug auf Art. 322bis StGB die Beweislast der Anklage obliegt[14]. Der Gutglaubensbeweis i. S. von Art. 173 Abs. 2 StGB hat aber eine Beweislastumkehrung zur Folge. Noch problematischer könnte die Beweislage sein, wenn der verantwortliche Redaktor die zu prü-

6 BGE 130 IV 121 Erw.6: «In caso contrario verrebbe stravolto lo stesso sistema repressivo previsto dal Codice penale in ambito di diffamazione, con il rischio di ammettere la punibilità di un redattore responsabile per pubblicazioni vere e giustificate dall'interesse pubblico (…) ».

7 BGE 130 IV 121 Erw. 1.8.1.

8 BGE 130 IV 121 Erw. 1.8.2: «si rende invece colpevole di mancata opposizione colposa (art. 322bis seconda frase CP) il responsabile che non ha usato le precauzioni di vigilanza redazionale alla quale era tenuto secondo le circostanze e la sua situazione personale». Das Erfordernis der Sorgfältigkeit kennzeichnet auch den Gutglaubensbeweis an sich: vgl. BGE 124 IV 149 Erw. 3b. Vom verantwortlichen Redaktor wird zwar eine andere, nicht aber eine mindere Sorgfalt verlangt.

9 Zum Beispiel, wenn er es mit besonders heiklen Fragen zu tun hat. «Je schwerer ein Ehreingriff ist, umso größere Sorgfaltspflichten bestehen hinsichtlich der Abklärung des wahren Sachverhalts (…)»: vgl. F.Riklin, Basler Kommentar , I. A. Basel 2003, Art. 173 StGB, N.16. Ohne zu vergessen, dass von den Medien Vorsicht per se geboten ist: vgl. BGE 124 IV 149 Erw. 3b. Siehe auch unter § II.3.

10 «Si rende invece colpevole di mancata opposizione colposa (…) il responsabile che non ha usato le precauzioni di vigilanza redazionale alle quali era tenuto secondo le circostanze e la sua situazione personale»: BGE 130 IV 121 Erw. 1.8.2.. Garantenstellung vgl. z.B. G. Stratenwerth, AT I, S. 424-433; K.Seelmann, Basler Kommentar, I. A., Art. 1 StGB, N. 66-70.

11 Z.Bsp. BGE 121 IV 14 Erw. 3. Zum Thema für viele s. G.Jenny, Basler Kommentar, I. A., Art. 18 StGB, mit Verweisen.

12 «Die erwähnten Bestimmungen setzen voraus, dass die verantwortlichen Personen tatsächlich Verantwortung tragen, also in der Lage sind, eine Überwachungsfunktion auszuüben und die Befugnis haben, ggf. einzuschreiten»: BBL 1996, S.551. Diesbezüglich auch F.Zeller, Basler Kommentar, 2. A., Art. 28 StGB, N. 74.

13 Art. 322 Abs. 2 StGB.

14 BGE 130 IV 121 Erw.1.8.2

Zusammenfassung: *Mit journalistischem Riskmanagement hat sich das Bundesgericht in BGE 130 IV 121 auseinandergesetzt. Bekannt ist dieser in italienischer Sprache verfasste Entscheid vor allem, weil der Wahrheits- und Gutglaubensbeweis i. S. von Art. 173 StGB auch auf den verantwortlichen Redaktor i.S. von Art. 28 StGB ausgedehnt wurde. Der Entscheid legt zudem Leitlinien der Sorgfaltspflicht des verantwortlichen Redakteurs fest. Höchstrichterlich werden somit die Umrisse eines publizistischen Risikomanagements zusammengefasst, was durchaus nicht nur auf strafrechtlicher Ebene und nicht nur für den verantwortlichen Redaktor Folgen haben könnte. Das Urteil schenkt jedoch wichtigen Fragen wie zum Beispiel denjenigen nach der Organisation der Medien oder ihren heutigen Verknüpfungen zu wenig Beachtung.*

fende Sorgfalt auf sein Vertrauen in eine i. S. von Art. 28a StGB nicht zu nennende Person stützen würde[15].

15 Der verantwortliche Redaktor hätte den Gutglaubensbeweis zu erbringen (Art. 173 Abs. 2 StGB); dieser würde sich aber auf eine Tatsache stützen, die er gesetzlich nicht zu nennen braucht (Autor- und Quellenschutz i. S. von Art. 28a StGB). Hier liegt ein Spannungsverhältnis vor. Zum Schutz der Identität des Autors vgl. F.Zeller, Basler Kommentar, 2. A., Art. 28 StGB, N. 25.

16 Das Zusammenspannen von medienspezifischen Normen (Quellenschutz), Entlastungsbeweismöglichkeit i. S. von Art. 173 StGB und reduziertem Ehrenschutz für bekannte Personen (nicht zu vergessen die nachteiligen Auswirkungen eines allfälligen Prozesses gegen ein Medium) schafft einen weiten Raum für die journalistische Tätigkeit. Dies ist zwar gerechtfertigt, muss aber durch sorgfältige Berufsausübung entsprochen werden. Über die medienspezifischen Sonderregelungen vgl. F.Zeller, Basler Kommentar, 2. A., Art. 28 StGB, N. 5-12.

17 Nur somit ist eine tatsächliche «situationsbezogene Bemessung der Sorgfaltspflicht» (vgl. G.Jenny, Basler Kommentar, Art. 18 StGB, N. 88) möglich. Andererseits, und gerade im Hinblick auf eine unternehmerische Tätigkeit «Plus l'activité est dangereuse, plus il faut veiller à ce que l'auxiliaire soit à la hauteur des tâches, de façon à ce qu'il ne mette pas les tiers en danger»: vgl. F.Werro, Commentaire romand, Genf-Basel-München 2003, Nr. 20 zu Art. 55 CO.

18 In Bezug auf die weitestgehende Mediatisierung z.B. N.Luhmann, Die Realität der Massenmedien, Wiesbaden 2004 (erste Auflage 1995); G.C.Tholen, Die Zäsur der Medien. Kulturphilosophische Konturen, Frankfurt 2002. Wichtig ist hier ein Hinweis auf zwei in Italien erschienene Studien: M.Bertolino, Privato e pubblico nella rappresentazione mediatica del reato, Riv.it.dir. e proc.pen 2003, S.1070-1114; C. E.Paliero, La maschera e il volto, Percezione sociale del crimine ed effetti penali dei media, Riv.it.dir.e proc.pen 2006, S. 467-538, Beide bieten sehr umfangreiche Hinweise auf die neueste Literatur, besonders im deutschen und amerikanischen Raum. Über die Wechselwirkung zwischen Medien und Justiz: A.P.Pires, la rationalité pénale moderne, la société du risque et la juridicisation de l'opinion publique, Sociologie et Sociétés, vol. XXXIII.1, 2001, p. 194-202.

19 Wer seine publizistische Produkte online zur Verfügung stellt, muss sich des erhöhten publizistischen Risikos bewusst sein. Dazu Entscheid des schweizerischen Presserats 36/2000 vom 18. August 2000, unter www.presserat.ch. Siehe auch unten § II.2 und N. 44/45.

20 BGE 104 IV 15; 105 IV 114.

21 In BGE 131 IV 160 Erw. 3.3.2 wird aber auch im umgekehrten Sinn auf die besondere Hektik der journalistischen Tätigkeit Rechnung getragen .

22 Dem trägt die Rechtsprechung bereits Rechnung. Vgl; BGE 116 Ib 37 Erw. 6; BGE 114 Ib 208 Erw.3e. Siehe unten § II.2.

23 BGE 127 IV 65 Erw.2d:«Wo besondere Normen ein Bestimmtes Verhalten gebieten, bestimmt sich das Maß der dabei zu beachtenden Sorgfalt in erstere Linie nach dieser Vorschriften».

24 So z. B. Art. 173 StGB oder 28 ZGB. Dass solche Regeln auch für Journalisten gelten, wurde vom Bger. betont. «Die Pressefreiheit als solche ist, trotz ihrer erheblichen Bedeutung in einer demokratischen Gesellschaft, kein Rechtfertigungsgrund für tatbestandsmäßiges Verhalten von Medienschaffenden»: vgl. BGE 126 IV 236 Erw. 4 d. Hingewiesen sei hier aber auf die Notwendigkeit einer «grundrechtskonformen» Auslegung zugunsten der Pressefreiheit: BGE 131 IV 160 Erw. 3.3.1; F.Riklin, Basler Kommentar, I. A., Art. 173 StGB, N. 16 mit Hinweisen auf die Rechtsprechung.

25 Ich verweise auf die «Erklärung der Pflichten und Rechte der Journalistinnen und Journalisten», auf die diesbezüglichen «Richtlinien» und auf den Entscheid des schweizerischen Presserates. Siehe unter www.presserat.ch. Für die SRG SSR Idée Suisse gelten dagegen die besonderen rechtlichen Vorschriften der BV (Art. 93) der RTVG vom 24. März 2006 (Art. 4, 5, 24) und der Konzession. Intern hat die SRG ihre publizistischen Grundsätze in einer «Programmcharta» niedergelegt. Dazu auch unten, § II.2 und N.40.

2. Umstände: welche?

Zentrale Bedeutung bekommt eine medien- und zeitgerechte Auslegung der Begriffe «Umstände» und «persönliche Verhältnisse». Dabei denke ich hauptsächlich an die kumulative Wirkung dreier Faktoren: der «Netzeffekt» der Medien, ihre Handlungsgeschwindigkeit und die medienspezifischen Normen, z. B. der Quellenschutz[16]. Nur wenn man das Zusammenspiel dieser Elemente im Auge behält, wird dem Grundwert Pressefreiheit Rechnung getragen und gleichzeitig ein tatsächlich wirkendes Sorgfaltsprofil angestrebt[17].

Unter «Umstände» i. S. von Art. 12 Abs. 3 StGB ist heute besonders die gegenseitige Verknüpfung der Medien zu beachten[18]. In Bezug auf die publizistische Verantwortung bedeutet dies, dass Fehler, welche von einem Medium begangen werden, sich sehr schnell und sehr weit verbreiten können: Man denke hier nur an die Wirkung von Internet-Suchmaschinen[19]. Entsprechend hoch liegt das Schädigungspotential journalistischen Fehlverhaltens. Das Verhältnis zwischen Verbreitungsgrad und anzuwendender Sorgfalt ist an sich seit langem bekannt[20]: Die mediale Entwicklung ist aber besorgniserregend. Entsprechend sollte die redaktionelle Überwachung gestaltet sein, insbesondere angesichts der Tatsache, dass die Geschwindigkeit der Kontrollen mit derjenigen der journalistischen Arbeits- und Verbreitungsabläufe Schritt halten muss[21]. Dies stellt die elektronischen Medien vor besondere Schwierigkeiten, da hier nicht nur online, sondern oft auch live gearbeitet wird[22]. Darauf werde ich zurückkommen.

3. Berufsregeln

Ist, wie gezeigt, auf die allgemeinen Kriterien der Fahrlässigkeitsdelikte zu verweisen, ergeben sich für die Bemessung der journalistischen Überwachungssorgfalt wichtige Folgen. Als erste wohl die zentrale Rolle der rechtlichen und beruflichen Verhaltensregeln. Wenn solche existieren, definieren sie bekanntlich die im Einzelfall anwendbare Sorgfaltsgrenze[23]. Dies soll auch im journalistischen Bereich der Fall sein, wo rechtliche[24] und berufsethische Verhaltensnormen vorhanden sind[25] und demnach befolgt werden müssen. Daran ändert nichts, dass berufsethische Erklärungen

rechtlich nicht zwingender Natur sind[26]: sie mögen nicht zwingend sein, ihre Nichtbefolgung kann jedoch durchaus rechtliche Konsequenzen nach sich ziehen. In diesem Zusammenhang ergibt sich für den verantwortlichen Redaktor die Notwendigkeit, die Berufsregeln nicht nur selber zu kennen, sondern ihnen auch innerhalb der Redaktion konkrete Beachtung zu verschaffen. Dazu sind praktische Maßnahmen wie z. B. Schulung, regelmäßige und kritische Produktanalyse sowie das Angebot von Aus- und Weiterbildungsmöglichkeiten für die Mitarbeiter notwendig. Berufsethische Sach- und Hinweiskompetenz gehören also zum Grundprofil eines verantwortlichen Redaktors. Aus dem Gesagten folgt, dass die redaktionelle Überwachung (und somit die betriebliche Organisation) primär an ihrer Wirkung auf die Einhaltung der Berufsregeln zu messen ist. Damit ist umgekehrt auch klar, dass die in Art. 12 Abs. 3 StGB vorgeschriebene Rücksichtnahme auf die «persönlichen Verhältnisse» nicht bedeuten kann, dass eine allfällige berufsethische Nichtvorbereitung des verantwortlichen Redakteurs als Entschuldigungsgrund anzusehen[27] ist.

II. Spezifische Sorgfaltskriterien

1. Etwas fehlt

In Rahmen einer nach den Grundsätzen von Art. 12 Abs. 3 StGB zu bemessenden Sorgfalt hat BGE 130 IV 121 Grundlinien für die Beurteilung der Tätigkeit des verantwortlichen Redakteurs definiert[28]. Das Urteil verweist auf verschiedene Elemente:

a) Art und Typ des Massenmediums und
b) diesbezügliche Risiken.
c) Vertrauen des Verantwortlichen in die Korrektheit seiner Mitarbeiter,
d) der Vertrauensgrundsatz,
e) die Maxime «ultra posse nemo tenetur».

Unerwähnt ist leider die Organisationsfrage geblieben, d.h. das Vorhandensein einer für die Ausübung der publizistischen Verantwortung adäquaten Organisation des Medienhauses. Dies erstaunt, weil oft von «Organisationsverschulden» innerhalb der Unternehmen gesprochen wird[29] und auch anerkannt wurde, dass gerade ein Organisationsmangel eine Sorgfaltspflichtverletzung darstellen kann[30]. Für die Gewährleistung einer effektiven redaktionellen Überwachung ist aber eine effiziente Organisation von zentraler Bedeutung. Gut möglich, dass das Bundesgericht die Organisation sozusagen als eine implizite Rahmenbedingung betrachtet, die nicht *expressis verbis* zu erwähnen ist und unter «Umstände» in Sinne von Art. 12 Abs. 3 StGB fällt. Nichtsdestoweniger ist es unverkennbar, dass eine wirksame Ausübung der redaktionellen Überwachung heute erheblich von einer effizienten redaktionellen Organisation abhängig ist. Dies umso mehr angesichts der bereits erwähnten Möglichkeit der geteilten publizistischen Verantwortung[31], die gerade bei mittleren und größeren Medienunternehmen die Regel darstellt. Schließlich soll nicht vergessen werden, dass Art. 322bis StGB einen unternehmensstrafrechtlichen Tatbestand – wenn auch nur *sui generis* – darstellt[32]. Umso mehr sollte die Organisationsfrage nicht vergessen werden.

Wichtig ist hier zu betonen, dass die im Hinblick auf Art. 322bis StGB entwickelten Sorgfaltskriterien durchaus auch zivilrechtliche Bedeutung haben[33]. Ein Medienunter-

26 Umgekehrt (BGE 127 IV 122 Erw. 5bb): «Im übrigen enthält die Erklärung der Pflichten und Rechten der Journalistinnen und Journalisten keine Bestimmungen, deren Einhaltung ein tatbestandsmäßiges Verhalten gemäß Art. 32 StGB rechtfertigen könnte». Art. 32 StGB ist demnach nur unter restriktiven Voraussetzungen anwendbar. Dazu BGE 127 IV 166 Erw. 2g; 127 IV 122 Erw. 5c.; F.Riklin, Recherchen mit versteckter Kamera – strafrechtlich legal? *medialex* 2/2007, S. 55 ff.

27 «Die generellen Sorgfaltsregeln, die sich auf den verschiedensten Gebieten herausgebildet haben (…), behalten daher ihren guten Sinn. Sie bezeichnen, als geronnene Erfahrung, die Techniken und Vorsichtsmassnahmen, die das Minimum an Sorgfalt bilden, das bei der betreffenden Tätigkeit aufzubringen ist»: vgl. G.Stratenwerth, Schweizerisches Strafrecht, AT I, Bern 2005, S. 455.

28 BGE 130 IV 121 Erw. 1.8.2

29 N.Bösch, Organisationsverschulden im Unternehmen, Baden-Baden, 2002; M.Pieth, Risikomanagement und Strafrecht, in Risiko und Recht, Bern 2004, S. 604-610.

30 Vgl. A.K.Schnyder, Basler Kommentar zum Schweizerischen Privatrecht, Basel-Genf-München 2003, N. 21 zu Art. 55 OR; R.Brehm, Berner Kommentar, Bern 1998, N. 77-80 zu Art. 55 OR.

31 Siehe oben § I.1, N. 16.

32 In Kraft seit dem 1. April 1998, antizipiert Art. 322bis die Art. 100^{quater} und 100^{quinquies} StGB um mehrere Jahre. Letztere sollten in Bezug auf 322bis StGB jedenfalls nur subsidiär sein: vgl. N.Schmid, Einige Aspekte der Strafbarkeit des Unternehmens, in Neue Tendenzen im Gesellschaftsrecht, Festschrift für P.Forstmoser, Zürich 2003, S. 775 mit Hinweisen. Diese Subsidiarität dürfte jedoch angesichts des gestuften Aufbaus von Art. 28 StGB nur selten in Betracht kommen.

33 Vgl. BGE 121 IV 15 Erw. 3a. Zu diesen Fragen siehe z.B. M.Postizzi, Sechs Gesichter des Unternehmensstrafrechts, Basel 2006, S. 31-32; H.Wiprächtiger, Strafbarkeit des Unternehmers, Die Entwicklung der bundesgerichtlichen Rechtsprechung zur strafrechtlichen Geschäftsherrenhaftung, AJP 7/2002, S. 754 ff. Zur Verantwortung des Verlegers für die Veröffentlichung von ehrenwidrigen Artikeln siehe Bundesgerichtentscheid 5C.184/1999, mit Anmerkung in *medialex* 3/2000, S.172.

nehmen hat daher auch aus zivilrechtlichen Gesichtspunkten Interesse an einer möglichst guten (d.h. eben auch möglichst gut organisierten) Ausübung der redaktionellen Verantwortung. Es geht nicht nur um die strafrechtliche Stellung des verantwortlichen Redaktors, sondern (z. B. gestützt auf Art. 55 OR) auch um eine allfällige Schadenersatzpflicht des Gesamtunternehmens.

In Bezug auf die Organisation wirft die erwähnte geteilte Verantwortungsausübung einige nicht leicht zu lösende Fragen auf. Wenn der verantwortliche Redaktor den verschiedenen Redaktionen (d.h. Produkten) möglichst nahe stehen muss (was die tatsächliche Überwachung fördert), so kommt es zur Aufteilung der Verantwortlichkeit zwischen einer nicht unerheblichen Anzahl von Personen. Wenn – im umgekehrten Falle – die Verantwortung zentralisiert wird, so entfernt sie sich vom Produkt und verliert damit an Wirksamkeit[34]. Beide Varianten sind möglich[35], für beide sind jedoch organisatorische Überlegungen wichtig, deren Fehlen mangelnde Sorgfalt bedeutet.

2. Art und Typ des Massenmediums und diesbezügliche Risiken

Als erstes spezifisches Kriterium erwähnt das Bundesgericht Art und Typ des benutzten Massenmediums. Da bereits bekannt ist, dass das Sorgfaltsmaß mit der Auflage verbunden ist[36], kann man umgekehrt fragen, ob in Bezug auf die redaktionelle Überwachung Veröffentlichungen mit reduziertem Publikum ein reduziertes Sorgfaltsprofil rechtfertigen. Die Frage lässt sich m. E. nur im Einzelfall beantworten. Eine spezialisierte Pharmarevue könnte sehr wohl nicht allzu viele Leser haben und trotzdem große Wirkung erzielen, zum Beispiel bei Verbreitung von Geschäftsgeheimnissen oder auf dem Gebiet des unlauteren Wettbewerbs[37]. Entsprechend würden sich die redaktionellen Sorgfaltsanforderungen erhöhen. Entscheidend scheint mir somit nicht die Verbreitung an sich, sondern die Wirkung des publizistischen Erzeugnisses.

Besondere – und strengere – gesetzliche Regeln gelten für Rundfunk und Fernsehen, insbesondere der SRG SSR Idée Suisse[38]. Ihre publizistischen Sorgfaltsstandards sind auf die Einhaltung dieser Sonderkriterien auszurichten und dürfen sich nicht mit den allgemeinen berufsethischen Normen begnügen. Interessanterweise schreibt die anfangs 2006 erlassene «Programmcharta» der SRG (eine Art betriebseigener Berufskodex) vor, dass die innerbetrieblichen Arbeitsabläufe (d.h die Arbeitsorganisation) so zu gestalten sind, dass die Einhaltung der «Programmcharta» erleichtert wird[39]. Im Zusammenhang mit Rundfunk und Fernsehen will ich hier lediglich auf zwei weitere Aspekten verweisen. Erstens arbeiten die elektronischen Medien strukturell unter extremem Zeitdruck. Man denke dabei an Livesendungen[40], oder an Radioprogramme, die unter Umständen jede halbe Stunde Nachrichten ausstrahlen. Hier spielt bei der publizistischen Überwachung der Zeitfaktor[41] eine entscheidende Rolle. Zweitens bilden Radio und Fernsehen große publizistische Einheiten, was zur bereits erwähnten Aufteilung der redaktionellen Verantwortung[42] führt. Gerade deswegen spielt auch hier die Organisationsgestaltung eine sehr wichtige Rolle.

Neben Art und Typ des Massenmediums verweist das Bundesgericht auch auf die

34 Diesbezüglich ist man in der Praxis auch mit einer anderen Organisationsfrage konfrontiert. Die publizistische Verantwortung mag unter verschiedenen Ressortleitern aufgeteilt sein, die heutige journalistische Realität ist aber durch Konvergenzen und Synergien innerhalb der verschiedenen Redaktionen eines Mediums gekennzeichnet (sog. multimediale Bearbeitung). Die Verantwortung ist geteilt, die Arbeitsweise dagegen transversal, d.h. redaktionsüberschreitend. Dies ist jedoch keine medientypische Realität, sondern erschwert jede Verantwortungsidentifikation innerhalb eines Unternehmens. Dazu z.B. M.Postizzi, Sechs Gesichter des Unternehmensstrafrechts, Basel 2006, S. 26 ff. Über die Mitwirkung mehrerer Personen an Fahrlässigkeitsdelikten siehe G.Jenny, Basler Kommentar, I. A., Art. 18 StGB, N. 105 mit Hinweisen.

35 Vgl. BBL 1996, 551.

36 Siehe oben § I.2, N. 21.

37 Darüber BGE 117 IV 364 Erw. 2b; Bundesgerichtsentscheid 4C.205/2000 und diesbez. F.Riklin, Rechtliche Grenzen kritischer Zeitungsbericht, *medialex* 4/2000, S. 214 ff.

38 Vgl. Artt. 93 BV; 4-8, 24 RTVG.

39 Programmcharta der SRG SSR Idée Suisse vom 24. Februar 2006, Abs. 10. Siehe unter www.srgssrideesuisse.ch.

40 Den Besonderheiten einer Livesendung wird in der Rechtsprechung Rechung getragen. «Bei direkt übertragenen Diskussionssendungen bestehen gewisse Risiken, die sich nicht ganz vermeiden lassen: heikle oder brennende Themen sollen deshalb aber nicht von Fernsehen verbannt werden»: vgl. VPBB 1986/81, S. 491 Erw. 9e. Jedoch besteht die journalistische Sorgfaltspflicht weiterhin. «In Betracht kommt eine Fahrlässigkeit jedoch bezüglich der von der Redaktion zu verantwortenden Auswahl (bzw. Zulassung), Instruktion und Begleitung der beteiligten Diskussionsteilnehmer (…) »: vgl. F. Zeller, Basler Kommentar, 2. A., Art. 322bis StGB, N. 10:

41 Siehe auch oben § I.2, N. 22-23.

42 Darüber oben § I.1, N. 14 und § II.1., N. 36.

Gefahren, denen ein konkretes Medium ausgesetzt ist. Gibt es aber heute überhaupt ein auf ein Einzelmedium begrenztes Risiko, wenn Medien eng miteinander verknüpft sind? Man denke nur an die Online-Angebote, welche diese Netzwirkung geradezu erzielen wollen. Hier ist das Spannungsverhältnis zwischen der Verantwortung des Einzelnen für «sein» jeweiliges Medium und der medienüberschreitenden Wirkung von medialen Produkten nicht zu leugnen. Einerseits ist zu unterstreichen, dass ein verantwortlicher Redakteur nur für seine Redaktion verantwortlich ist[43]. Trotzdem sind aber die Anforderungen an die Sorgfalt seiner publizistischen Überwachung m. E. auch an möglichen «externen» Folgen zu bemessen, sofern diese vernünftigerweise voraussehbar sind[44]. Dies bedeutet nicht, dass er strafrechtlich für eine durch Dritte zu verantwortende Weiterverbreitung belangt werden kann. Was sich erhöhen kann, ist die Schwere des Schadens und – indirekt – des Verschuldens[45]. Damit ergibt sich aber auch die Notwendigkeit eines erhöhten Sorgaltprofils, das auch voraussehbare «Folgeschäden» mitberücksichtigt. Ein Verantwortlicher darf sich natürlich nicht von der Angst vor möglichen Fehlern anderer Medien lähmen lassen. Bei der Gestaltung seiner Arbeit darf er aber auch nicht vergessen, dass ein Fehler seiner Redaktion u. U. zu medialen Kettenreaktionen führen kann. Darauf werde ich noch zurückkommen.

In Bezug auf medienspezifische Risiken und Sorgfaltsanforderungen will ich auf eine weitere Frage hinweisen. Kann sich der Leiter einer auf besonders schwierige journalistische Themen oder Vorgehensweisen spezialisierten Redaktion nur ein Mindestmaß an Sorgfalt leisten? Ich denke dabei z. B. an den sog. Investigationsjournalismus. Die Frage ist wohl zu verneinen[46].

3. Vertrauen mit Grenzen

Als Sorgfaltskriterium erwähnt das Bundesgericht auch das Vertrauen, das ein Verantwortlicher in die Korrektheit seiner Mitarbeiter setzen kann. Hier geht es um die altbekannten *cura*e in der Auswahl, Ausbildung und Überwachung der Mitarbeiter[47]. Tatsächlich hängt das berechtigte Vertrauen in die Mitarbeiter eng mit deren beruflichen Qualitäten zusammen: nur guten Leuten kann man vertrauen. Wie bewertet man nun Journalisten diesbezüglich, umso mehr, als – anders als in anderen Berufen – keine allgemein anerkannte «Fähigkeitsprüfung» existiert[48]? Entscheidend wirkt hier die Aufmerksamkeit in der Selektion wie in der Aus- und Weiterbildung.

Bekanntlich sind Journalisten großenteils Generalisten[49], welche oft über Bereiche zu berichten haben, in denen es ihnen an Vorkenntnissen fehlt. Dies hat viele Vorteile – aber ist das damit objektiv verbundene Risiko für einen verantwortlichen Redaktor tragbar? Ich denke ja, allerdings mit Einschränkungen. Werden Nichtspezialisten auf speziellen Gebieten eingesetzt, so muss die redaktionelle Überwachung besonders effektiv sein[50]. Unerfahrene dürfen arbeiten,

43 So F.Zeller, Basler Kommentar, 2. A., Art. 28 StGB, Nr. 75 mit Hinweis auf BGE 79 IV 51 Erw. 2. Immerhin geht es in BGE 79 IV 51 um einen Fall von 1953. Zur Beurteilung stand ein Artikel des «Thuner Geschäftsblatts», der eine Woche später von der «Schweizer Schreinerzeitung» in Zürich abgedruckt wurde. Das heutige mediale Umfeld dürfte sich im Hinblick auf die Voraussehbarkeit einer Weiterveröffentlichung geändert haben.

44 Man bedenke, dass bereits die Tatsache, dass der Täter sich die Möglichkeit des Erfolgs überhaupt vorstellen kann, die Strafbarkeit u. U. rechtfertigt: vgl. u. a. BGE 114 IV 102; 99 IV 132. Wird z.B. aus Werbegründen ein Artikel einer Presseagentur weitergeleitet oder im Internet zur Verfügung gestellt, ist diese Voraussehbarkeit m. E. anzunehmen. Über die sog. «Vorhersehbarkeit des Erfolges» vgl. G.Stratenwerth, AT I, S. 456.

45 Nach Art. 47 Abs. 2 StGB misst sich bekanntlich das Verschulden nach der Schwere der Verletzung und hängt auch davon ab, inwieweit der Täter in der Lage war, die Verletzung zu vermeiden.

46 Bereits der sog. «allgemeine Gefahrensatz» würde vorschreiben, die Sorgfalt im Verhältnis zum Risiko zu erhöhen. Diesbezüglich z.B. BGE 127 IV 65; 126 IV 17. Über die Sorgfaltsanforderungen für den Investigationsjournalismus siehe z.B. P.Studer, Recherchejournalismus und Berufsethik, *medialex* 2/2002, S.74 ff.; ders. Wie weit geht die Anhörungspflicht der Medien, *medialex* 4/2003, S. 218 ff.; B.Graber, Journalistische Sorgfaltspflichten bei anwaltschaftlichem Journalismus; *medialex* 4/2005 (Anm. zu Bundesgerichtsentscheid 2A.41/2005); F.Riklin, Enquêter oui, mais sans transgresser la loi, *medialex* 3/2001 im Hinblick auf BGE 127 IV 166; F.Riklin, Recherchen mit versteckter Kamera – strafrechtlich Legal? *medialex* 2/2007, S. 55 ff.

47 Diesbezüglich vgl. z.B. R.Brehm, Berner Kommentar zu Art. 55 OR, Bern 1998, S. 576-584.

48 Einem Spitaldirektor kann z.B. niemand vorwerfen, er habe einen zugelassenen Arzt angestellt, falls dieser einen Fehler begeht. Die journalistische Wirklichkeit der Länder (z.B. Italien), wo nur diejenigen als Journalisten arbeiten können, welche staatlich anerkannten Standesorganisationen angehören, macht aber bezüglich der qualitätsfördernden Wirkung solcher Lösungen skeptisch. Immerhin aber hat kein Geringerer als der Philosoph K.Popper eine Art «Zulassungsprüfung» für Journalisten gefordert: vgl K.Popper, Una patente per fare TV? in G.Bosetti, Cattiva maestra televisione, Mailand 1996.

49 Dies auch aus ökonomischen Gründen. Nur ganz wenige Medienunternehmen können es sich leisten, ausschließlich Spezialisten in den verschiedenen Sachgebieten einzusetzen.

50 Dadurch entsteht in der Praxis eine Art «Kompetenzübertragung» welche den anfänglichen Mangel an Erfahrung bzw. Sachkenntnis einigermaßen kompensiert.

aber sie dürfen nicht allein gelassen werden. Auch dies hat aber Grenzen. Es wäre z. B. kaum vertretbar, dass spezialisierte Medienprodukte nicht von Fachredakteuren realisiert werden. Wer eine Zeitschrift für Herzkranke oder Übergewichtige auf den Markt bringen will, kann sich als Verantwortlicher i. S. von Art. 322bis StGB nicht leisten, eine kostengünstige Laienredaktion mit seinem Vorhaben zu beauftragen[51].

BGE 130 IV 121 erwähnt als Bewertungskomponente auch den sog. «Vertrauensgrundsatz»[52]. Dieser wirkt zuerst innerhalb einer Redaktion. Der Verantwortliche muss damit jedoch vorsichtig umgehen: Wer mit der Kontrolle beauftragt ist, kann nicht einfach annehmen, die zu kontrollierende Person werde sich schon vorsichtig verhalten[53]. Denkt man dagegen an das Vertrauen in andere Medien in Bezug auf ein allfälliges Weiterverbreitungsrisiko, darf man sich ebenfalls nicht mit dem Hinweis entschuldigen, man habe auf die besondere Sorgfalt anderer vertraut, insbesondere, wenn diese sich bereits als inexistent erwiesen hat[54]. Hier berühren wir nochmals die Frage der medialen «Folgeschäden»[55]. Manchmal muss hingegen gerade auf Journalisten ausserhalb einer Redaktion vertraut werden: Man denke an Presseagenturen. Grundsätzlich ist dies berechtigt[56]; in Bezug auf die Auswahl der Agentur bleibt aber die Haftung bestehen.

Als letztes kommt in BGE 130 IV 121 der Grundsatz «Ultra posse nemo tenetur» vor, d.h. keine Verpflichtung zu Unmöglichem. Was man darunter zu verstehen hat, ist m. E. nicht leicht zu definieren. Kann man in Grenzfällen die Überwachung vernachlässigen, weil sie die Arbeit erschwert? Oder wäre die Nichtverpflichtung zu Unmöglichem darin zu sehen, dass die heutige, exponentiell gewachsene Nachrichtenflut die Redaktionsverantwortlichen sowieso vor eine *mission impossible* stellt, was die Kontrollfähigkeit anbelangt? Dem besonderen Wert der Pressefreiheit wird bereits mit einer journalistenfreundlichen Normenauslegung Rechnung getragen[57]: *In dubio pro libertate*. Da dem Journalismus damit vieles ermöglicht wird, kann das Verbot der «Verpflichtung zu Unmöglichem» praktisch keine weiter reichende Wirkung haben. Darüber hinaus muss betont werden, dass die journalistische Tätigkeit nur in solchem Maße ausgeübt werden kann, wie die Einhaltung der rechtlichen und berufsethischen Normen möglich bleibt. Nicht allfällige Bedürfnisse des journalistischen Alltags oder medialer Konkurrenzkampf sollen über die Einhaltung der Berufsregeln entscheiden, sondern umgekehrt[58]. ■

51 Je komplexer ein Thema, desto sorgfältiger muss die Vorbereitung sein. «Mit der Frage eines ärztlichen Kunstfehlers stand ein juristisch und technisch komplexes Thema zur Diskussion (…) Dies macht rundfunkrechtlich eine sorgfältige, auch Einzelheiten erfassende Recherche (…) unabdingbar»: vgl Bundesgerichtsentscheid 2A.41/2005 Erw. 3.1.

52 Bez. Vertrauensgrundsatz z.B. G.Jenny, Basler Kommentar, I. A., Art. 18 StGB, N. 89.

53 «So versteht sich zunächst von selbst, dass er (der Vertrauensgrundsatz, Anm. d. A) von vorneherein überall dort nicht greifen kann, wo (aber auch nur: soweit) Sorgfaltspflichten auf die Überwachung, Kontrolle oder Beaufsichtigung des Verhaltens anderer gerichtete sind, sie gerade deren Fehlverhalten entgegenwirken sollen»: vgl. G.Jenny, Basler Kommentar, I. A., Art. 18 StGB, N. 91.

54 G.Jenny, Basler Kommentar, I.A., Art. 18 StGB, N. 91.

55 Darüber oben § II.2 und N. 44/45.

56 Vgl. Stellungnahme des schweizerischen Presserats 1992/3. Über diese Fragen s. auch C.Born, Wann haften Medienschaffende für die Wiedergabe widerrechtlicher Äußerungen Dritter, *medialex* 1/2001, S. 13 ff.; F.Riklin, Zur Berichterstattung über Aussagen und Bilder mit strafbarem Inhalt, *medialex* 1/2005, S. 34 ff.

57 BGE 130 IV 160 Erw. 3.3.2. Über grundrechtskonforme Auslegung in Bezug auf mittels Presse begangene Ehrendelikte; BGE 131 IV 160 Erw. 3.3.1. Dazu auch F.Riklin, Basler Kommentar, I. A. Art. 173 StGB, N.16 mit Hinweisen. Siehe auch oben § I.3.

58 Kann man eine Tätigkeit nicht normenkonform ausüben, ist sie zu unterlassen. «Beherrschbar ist ein Geschehensablauf sodann nur, wenn der Täter die Fähigkeit hat, das mit dem Verhalten verbundenen Risiko auszuschalten, sei es durch entsprechende Vorsichtsmassnahmen, sei es auch, wo dies nicht möglich ist, durch Unterlassen der riskanten Handlung»: vgl. G.Stratenwerth, AT I, Basel 2005, S. 457; G.Jenny, Basler Kommentar, I. A., Art. 18 StGB, N. 79.

Korrigenda:
In der letzten Ausgabe von medialex (2-07) fehlt beim Aufsatz von Thomas Geiser und Nathalie Zuffrey mit dem Titel «Zur Aus- und Weiterbildung im Filmbereich» auf Seite 86 der zweite Teil des letzten Satzes. Nachfolgend wird der letzte Abschnitt des Aufsatzes nochmals korrekt abgedruckt. Wir entschuldigen uns für dieses Versehen.
Bei dieser Aufteilung bleibt indessen ein Bereich auf der Strecke: Wie bereits dargelegt, findet ein wesentlicher Teil der Ausbildung im Filmbereich in Stages statt. Diese fallen nicht unter die auf Grund der Normen im Bildungsbereich subventionierten Ausbildungen. Das Bundesamt für Kultur sollte deshalb die der Aus- und Weiterbildung zur Verfügung stehenden Mittel des Filmkredites für die Weiterbildung und die Stages andererseits verwenden und auf diese Bereiche auch konzentrieren.

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I. Introduction

1. Perceptions of Gov

In the last fifteen years «governance» and its im come increasingly popu doctrine. «Governance»

* The authors would like mer, Thomas Schneide for their valuable comm

1 For a sociological poi Lange/Uwe Schimank, G schaftliche Integration, (Hrsg.), Governance un gration, Wiesbaden 200 ence approach is given tung: Governance – M ches sozialwissenschaftli (Hrsg.), Governance – Regelsystemen, Wiesba

2 John Gerard Ruggie, Re Public Domain – Issues in: European Journal of 2004, 499, 504.

3 See Anne-Marie Slaughte Princeton/Oxford 200 discussion see below III

4 See Thomas M. Franck, al Law and Institution (hereinafter: Franck, Fai

5 For an overview on gove developments see Rolf nance, Qualitätssicherun cher Rundfunk, in: Jusle 5 ss, available at: http:// inafter: Weber, Media C cherung) (all of the wel last on 14 August 200 dienpolitik und Media G (Hrsg.), Von der Medien ernance?, Köln 2007, 7

6 David Held & Anthony in: Held/McGrew (eds.) tion: power, authority a Cambridge 2002, 8.

Internet Governance – From Vague Ideas to Realistic Implementation *

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Zusammenfassung: *Die Governance-Diskussionen haben auch vor dem Bereich des Internet (als letztem autonomen Raum) nicht Halt gemacht und im Rahmen des WSIS und IGF für viel Gesprächsstoff gesorgt. Um die Verhandlungen mit Blick auf die künftige Ausgestaltung der Internet Governance im Rahmen der ICANN zu deblockieren, sind Innovationen gefordert: Die Regulierung des Internet sollte die architektonischen und verfassungsähnlichen Besonderheiten des Netzes beachten. Die Gründung eines internationalen Forum, aufbauend auf bestehenden spezialisierten Einrichtungen und unter Beachtung des Multi-stakeholder-Ansatzes, wäre zukunftsweisend; besondere Beachtung finden müssten die Aspekte der Transparenz, der Legitimation der Beteiligten und der Repräsentation der wesentlichen Stakeholder.*

I. Introduction

1. Perceptions of Governance

In the last fifteen years, discussions about «governance» and its implications have become increasingly popular within the legal doctrine. «Governance» can be traced back to the Greek term «kybernetes», the «steersman», and the Latin word «gubernator» leading to the English notion «governor» and therewith addressing aspects of steering or governing behavior.

Different disciplines have addressed governance issues which, in a nutshell, can be summarized as the discussion on the appropriate allocation of duties and responsibilities as well as the proper structuring of the concerned «organs», thereby balancing performance-based strategic management and financial/economic control[1]. Or in other words: «Governance, at whatever level of social organization it may take place, refers to conducting the public's business – to the constellation of authoritative rules, institutions and practices by means of which any collectivity manages its affairs»[2].

What had first started out in the private domain under the well-known concept of «corporate governance» has eventually expanded to further regulatory structures, including the public sector, at both national and international level. Thereby, different governance theories have been developed, of which the so called «transgovernmentalism»[3] as well as concepts of «democratic governance»[4], taking particular account of aspects of fairness, are of special interest for the present topic of Internet governance and will subsequently be outlined in more detail[5].

When addressing central questions such as: who rules the Internet, in whose interests, by which mechanisms and for which purposes[6], the concept of «co-regulation» is of

* The authors would like to thank Markus Kummer, Thomas Schneider and Valérie Menoud for their valuable comments.

1 For a sociological point of view see Stefan Lange/Uwe Schimank, Governance und gesellschaftliche Integration, in: Lange/Schimank (Hrsg.), Governance und gesellschaftliche Integration, Wiesbaden 2004, 9, 19; a political science approach is given by Arthur Benz, Einleitung: Governance – Modebegriff oder nützliches sozialwissenschaftliches Konzept?, in: Benz (Hrsg.), Governance – Regieren in komplexen Regelsystemen, Wiesbaden 2004, 11, 25.

2 John Gerard Ruggie, Reconstituting the Global Public Domain – Issues, Actors and Practices, in: European Journal of International Relations 2004, 499, 504.

3 See Anne-Marie Slaughter, A New World Order, Princeton/Oxford 2004, 18 ss; for a further discussion see below III.

4 See Thomas M. Franck, Fairness in International Law and Institutions, Oxford 1995, 85 ss (hereinafter: Franck, Fairness).

5 For an overview on governance perceptions and developments see Rolf H. Weber, Media Governance, Qualitätssicherung und öffentlich-rechtlicher Rundfunk, in: Jusletter of 16 July 2007, Rz 5 ss, available at: http://www.weblaw.ch (hereinafter: Weber, Media Governance, Qualitätssicherung) (all of the websites have been visited last on 14 August 2007); Patrick Donges, Medienpolitik und Media Governance, in: Donges (Hrsg.), Von der Medienpolitik zur Media Governance?, Köln 2007, 7 ss, 10.

6 David Held & Anthony McGrew, Introduction, in: Held/McGrew (eds.), Governing Globalization: power, authority and global governance, Cambridge 2002, 8.

Résumé: *Les discussions sur la gouvernance ne se sont pas arrêtées devant ce dernier espace autonome qu'est l'Internet et n'ont pas manqué de fournir matière à discussion dans le cadre du SMSI (Sommet mondial sur la société de l'information) et de l'IGF (Forum sur la gouvernance de l'Internet). Seules des solutions innovatives seront à même de débloquer les négociations concernant la gouvernance de l'Internet dans le cadre de l'ICANN: la régulation de l'Internet devra ainsi prendre en considération les particularités architecturales et structurelles du réseau. La fondation d'un forum international, basé sur des instances spécialisées existantes et utilisant le partenariat multi-acteur (multi-stakeholder policy) serait ainsi une solution d'avenir. En effet, cela permettrait que soient respectés à satisfaction les principes essentiels de la transparence, de la légitimation des participants ou encore de la représentation des protagonistes essentiels.*

major importance as in the field of media in general: The original governance theories, which reflected the traditional view that strictly distinguished the state (public law) from society (civil law), have been adapted towards overarching networks and negotiation systems between these two sectors in a form of a «cooperative approach to governance». They include the whole of society, hence dividing responsibilities between public and private actors[7].

As a form of global governance with reference to an international framework, Internet governance has to be seen in connection with the globalization of governmental relationships. The aim is to provide a conceptual setting which describes the combination of rule-making systems, political co-ordination and problem solving, making global Internet governance a highly ambitious and complex undertaking.

2. Governance and the Internet

When addressing Internet governance, the particularities of the Net have to be taken into account. From the very beginning, the Internet developed beyond a regulatory legal framework and was mainly based on self-regulation by its users. In fact, the interpretation did exist that cyberspace was an independent new «province» in the world, not governed by laws in the legal sense, but rather by «codes» defining the Internet as parameters resulting from technical protocols, standards, and procedures[8]. The Internet as a subject to governance mechanisms was challenged.

However, the necessity of the Internet's regulation by law seems clear: Since cyberspace cannot be entirely dissociated from real (physical) space, activities on the Internet necessarily have an influence on individuals and other entities in the real world; the citizen entering cyberspace and becoming a netizen cannot escape the national legal system[9]. Furthermore, the Internet has become too important for different stakeholders in order not to be regulated. As a prominent example, the success of electronic commercial transactions depends on the stability of the legal framework; only if the legal consequences of certain activities can be properly foreseen, it is likely that cross-border transactional e-business comes into life; for example it is imperative to establish a stable legal framework for e-trade[10].

As another principle, it should not be overlooked that various aspects of the Internet are already managed by a number of different organizations, such as ICANN, WIPO, etc. The Domain Name System (DNS), in particular, was of major importance for the functioning and the regulation of the Internet and the beginnings of its governance[11].

Consequently, governance needs to address and balance the different interests of the many stakeholders involved when establishing a legal framework. As a rule, private corporations are generally interested in the Internet as an advertising and connecting platform for their businesses. In addition, states have become increasingly interested in their

7 Weber, Media Governance, Qualitätssicherung, note 5 above, Rz 9; Christopher T. Marsden, Co- and Self-regulation in European Media and Internet Sectors: The Results of Oxford University's Study, in: Möller/Amouroux (eds.), OSCE Representative on Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, 76 ss.

8 On codes as the law in the Internet see Lawrence Lessig, Code and other Laws of Cyberspace, New York 1999; regarding its critical appraisal as well as the myth of independence of cyberspace and the role of law see Rolf H. Weber, Regulatory Models for the Online World, Zürich/Basel/Genf 2002, 25 ss and 93 ss (hereinafter: Weber, Regulatory Models for the Online World); see also Wolfgang Kleinwächter, Internet Governance – die Kontroverse des WSIS; Eine globale Ressource im Spannungsfeld nationaler Interessen, in: Medienheft Dossier 24, 14 November 2005, 29-30 (hereinafter: Kleinwächter, Kontroverse des WSIS).

9 Kleinwächter, Kontroverse des WSIS, note 8 above, 30.

10 Rolf H. Weber, International E-Trade, in: The International Lawyer, forthcoming in fall 2007, III.1., V.

11 In order to be present on the Internet, an individual or an enterprise needs to have a specific address which allows them to be available worldwide on global networks. Domain names serve to identify the destination of communications, strengthen the organizational identity of the addressee, increase accessibility to information, and may have an economic value as substitutes for trademarks. Therefore their management is of utmost practical, commercial and strategic importance. See Rolf H. Weber, Looking ahead: more harmonization in the domain name system?, in: Int. J. Intercultural Information Management, Vol. 1, No. 1, 2007, 74 ss (hereinafter: Weber, Harmonization).

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country domain over which they desire sovereign rights and control[12]. The states' interests on issues such as cybersecurity and stability also call for regulation and were addressed particularly in the light of action to counter terrorism; especially in this context, the Internet has been affected by forms of censorship in various countries due to the development of powerful surveillance devices which have been applied to trace the contents of communications and discover the identity of users, making Internet Service Providers subjects to international critics[13].

The Internet, as a network of interconnected computer networks transmitting data, is specially characterized by its worldwide reach, which takes no account of national boundaries. Furthermore, the Internet as a public sphere is generally open to everyone and accessible from everywhere. An adequate concept of governance should therefore have an international realm taking due account of the globalization of international relations in the sense of global governance theories. In this context it has to be kept in mind that Internet technology itself has an accelerating effect on the process of globalization of legal rules, and the potential to improve the effectiveness of the international law system[14]. Furthermore, a consistent governance framework should not be hindered by alleged differences between public and civil law. In sum, overarching networks between these two sectors, encompassing approaches of all of the stakeholders concerned in terms of the concept of «co-regulation», seem suitable[15].

II. Development of Internet Governance

1. First Steps towards the Internet's Institutionalization

In order to be present on the Internet for private or professional purposes, an individual or an enterprise needs to have a specific address. Comparable with a piece of land in the real world, the establishment of a domain name traces out a «territory in cyberspace», which enables e-business. Therefore, the management of domains as names in the online world is of utmost practical, commercial, and strategic importance[16]. Originally, the Internet address system was based on the unique Internet Protocol (IP) numbers which are assigned to every website and allow for their identification by the system. By 1984 these addresses were becoming very complicated to use, leading to the translation of the numbers into words and their organization into the generic domains by the DNS[17].

The United States quickly had identified the meaning of the DNS system and developed a «soft Internet policy» by making an effort to institutionalize its management. At first, the domain names were managed by Network Solutions, a monopoly company in the U.S. In 1989 the U.S. Department of Commerce concluded a contract with the Department of Post and Telecommunications' Information Sciences Institute (ISI) at the University of Southern California, establishing the Internet Assigned Numbers Association (IANA). The organization assigned IP addresses, allocated domain names and monitored root services. Therewith, the United States' forerunner position in the global field of the Internet became evident. In contrast, international attempts to find a global framework for internation-

12 Klaus W. Grewlich, Governance in «cyberspace»: access and public interest in global communications, The Hague etc. 1999, 53 ss; A. Michael Froomkin, Wrong turn in cyberspace: using ICANN to route around the APA and the constitution, in: Duke Law Journal, Vol. 50, 2000, 17 ss (hereinafter: Froomkin, Wrong turn in cyberspace); A. Michael Froomkin, International and national regulation of the Internet, in: Dommering/van Eijk (eds.), The Round Table Expert Group on Telecommunications Law Conference Papers, Amsterdam 2005, 243 ss (hereinafter: Froomkin, International and national regulation); Jonathan Weinberg, ICANN and the problem of legitimacy, in: Duke Law Journal, Vol. 50, 2000, 187 ss; see also: Who rules the Internet? Understanding ICANN, in: Panos Media Toolkit on ICTs – No. 1, 2005, available at: http://www.itu.int/wsis/documents/background.asp?lang=en&theme=ip.

13 Anne S.Y. Cheung & Rolf H. Weber, Freedom of Expression, Private Controllers, and Internet Governance, presentation at the IAMCR in Paris, July 24, 2007; forthcoming article to be published in early 2008.

14 See, Weber, Regulatory Models for the Online World, note 8 above, 42.

15 Rolf H. Weber, Selbstregulierung und Selbstorganisation bei den elektronischen Medien, in: *medialex* 4/2004, 211-217.

16 Wolfgang Kleinwächter, Internet Governance: Auf dem Weg zu einem strukturierten Dialog, in: Klumpp/Kubicek/Rossnagel/Schulz (eds.), Medien, Ordnung und Innovation, Berlin/Heidelberg/New York 2006, 216 (hereinafter: Kleinwächter, Internet Governance); Weber, Harmonization, note 11 above, 74 ss.

17 Jonathan Postel, the Internet pioneer, coordinator of the DNS defined seven «generic top level domains» (gTLDs): three for universal use («.com» for commercial activities, «.org» for organizations and «.net» for networks), three for use in the U.S. («.gov» for governments, «.edu» for universities, «.mil» for the military) and one for intergovernmental treaty organizations (.«int»). Countries and territories were given their own last names with the so-called «country code top level domain» (ccTLDs).

al communication in general did for a long time not expand to cyberspace. In particular, the discussion of a «New World Information Order» (NWIO) in the early 1970s didn't mention the role of the Internet[18].

The political and economic dimensions of the Internet became more apparent in the early 1990s when the National Science Foundation (NSF) received the authority to commercialize the Internet and develop the World Wide Web (WWW). It was against this background that a worldwide structure of the DNS was called for[19].

2. Internet Corporation for Assigned Names and Numbers (ICANN)

In the light of these developments the U.S. discussed possible changes on the basis of a Green Paper and a subsequent White Paper brought forth by the government[20]. In July 1997 the privatization of the DNS was suggested which led to the foundation of the «Internet Corporation for Assigned Names and Numbers» (ICANN) in November 1998 as the successor of IANA.

ICANN is established as a private non-profit organization, governed by Californian law and domiciled in California. It used to operate based on a Memorandum of Understanding (MoU) with the U.S. Department of Commerce[21]. The MoU expired on September 30, 2006, but was extended through the adoption of the three year Joint Project Agreement between the two parties[22].

The organization is responsible (i) for allocating Internet Protocol (IP) addresses, (ii) for managing the root servers that enable devices on the network to identify and find each other and for information to travel from senders to recipients, and (iii) for managing the generic (gTLD) and country code (ccTLD) Top-Level Domain name systems. Hence, ICANN is responsible for deciding which devices can connect to the Internet and under which names[23]. New Top Level Domain names have to be approved by the U.S. Government, which has veto power over the Internet addressing system[24].

The corporate organization of ICANN is based on the decision making capacity of the providers and users of Internet services, while national governments compose the «Governmental Advisory Committee» (GAC) with an advisory role within the organization[25]. Furthermore, a specific dispute resolution process has been established in the form of the Uniform Domain Name Dispute Resolution Policy (UDRP)[26]. Institutionally, the organization is governed by fifteen voting directors. Originally five members of ICANN's board were to represent users in specific geographic regions and were elected through Internet-wide elections. However, in 2002 these At-Large board members were replaced by a more internal selection process with regard to geographic diversity[27].

Although ICANN was composed as a global organization, it has been materially influenced by and politically dependant on

18 Wolfgang Kleinwächter, Beyond ICANN vs. ITU? How WSIS tries to enter the new territory of Internet Governance, 11 March 2004, available at: http://www.itu.int/wsis/documents/background.asp?lang=en&theme=ip (hereinafter: Kleinwächter, Beyond ICANN vs. ITU); Joseph P. Liu, Legitimacy and Authority in Internet Co-ordination: a domain name case study, in: Indiana Law Journal, Vol. 74, 1999, 587 ss; Henry H. Perritt Jr, The Internet is changing the public international legal system, in: Kentucky Law Journal, Vol. 88, 1999-2000, 885 ss.

19 Postel, director of the IANA, wanted to move IANA under the Internet Society (ISOC), a policy oriented network of Internet technicians. However, this plan was opposed to in particular by the U.S. government, the private industry, and the European Commission. In order to avoid governmental and commercial control, Postel initiated the so-called «Interim Ad Hoc Committee» (IAHC) for the purpose of establishing a «Policy Oversight Committee» (POC), as the highest decision making body for the management of domain names. Furthermore, the plan was to move the «A Root Server» from Herndon, Virginia to Geneva, Switzerland. Moreover, the «Memorandum of Understanding on generic Top Level Domains» was signed on 2 May 1997 and deposited by the ITU. It was set forth as a legally non-binding recommendation signed by governmental and business institutions. However, both of the new initiatives were faced with opposition by the U.S. government which particularly wanted to keep the «A Root Server» within the United States (for further information see Kleinwächter, Beyond ICANN vs. ITU, note 18 above, 2 ss.)

20 Io Montes, Legal Framework for Domain Names, Diss., Zürich 2005, 38 ss.

21 The Memorandum of Understanding is available at: http://www.icann.org/general/icann-mou-25nov98.htm.

22 The Joint Project Agreement is available at: http://www.ntia.doc.gov/ntiahome/domainname/icann.htm.

23 Viktor Mayer-Schönberger & Malte Ziewitz, Jefferson Rebuffed: The United States and the Future of Internet Governance, in: The Columbia Science and Technology Law Review, Vol. 8, 2007, 188 ss, 192-193 available at: http://www.stlr.org with further references; see also http://www.icann.org/general.

24 See Mayer-Schönberger/Ziewitz, note 23, 194 with further references.

25 See Bylaws for Internet Corporation for Assigned Names and Numbers, available at: http://www.icann.org/general/bylaws.htm#XI.

26 See Uniform Domain Name Dispute Resolution Policy, adopted on August 26, 1999, available at: http://www.icann.org/udrp/#udrp.

27 Articles VI-X of the 15 December 2002 ICANN Bylaws, available at: http://www.icann.org/general/archive-bylaws; see also Mayer-Schönberger/Ziewitz, note 23 above, 196.

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the U.S. Over time, and in particular during the first phase of the World Summits on the Information Society (WSIS), many objections have been levied against this fact. The theoretical possibility that the U.S. could limit the access to the root server or hinder Internet communication by deleting country codes from the root has sufficed for culminating in a call for an internationalized organization, notwithstanding that ICANN has not proved these concerns right. Particular objections have addressed ICANN's lack of an adequate democratic and legitimized background and have expressed misgivings because the privately established rules supposably erode the power of sovereign states[28]. As one of the most important actors in the present Internet governance system, ICANN is a prevailing issue on the international level dealing with the World's Information Society.

3. World Summit on the Information Society (WSIS) and Internet Governance

In the light of the growing importance of information and communication, the International Telecommunication Union (ITU) passed a resolution proposing the idea of a World Summit on the Information Society (WSIS) under the auspices of the United Nations[29]. In 2001 the ITU Council endorsed the approach of holding the Summit in two phases, the first in Geneva in 2003 and the second in Tunis two years later[30]. This led to the adoption of the General Assembly Resolution 56/183[31] setting the objective of the WSIS to develop an international «common vision and understanding of the information society» and to adopt a declaration of fundamental principles for the creation of an information society which is truly global in participation and benefits. Internet governance was not explicitly mentioned in these resolutions yet, however, the ITU Plenipotentiary Conference did stipulate its consciousness «of the fact that the globalization of telecommunications must take account of a harmonious evolution in policies, regulations, networks and services in all Member States»[32].

a. First Phase: Geneva 2003

In the first («Geneva») phase, two preparatory committee meetings (PrepComs) and various regional conferences culminated in the Geneva Conference in December 2003 which finally enacted the Geneva Declaration of Principles[33] and the Geneva Plan of Action[34], defining a framework for future actions.

During the series of regional conferences Internet governance gained more and more attention, but none of the PrepComs managed to find an agreement. Difficulties arose whilst trying to find a common notion of the term «Internet governance». Depending on whether the focus is set on the technical management of the Internet's core resources in terms of a restrictive definition, or whether the Internet is understood extensively including further issues arising such as e-commerce, spam, cybercrime etc., different notions of the concept exist, complicating a possible compromise on the international level.

What clearly was crystallized from the discussions though, is that both approaches have considerable economic and political implications[35]. Particularly, discussions on the responsibility for Internet governance were at issue, also putting the activities of ICANN in the center of the debate. On the one hand, the U.S. government – supported by the European Union, Canada, Australia and Japan – adopted the position that the principle of «private sector leadership» has stood the test of time for the management of the Internet under ICANN[36]; they referred to the narrower definition of Internet governance and held

28 See Mayer-Schönberger/Ziewitz, note 23 above, 194 ss with further references; see also Kleinwächter, Beyond ICANN vs. ITU, note 18 above, 4; for more information on the problem of legitimacy see Weinberg, note 12 above, 187 ss.
29 Resolution 73 of the ITU Plenipotentiary Conference, Minneapolis, available at: http://www.itu.int/wsis.
30 Resolution 1179, ITU Council 2001, available at: http://www.itu.int/wsis.
31 56/183, U.N. Doc. A/RES/56/183 (31 January 2002). UN General Assembly Resolution
32 See Resolution 73 of the ITU Plenipotentiary Conference, Minneapolis, 1998, available at: http://www.itu.int/council/wsis/R73.html.
33 Doc. WSIS-03/GENEVA/DOC/4-E, 12 December 2003, available at: http://www.itu.int/wsis.
34 Doc. WSIS-03/GENEVA/DOC/5-E, 12 December 2003, available at: http://www.itu.int/wsis.
35 Kleinwächter, Internet Governance, note 16 above, 215, 216.
36 This approach was emphasised in the Joint Project Agreement between the U.S. Department of Commerce and ICANN in 2006.

the view that the present system under ICANN works, making changes needless. On the other, China, India, Brazil, and South Africa, supported by the majority of the developing countries, argued that Internet governance is related to national sovereignty, making it necessary to bring governments in charge of the process, preferably under the supervision of the UN organization ITU[37].

The first part of the World Summit almost collapsed under the weight of the conflict-laden issue[38]. Finally, the Geneva Declaration of Principles explicitly acknowledged the evolved importance of the Internet and stipulated that Internet governance should constitute a core issue of the Information Society agenda. In terms of a general mandate, it was stated that «the international management of the Internet would have to be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism»[39]. This approach was maintained throughout the further discussions[40]. It stands out as an example of the previously outlined model of «co-regulation» between different stakeholders, overriding differences between the public and the private sector and appears to be only consequent for the field of the Internet.

b. Working Group on Internet Governance (WGIG)

The WSIS Geneva Declaration of Principles asked the UN Secretary General, Kofi Annan, «to set up a working group on Internet Governance [WGIG]», ensuring a mechanism for the full and active participation of all of the stakeholders involved, «to investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005»[41]. The WGIG was established as a compromise between the governments that felt that the WSIS process was not open enough to the private sector and civil society, and the governments that wanted a process within the UN framework. Its implementation was borne by the hope to resolve the differences of opinion that had become apparent during the first phase of the WSIS[42]. The Swiss diplomat Markus Kummer was appointed Executive Co-ordinator of the WGIG's Secretariat.

In July 2005 the WGIG submitted its Report to the UN Secretary General, in time for the second phase of the WSIS. Pursuing the mandate received, it had mainly concentrated on (i) developing a working definition of Internet governance; (ii) identifying the public policy issues that are relevant for Internet governance; and (iii) developing a common understanding of the respective roles and responsibilities of governments, existing international organizations and other forums as well as the private sector and civil society from both developing and developed countries[43]:

The working definition of Internet governance proposed was based on a broad notion and reinforced the concept of co-governance. As a result «Internet governance is the development and application by gov-

37 Adam Peake, Internet governance and the World Summit on the Information Society (WSIS), prepared for the Association for Progressive Communications (APC), June 2004, 5, available at: http://www.itu.int/wsis/documents/background.asp?lang=en&theme=ip.

38 Kleinwächter, Internet Governance, note 16 above, 215.

39 Article 48 of the WSIS Geneva Declaration of Principles. The emphasis on a «multistakeholder» approach for Internet Governance was explicated with the following words:
«a) Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues;
b) The private sector has had and should continue to have an important role in the development of the Internet, both in the technical and economic fields;
c) Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role;
d) Intergovernmental organizations have had and should continue to have a facilitating role in the co-ordination of Internet-related public policy issues;
e) International organizations have also had and should continue to have an important role in the development of Internet-related technical standards and relevant policies» (Article 49 of the WSIS Geneva Declaration of Principles).

40 This approach was specially supported by Switzerland which organized particular Multi-stakeholder Summit Events; see Abriss über das Engagement der Schweiz als Gastland der ersten Phase des WSIS im Dezember 2003 in Genf, 9, available at: http://www.bakom.ch/org/international; Compilation of Comments received on the Report of the Working Group on Internet Governance (WGIG), Doc. WSIS-II/PC-3/DT/7(Rev. 2) E, 23 September 2005, 3, available at: http://www.itu.int/wsis/wgig/index.html.

41 Article 50 of the WSIS Declaration of Principles; for further information see Kleinwächter, Beyond ICANN vs. ITU, note 18 above, 1 ss, 4 ss.

42 Adam Peake, note 37 above, 5.

43 See Geneva Plan of Action, Doc. WSIS-03/GENEVA/DOC/5-E, 12 December 2003, paragraph 13.

ernments, 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»[44]. This definition was supplemented by the establishment of four key clusters of public policy issues[45] as well as the identification of 16 issues of highest priority[46].

Last but not least, the Report of the WGIG recognized that the management of the Internet should not be inherited by a sole organization or a sole group of stakeholders, but rather by all of the stakeholders in mutual co-action such as the governments, the private sector, the civil society, the academic and technical community, as well as the already existing intergovernmental and international organizations and similar fora. Thereby, the WGIG stressed the need for enhanced communication, co-ordination and co-operation between the different stakeholders, in a so-called «multilayer multiplayer mechanism», and particularly pointed out the importance of full participation of developing countries. The establishment of a «multilateral, transparent and democratic» multi-stakeholder forum, preferably linked to the United Nations, was recommended as a space for dialogue, involving all stakeholders and relevant organizations, without allowing any government to have a pre-eminent role in international Internet governance[47]. Furthermore, the Report provided for recommendations to address Internet-related issues, allocating specific and adequate governance mechanisms to the 16 issues of highest priority mentioned above[48].

c. Second Phase: Tunis 2005

In the forefront of the second phase of the WSIS, taking place in Tunis from 16-18 November 2005, the organization of the Internet remained a very controversial issue. The United States had opposed any internationalization of the process, arguing that the current DNS under the auspices of ICANN provided for security and stability as opposed to an intergovernmental process. The Europeans shifted their previous opinion, and formally proposed a more international and intergovernmental framework for the Internet's naming and numbering, and therewith provoked high-tension with the U.S. Nevertheless, the mutual adoption of the Tunis Commitment[49] and the Tunis Agenda[50] succeeded on November 18, 2005[51].

The Agenda sets out the medium-term future of global Internet governance[52]: The working definition of Internet governance, established by the WGIG, was taken on, with a special emphasis on the fact that Internet governance «includes more than Internet naming and addressing. It also includes other significant public policy issues such as, inter alia, critical Internet resources, the security and safety of the Internet, and developmental aspects and issues pertaining to the use of the Internet»[53]. Moreover, it was recognized that social, economic and technical issues encompassing affordability, reliability and quality of service were further issues at hand[54].

The establishment of the Internet Governance Forum (IGF) under the auspices of the United Nations was considered as being of particular importance. Its mandate has been very carefully formulated: it stip-

44 Paragraph 10 of the Report of the WGIG, available at: http://www.wgig.org/docs/WGIGREPORT.pdf.
45 The public policy issues addressed were: (i) «issues relating to infrastructure and the management of critical Internet resources»; (ii) «issues relating to the use of the Internet, including spam, network security and cybercrime»; (iii) «issues that are relevant to the Internet but have an impact much wider than the Internet and for which existing organizations are responsible, such as intellectual property rights (IPRS) or international trade»; and (iv) «issues relating to the developmental aspects of Internet governance, in particular capacity-building in developing countries» (Paragraph 13 of the Report of the WGIG, note 44 above).
46 1. Administration of the root zone files and system; 2. Interconnection costs; 3. Internet stability, security and cybercrime; 4. Spam; 5. Meaningful participation in global policy development; 6. Capacity-building; 7. Allocation of domain names; 8. IP addressing; 9. Intellectual property rights (IPR); 10. Freedom of Expression; 11. Data protection and privacy rights; 12. Consumer Rights; 13. Multilingualism; 14. Convergence; 15. Next Generation Networks; 16. e-Commerce (see Paragraphs 15-28 of the Report of the WGIG, note 44 above).
47 Paragraph 29-48 of the Report of the WGIG, note 44 above. This approach corresponds to general tendencies in international law questioning the sole subjectivity of nation states and gradually acknowledging new actors on the international level.
48 KLEINWÄCHTER, Internet Governance, note 16 above, 219-220; for further information on the WGIG see KLEINWÄCHTER, Kontroverse des WSIS, note 8 above, 30-32.
49 Doc. WSIS-05/TUNIS/DOC/7 –E, 18 November 2005, available at: http://www.itu.int/wsis.
50 Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E, 18 November 2005, available at: http://www.itu.int/wsis.
51 MAYER-SCHÖNBERGER/ZIEWITZ, note 23 above, 190-191.
52 See paragraphs 29-82 Tunis Agenda.
53 See paragraph 58 Tunis Agenda.
54 See paragraphs 34, 58, and 59 Tunis Agenda.

ulates the purpose of the forum to support the United Nations Secretary General in convening a new forum for multi-stakeholder policy dialogue. The IGF was set up as a consequence of a compromise: In the light of the United States' reluctance, its mandate includes only soft powers, such as the discussion of public policy issues, the facilitation of discourse and exchange of information and best practices, the advising of all stakeholders, the contribution to capacity building for Internet governance in developing countries etc[55]. Thereby, it is made clear that the IGF has «no oversight function» and does «not replace existing arrangements, mechanisms, institutions or organizations», but involves them and takes advantage of their expertise. The forum is «constituted as a neutral, non-duplicative and non-binding process», having no involvement in day-to-day technical operations of the Internet, but featuring a «multilateral, multi-stakeholder, democratic and transparent» structure[56].

Furthermore, the recognition of «enhanced co-operation in the future» was underlined as an important outcome[57]. The process towards enhanced co-operation was set out «to be started by the UN Secretary General, involving all relevant organizations by the end of the first quarter of 2006»[58]. However, in practice the international attempts did not go beyond the installation of the Internet Governance Forum[59].

55 See paragraph 72 Tunis Agenda.
56 See paragraphs 77 and 73 Tunis Agenda.
57 See paragraph 69 Tunis Agenda stating that: «We further recognize the need for enhanced co-operation in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues.»
58 See paragraph 71 Tunis Agenda.
59 See Mayer-Schönberger/Ziewitz, note 23 above, 209; paragraphs 69 and 71 Tunis Agenda were affirmed anew in the tenth session of the ECOSOC Commission on Science and Technology for Development (CSTD) from 21-25 May 2007, see Draft resolution for adoption by the Council, paragraph 2, in: CSTD Report on tenth session, Doc. E/CN.16/2007/4, available at: http://www.unctad.org.
60 See also paragraph 82 Tunis Agenda.
61 Thomas Schneider, IGF: Neues Modell für einen Multi-Stakeholder Policy Dialog?, in: *medialex* 1/2006, 8-9.
62 See The Secretariat's summing-up of the panel sessions of the Inaugural Session of the IGF, available at: http://www.intgovforum.org/meeting.htm, as well as the Secretariat's Synthesis Paper of the IGF Stocktaking session, Geneva, 13 February 2007, and the Workshop Proposals for the Rio de Janeiro Agenda, available at: http://info.intgovforum.org/wsl2.php?listy=OTH. For further information on the Preparation for the second meeting in Rio, see http://www.intgovforum.org.

d. IGF and the Current Situation between Athens and Rio

The Inaugural Meeting of the IGF took place in Athens from 30 October-2 November 2006[60]. There were six panel sessions taking place in a format of interactive multi-stakeholder panels with remote participants joining via blogs, chat rooms, e-mail and text messaging. Concerns issued in the run-up to the meeting that controversial themes would not find a forum were not validated. The IGF brought together various stakeholders from civil society, private sector, governments and international organizations in an equal and voluntary platform. The openness as well as the absence of procedural rules and provisions envisioning the adoption of resolutions, enabled valuable open dialogues and non-binding approaches on current issues between actors that would otherwise hardly have encountered one another. In fact, a very broad range of issues was addressed and their substantiation proceeded in dynamic coalitions. Altogether, the test run of Internet governance was deemed successful[61].

Preparing for the second meeting of the IGF taking place in Rio de Janeiro from 12-15 November 2007, new rounds of consultations took place in Geneva from 15-25 May 2007 and will continue on 3 September 2007. The preparatory process was envisaged to be based on the meanwhile acknowledged framing of the working definition of Internet governance as well as the key principle of multistakeholder co-operation. Based on the consultations and the discussions held in Athens, the subjects of main focus for enhanced communication, co-ordination and co-operation in Rio, will be laid on the broad themes of «critical Internet resources», «access», «diversity», «openness», «security», as well as the cross-cutting priorities of «development/capacity building» inter alia[62].

It is foreseen that after Rio the IGF will continue its valuable contribution to the multi-stakeholder dialogues on Internet governance issues. Further important inputs are provided by the Global Internet Governance Academic Network (GigaNet), a scholarly community established in Spring 2006. It offers a platform for the exchange of academic research and for dialogue between interested parties. The first

research symposium organized by the GigaNet was held one day prior to the first IGF meeting. The second symposium will also take place in the run-up to the forthcoming IGF conference in Rio[63]. These initiatives play an important role for the development of Internet governance, particularly by upholding moral pressure on the existing mechanisms to proceed.

III. Discussion and Evaluation of Possible Internet Governance Mechanisms

As outlined above, several steps have been taken towards an international conciliation in the field of Internet governance. However, some major issues remain controversial and are of predominant relevance in view of the preparatory consultations for the second meeting of the IGF and the ongoing discussions.

Fresh thinking is needed. On the one hand, when addressing the Internet and its governance in general, a consensus should be found on the key principles at issue with regard to the particularities of this specific field of action. On the other, the strengths and weaknesses of the present architectural frameworks and ICANN in particular need to be identified, before daring to frame ideas for possible future Internet governance institutional mechanisms.

1. Architectural and Constitutional Principles

The Internet was established mainly by the private sector which mostly followed a bottom-up approach in self-regulation, taking special account of the technical issues raised by this new network system. In the meantime, the development of Internet regulation by state law has become an undisputed fact. The legal doctrine has realized that a fitting legal framework needs to consider the principles of the subject it addresses and hence pay special attention to the technological environment of the Internet[64].

The European Union proposal, submitted to the WSIS process during the third preparatory conference for the Tunis meeting (PrepCom 3) on 30 September 2005, explicitly addressed «the architectural principles of the Internet, including the interoperability, openness and the end-to-end principle», however, without providing for a definition of these concepts[65]. They are specified in the RFC 1958, a document of the Internet Architecture Board's (IAB) Network Working Group entitled «Architectural Principles of the Internet»[66] which also addresses technological change and development in the information technology industry. Furthermore, this document states that the Internet community's belief is «that the goal is connectivity, the tool is the Internet Protocol, and the intelligence is end to end rather than hidden in the network»[67]. The end-to-end principle (e2e) in particular is referred to as one of the most fundamental architectural principles of the Internet. It stipulates that the network should merely transmit data packages, without performing further functions such as authentication, processing or filtering based on the contents of the data, etc., therewith taking due account of the principle of net neutrality[68].

Perspectives for the development of Internet governance could be drawn from the experience made in other segments of the economy with similar characteristics as the Internet. In particular, areas of international resources that should be open to all persons could allow potential analogies[69]. However, in contrast to the finite key resources of the Industrial Age such as natural resources, energy, satellite positions etc., the virtual resources of the Internet, i.e. IP addresses in particular, are practical-

63 For further information see http://igf2006.info/events/giganet-symposium and http://www.intgovforum.org/giganet_program.html.

64 First theoretical attempts to develop a legal framework were undertaken by Joel Reidenberg in 1998 with the «lex informatica» and by Lawrence Lessig a year later with the concept of a «code based regulation», note 8 above. For further information and references see Weber, Regulatory Models for the Online World, note 8 above, 89 ss.

65 § 63, fourth bullet point of the European Union (UK), Proposal for Addition to Chair's Paper Sub-Com A Internet Governance on Paragraph 5 «Follow-up and Possible Arrangements», Doc. WSIS-II/PC-3/DT/21-E, 30 September 2005, available at: http://www.itu.int/wsis/docs2/pc3/working/dt21.pdf (hereinafter: the European Proposal).

66 See Internet Engineering Task Force of The Internet Society, Architectural Principles of the Internet, RFC 1958, 1 (Brian Carpenter ed., 1996), http://www.ietf.org/rfc/rfc1958.txt.

67 Id. at 2.1.

68 See Mayer-Schönberger/Ziewitz, note 23 above, 22 with further references; for further information on characteristics of global networks see Weber, Regulatory Models for the Online World, note 8 above, 41 ss.

69 See Weber, Regulatory Models for the Online World, note 8 above, 75 ss.

ly unlimited and cannot be geographically located. Therefore, regulation priority in Internet governance should not be given to their equal distribution, but moreover to their unhindered access[70].

However, the flexibility and openness aspired should not disregard a minimum of predictability required for an adequate legal framework in order to establish reliable relations between persons. The sole regard to the technical side of a rule setting framework would leave several problems in terms of governance issues unsolved[71].

In this sense, it is interesting to note that the European Proposal attaches values to the technical principles mentioned, by referring to them as «architectural» and therewith situating them on a higher, «constitutional» level together with the Geneva Principles and further guidelines as well as general legal principles. The latter are accepted by most states and play an important role in international law. They encompass behavior in good faith, human rights, equal treatment, fairness in trade etc., i.e. fundamental rules that can be found in every legal system and are recognized by the entities concerned[72]. The Geneva Principles in particular encompass the efforts for an inclusive information society with access to information and knowledge, the respect for cultural identity, cultural and linguistic diversity, the right to freedom of expression and opinion in particular. Censorship of the Internet is not tolerated and diversity and pluralism of the contents of the Internet should become a common objective[73]. Furthermore, specific aims can be drawn from the communication rights perspective, chosen by the civil society coalition campaign on Communication Rights in the Information Society (CRIS), directed at the democratization of access to and the strengthening of communications in the service of sustainable development. This approach lays its focus on building a more people-centred communications landscape based on human rights and social justice[74]. The final objective should be the enhanced use of the Internet, and thereby greater global participation by an increasing number of citizens from diverse linguistic and cultural backgrounds[75].

The key principles have to be considered as a source for legislation and respected as a guideline when referring to Internet governance in general[76]. Furthermore, they provide for substantive self-constraints for policy-making of the governing institution itself[77]. The establishment of consensus on their contents should be a main issue in the future rounds of negotiations. In the process, due respect should be paid to the attempts taken and the choice of principles made by the European Proposal as well as to the CRIS. Unlike ICANN's legitimacy which is founded on the selection process of its board members, the mandate to follow the principles of the Internet community, at least to an extent, addresses legitimacy issues more effectively, by referring to a level of principles which exists independently of the actual policies of individual representatives. By adhering to fundamental principles of cyberspace, the Internet community experiences representation on the international level[78].

2. Theory of Government Networks and ICANN

a. Theoretical Background of Government Networks

Cyberspace significantly differs from nation states according to the Westphalian percep-

70 Kleinwächter, Internet Governance, note 16 above, 221-222.
71 Weber, Regulatory Models for the Online World, note 8 above, 89 ss, 99 in particular.
72 See Weber, Regulatory Models for the Online World, note 8 above, 66-67.
73 § 63 of the European Proposal; see Mayer-Schönberger/Ziewitz, note 23 above, 204-205; see UNESCO Position Paper on Internet Governance at http://portal.unesco.org and Mogens Schmidt & Silvie Coudray, Future Challenges to Building Knowledge Societies, in: Möller/Amouroux (eds.), OSCE Representative on Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, 221 ss.
74 Steve Buckley, Whose Information Society? Communication Rights and the WSIS, in: Möller/Amouroux (eds.), OSCE Representative on Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, 230 ss. For further information on CRIS, see http://www.crisinfo.org.
75 See UNESCO Position Paper on Internet Governance at http://portal.unesco.org.
76 See The Recipes, Recommendations of the OSCE, Representative on Freedom of the Media from the 2004 Amsterdam Internet Conference, first bullet point under «A. Legislation & Jurisdiction», available at: http://www.osce.org/publications/rfm/2004/12/12239_91_en.pdf and printed in: Möller/Amouroux (eds.), OSCE Representative on Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, 15 ss.
77 Mayer-Schönberger/Ziewitz, note 23 above, 205-207.
78 Mayer-Schönberger/Ziewitz, note 23 above, 206-207; on governance and constitutionalization see: Klaus W. Grewlich, Konstitutionalisierung des «Cyberspace», Zwischen europarechtlicher Regulierung und völkerrechtlicher Governance, Baden-Baden 2001.

tion of international law and its subjects. Therefore, the need to substitute national regulatory approaches by globally standardized action is undisputed and leads to the emergence of intensified global responsibilities and possibly shared sovereignty[79].

In connection with the need for establishing global rules and institutions in terms of global governance, the so-called «governance dilemma»[80] or «globalization paradox»[81] is raised, according to which institutions, which are essential for human life, also bear certain threats for the society's liberty. When referring to the Internet, «liberty» is contained in the key values like freedom of expression, cultural diversity and openness. Governance of the Internet should not hinder the free flow of ideas and knowledge or complicate technical innovation[82].

In «A New World Order», Anne-Marie Slaughter attempts to offer a solution for this dilemma by referring to «government networks». These are set out as «relatively loose, cooperative arrangements across borders between and among like agencies that seek to respond to global issues»[83] and that manage to close gaps through co-ordination between governments from different states, «creating a new sort of power, authority, and legitimacy»[84]. This model assumes disaggregated states in terms of a decomposed collection of disparate institutions with their own powers, mandates, incentives, motivations, abilities etc. similar to the term of «the government» which can be distinguished in activities of the courts, parliaments, regulatory agencies and the executive itself[85]. This notion is contrary to perceptions of unitary states in traditional international law. According to Slaughter the national governments cannot effectively address every problem in a networked world and should therefore delegate their responsibilities and «actual sovereign power to a limited number of supranational government officials»[86] which engage in intensive interaction and the adoption of codes of best practices and agreements on coordinated solutions to common problems[87].

Translated into terms of Internet governance, this theory leads to a model of a governance body, formed from the networks achieved by negotiations on the international level. This forum for government officials specialized on Internet issues would permit co-ordination on a global level and create a new authority responsible and accountable for Internet governance. The focus would not be laid on unitary sovereign nation states' governments, but moreover on a limited number of supranational government officials within the Internet governance body and their networks, thereby taking due account of existing international organizations, corporations, NGOs and other actors in transnational society[88].

However, the concept of government networks has not been spared with critics. Although governments are specifically legitimized through democratic elections, it has been put forward that, over time, this proposed new world order could fail to preserve democracy and democratic accountability; last but not least due to its top-down approach it could finally lead to a form of liberal internationalism[89].

b. ICANN and its Democratic Legitimacy

As a non-profit organization, ICANN seems to correspond to the model of government networks at first glance. National states are not in a position to mutually govern the technical regulation of the Internet, therefore the corresponding responsibilities are delegated to the specialized Californian organization. However, even if ICANN would establish a network in terms of an internationally active organization, the delegation to «supranational government officials» seems

79 Kleinwächter, Internet Governance, note 16 above, 221; see also Weber, Regulatory Models for the Online World, note 8 above, 77.
80 Rober O. Keohane, Governance in a Partially Globalized World, in: American Political Science Review, Vol. 95, 2001, 1.
81 Slaughter, note 3 above, 8-11.
82 See UNESCO Position Paper on Internet Governance, available at: http://portal.unesco.org.
83 Kenneth Anderson, Book Review: Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks, Harvard law Review, Vol. 118, 2005, 1257; see Slaughter, note 3 above, 14.
84 Anderson, note 83 above, 1257.
85 Slaughter, note 3 above, 12-13.
86 Slaughter, note 3 above, 263.
87 Slaughter, note 3 above, 263.
88 Slaughter, note 3 above, 262-263.
89 Anderson, note 83 above, 1301 ss, 1309.

questionable, in particular since ICANN's role as a political representative is ambivalent. On the one hand, ICANN has repeatedly insisted on its perception as a merely technical organization as opposed to a political policy-making entity; on the other, the organization's legitimacy is questioned and its techniques of representation are deemed to be unsatisfactory, since the heterogeneous Internet community is not actually reflected within the organization's structures. The GAC cannot officially claim to represent the governments in their entirety, since it is established only on ICANN's bylaws, not on an intergovernmental treaty[90].

Legitimacy can be described as «the aspect of governance that validates institutional decisions as emanating from right process. What constitutes right process is described in a society's adjectival constitution or rules of order, or is pedigreed by tradition and historic custom»[91]. Democratic processes are not mandatory for the constitution of legitimate decision-making; however, they play a major role in fairness and legitimacy debates in the West and in the foreign policy of the U.S. in particular. «Democracy» generally addresses the role of people in governance. In order to facilitate governing, the people holding actual political power have transferred their control over the nation's validation process to another level, encompassing national electoral commissions, parliaments etc. Legitimate validation is achieved by these entities that decide whether democratic guidelines have been met by those claiming the right to govern[92].

As outlined above, the lack of an adequate democratic and legitimized background of ICANN was repeatedly brought forward during the discussions of Internet governance on the international stage. Originally, the U.S. pointed out that the At-Large board member election was a specific form of a democratically legitimated, bottom-up decision-making process, since five members of ICANN's board were selected through Internet-wide elections to represent users in various geographic regions. However, in 2002 ICANN's reorganization abolished these At-Large board members and introduced an almost entirely internal selection process, subject to certain rules requiring geographic diversity. This lack of transparency was criticized[93] and was not appeased by ICANN's subsequent adoption of legitimizing techniques from U.S. administrative agencies[94].

Legitimacy crises are well-known with respect to international organizations, such as the European Union, the World Trade Organization or the United Nations[95]. In these debates, the question may arise whether the traditional perception of democratic legitimacy is appropriate for these specific fora. Even if the election of an international organization's council for example pays due regard to the need for equitable distribution of council seats among the five world regions, the democratic legitimacy of the individual organization functionary – after all in charge of specific policy decisions – may remain rather questionable and not much more favorable than the direct election of board members via the Internet[96]. In general, if legitimacy of the international entities is deduced from the legitimacy of national regimes, without taking due account of the national situation[97], even the most democratic process on the international level may not suffice to meet the desired standards. Therefore, in Internet governance, legitimacy based on democratic entitlement alone should not be overestimated.

3. Milestones for Global Internet Governance

With respect to the developments on the international level it seems probable that

90 Weinberg, note 12 above, 235 ss, 249, 258-259.
91 Thomas Franck, Democracy, Legitimacy and the Rule of Law: Linkages, in: Public Law and Legal Theory Working Paper Series, Working Paper 2, 1999, 1, available at: http://papers.ssrn.com (hereinafter: Franck, Linkages).
92 See Franck, Fairness, note 4 above, 83 ss.
93 Mayer-Schönberger/Ziewitz, note 23 above, 196 with further references.
94 Weinberg, note 12 above, 235 ss, 249, 258-259.
95 See the discussions that followed the rejection of a European Constitution, and ideas to reform the United Nations. For more information on the general debates see amongst many others: Winfried Kluth, Die demokratische Legitimation der Europäischen Union, Berlin, 1995; Manfred Elsig, The World Trade Organization's Legitimacy Crisis: What does the Beast look like?, in: Journal of World Trade, Vol. 41, 2007, 75 ss; Ian Clark, Legitimacy in International Society, New York, 2005, 11 ss, 173 ss.
96 On this note also: Hans J. Kleinsteuber, The Internet between Regulation and Governance, in: Möller/Amouroux (eds.), OSCE Representative on Freedom of the Media, The Media Freedom Internet Cookbook, Vienna 2004, 73.
97 See Franck, Fairness, note 4 above, 91.

ICANN cannot continue as it is constituted at present. The call for a more legitimate organization structure will not trail away; therefore, a more satisfactory governance system has to be worked out for the appeasement of all involved parties. As a first step, the need for better transparency should be tackled. Second, attempts of governing the Internet on the international level need to address the basic question whether a new international governance body should be established at all, replacing ICANN. If this question is answered in the affirmative, solutions have to be found on the one hand, for its set-up and, on the other, for the issues it should deal with and regulate. Some of them shall be outlined in the following.

a. Need for Better Transparency

Transparency is a recognized important norm and principle for regulatory systems. Its importance stems from its relevance for the achievement of other important tenets of regulation, such as independence and accountability of regulators and providing sufficient information to make informed decisions[98]. Accessibility, clarity, logic and rationality, truthfulness and accuracy, as well as openness are further major characteristics that are associated with the notion of transparency. Modern legal jurisprudence asserts that the validity of legal rules depends in part on whether those obliged by the rules can ascertain in advance what behavior or restraint is required[99]. Since a transparent methodology for rule-making processes based on revisable procedures reduces mistrust and can have a legitimizing effect, transparency should be a persistent objective of any governance mechanism.

Elements of transparency have become significant aspects of good regulatory governance and have become increasingly important in many areas of public policy. In fact, transparency and accountability issues were mentioned in the Joint Project Agreement between the U.S. Department of Commerce and ICANN which replaced the MoU in 2006[100]. Their importance was further underlined within ICANN itself by an independent review of its accountability and transparency[101] as well as its recent posting of the Draft Management Operating Principles for Community Consultation[102].

An international approach in this direction can also be found in the «Code of Good Practices on Transparency in Monetary and Financial Policies», developed by the IMF in co-operation with the Bank for International Settlements and in consultation with several other relevant actors in 1999[103]. Assessments of the Code have highlighted the main benefits of transparency within the monetary and financial policies[104].

Even though the monetary and financial market is hardly comparable to the Internet at first glance, both sectors need to address legitimacy issues when establishing an international framework. Thus, valuable inputs could be deduced for Internet governance and merit further examination. Indeed, in order to achieve transparency in the regulation process, the Net could be used to achieve open access to negotiations, collect proposals and statements from the various stakeholders concerned, present the decisions and results, and thereby enhance and facilitate communication and dialogue[105].

b. Creation of an International Internet Governance Body

The European Proposal brought forward the suggestion to build on the existing mechanisms and structures of Internet governance, with a special emphasis on the complementarity between all the actors al-

98 Fabian Amtenbrink, The Three Pillars of Central Bank Governance – Towards a Model Central Bank Law or a Code of Good Governance, presentation during an IMF LEG Workshop on Central Banking, Washington DC, March 2004, available at: http://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/amtenb.pdf.

99 See also Kleinsteuber, note 96 above, 73; Herbert Hart, The Concept of Law, 2nd ed., Oxford 1997, 10.

100 Section V.B.1. from the Joint Project Agreement, note 22 above.

101 Independent Review of ICANN's Accountability and Transparency - Structures and Practices, available at: http://www.icann.org/transparency.

102 See Announcement of 23 June 2007, available at: http://www.icann.org/announcements.

103 Code of Good Practices on Transparency in Monetary and Financial Policies available at: http://www.imf.org/external/np/mae/mft/index.htm together with the Supporting Document providing for a more detailed description of the Code.

104 See International Monetary Fund, Assessments of the IMF Code of Good Practices on Transparency in Monetary and Financial Policies – Review of Experience, 23 December 2003, available at: http://www.imf.org/external/np/mae/mft/assess/122303.htm.

105 See Kleinsteuber, note 96 above, 73.

ready involved in this process. Switzerland supported this approach[106]. This idea makes sense in terms of efficiency, since the existing bodies concerned with the Internet are experienced and possess a high level of specialization and should not be completely replaced by new mechanisms.

On the international level, expert bodies are a familiar instrument. The Financial Stability Forum (FSF) for example brings together representatives of national financial authorities, international financial institutions, international regulatory and supervisory groupings, committees of central bank experts and the European Central Bank with the objective to promote international financial stability through information exchange and co-operation in financial supervision and surveillance[107]. Both the International Monetary Fund (IMF)[108] and the World Bank[109] provide for a representation of their shareholders in a Board of Governors, assembling one governor and one alternate governor for each member country. Generally these governors are government officials that meet once a year and constitute the highest decision-making bodies of these entities.

The establishment of an international forum of governments confirms the constitutional approach mentioned above. Thereby, the fields of action of the states on the one, and the public sector on the other hand need to be distinguished: The states remain responsible for addressing public policy issues related to key elements of Internet governance as well as typical sovereignty issues, such as criminal proceedings in the Internet. However, the technical management of the Internet core-resources should be left to private entities, composed of technicians, service providers, users, etc. and should provide for regulation only when necessary. The feared blockage of the operational functioning of the Internet through dissenting government policies could be avoided by this approach. By separating technical from political aspects in governance, but by respecting both in the end, a kind of division of powers could be realized, which enables a positive balance between the different interests[110].

Such approach provides a compromise when addressing the issues about the legality and constitutionality of a governance body as well as the risks that privately-established rules erode or undermine the power of sovereign states[111]. Furthermore, the United States could be propitiated by the fact that the international body would not be involved in technical day-to-day operations and functions of the Internet. However, the concern that nations lacking appreciation for freedom of ideas and open communication may have a say in Internet policy-settings, would not be met[112]. It could be answered by stating that the existing influence of nations with different perceptions of freedom of expression, such as China, Cuba, Iran, etc. remains unchallenged with or without an Internet governance body. The set-up of a forum would not confirm these countries' attitude, but rather provide for a space where the necessary discussions on different perceptions could take place, similarly to the IGF at present, but with further participation mechanisms, binding procedures, decision-making processes, etc.

In political science the public choice theory is drawn on to analyze political decision making economically: The theory assumes that human beings generally act rationally, driven by the desire to maximize their gains. Therefore, the opposition of the U.S. to the European proposal can be interpreted as the reflection of domestic U.S. political dynamics, since none of the interested stakeholders from the United States had an incentive to accept an accordant model[113].

However, perhaps too much focus was laid on short-term deliberations. As outlined above, it seems clear that ICANN cannot

106 § 63 of the European Proposal, fist bullet point; see also Switzerland's position in the Compilation of Comments received on the Report of the WGIG, note 40 above, 35.
107 For further information see http://www.fsforum.org/home/home.html.
108 For further information see http://www.imf.org.
109 For further information see http://www.worldbank.org.
110 See § 63 of the European Proposal, second and third bullet point; see Paragraphs 29 ss Report of the WGIG, note 44 above; Kleinwächter, Internet Governance, note 16 above, 219.
111 Weber, Regulatory Models for the Online World, note 8 above, 106 ss.
112 See Mayer-Schönberger/Ziewitz, note 23 above, 204.
113 See Mayer-Schönberger/Ziewitz, note 23 above, 217 ss, 227-228. Furthermore, the U.S.' rejection against an international Internet governance body has to be considered in the light of the USA's position against international law in general (Mayer-Schönberger/Ziewitz, note 23 above, 220 ss).

carry on without taking into account the criticism delivered. Moreover, the continuing discussions on an international Internet governance body hinder the creation of a stable legal Internet governance framework which is necessary in the light of the increased economic relevance of the cyberspace. The existing discussions cannot be avoided. By providing a specialized forum, they could be concentrated and therewith kept out of other important Internet governance negotiations. The creation of an Internet governance body would provide for a global compromise incorporating all of the states' interests in the Internet and enabling communication and dialogue between the different stakeholders involved. The states' gains could particularly be maximized by ensuring their Internet access and the fair distribution of domain names. Furthermore, a coordinated approach to issues such as cybersecurity for example might be more effective, and could reinforce counter-terrorism measures globally. In the long term, the importance of a consistent Internet should particularly not be underestimated in the light of the theoretically possible establishment of alternative roots by new Internet markets which could construct «Internets of their own». The situation would be made even more difficult by the implementation of different alphabets that are not based on the Latin script, such as the Chinese, Japanese, Arabic, Cyrillic alphabets[114]. In fact, the languages applicable in the Internet remain a prevailing issue on the international level. Different alphabets in cyberspace, however, would hinder global communication. Consequences of a fragmentation of the Internet would be devastating and contradictory to the perception of the World Information Society. Thus, a consistent framework guaranteeing a unique Internet should undoubtedly be aspired to.

c. Legitimacy Issues within the Governance Body

Generally speaking, «for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied»[115]. When referring to governance, legitimacy and fairness issues need to be considered.

The specialized field of Internet regulation requires a high level of competence and expertise. Joint involvement of all of the stakeholders having the necessary know-how is desirable[116]. Additionally, the multi-stakeholder approach, which has already been set out on the international stage since the Geneva Declaration of Principles and the WGIG, provides for valuable inputs. Including all of the stakeholders concerned with the Internet in one way or the other generally provides for a form of representation on the international level, an important aspect when considering the legitimacy of governance[117]; their co-action, enhanced communication, co-ordination and co-operation in a kind of forum, frames a central governance point for Internet issues, allowing for participation and dialogue. As a governance model of «co-regulation», this overarching concept is rather new in governance doctrine. It appears to be only consequent for Internet governance in the light of the special nature of the Internet as a public sphere, generally open to everyone and accessible from everywhere, crossing national borders.

However, the question does arise, how these multi-stakeholder representatives should be appointed, since their legitimacy cannot be achieved by adopting one-to-one democratic elections, like the governments' can. It has been put forth, that the best way would be to base their legitimacy on Net-based votes and elections, as it has already been practiced by ICANN in the past[118]. Yet then, if legitimate Internet governance should include all of the world regions and developing countries' interests in particular, global Internet access would have to be strived towards. Since the bridging of the digital divide is a complex undertaking which is not achieved soon, Net-based votes alone cannot be a viable solution: Indeed, the dialogue with all of the

114 See Kleinwächter, Internet Governance, note 16 above, 225.
115 Franck, Fairness, note 4 above, 7-8.
116 Kleinsteuber, note 96 above, 72-73.
117 The major players in the online world are the following: Governments, Internet Service Providers (ISPs), Local Telephone Companies, Builders and Custodians of Internet Backbone, Hardware and Software Companies, and Internet Organizations (Weber, Regulatory Models for the Online World, note 8 above, 51-52).
118 Kleinsteuber, note 96 above, 73-74.

stakeholders should not be interrupted. The actual formation of a forum should be established in a «fair» procedure[119]. As a general principle, the forum needs to be open and accessible for all of the interested parties. Thereby, the fact that the initial status of the stakeholders differs to a large extent has to be addressed: Due account must be given to the fact, that developing countries in particular do not have the same technical know-how or infrastructures in order to possess equal opportunities in the information society and engage in significant participation of Internet governance negotiations. A forum legitimately referred to as international would have to be accessible to both developed and developing countries and provide for specific approaches to address these delicate issues of inequality.

In addition, procedures enabling «real» consensus and rule-making would have to be established. In order to have a legitimizing effect, bargaining power should be given to all of the participants including those with politically less powerful interests. Since ICANN cannot afford to antagonize its powerful members and is, therefore, especially dependant on the U.S. government, it has been criticized for not providing corresponding procedures[120]. Furthermore, the GAC at present lacks a sufficient autonomous role with its merely consultative status.

A further important issue would be the introduction of judicial review procedures for rendered decisions. ICANN lacks a meaningful constraint mechanism in this respect[121]. The Uniform Domain Name Dispute Resolution Policy (UDRP) of ICANN has been subjected to complaints, stating that disputes among U.S.-based claimants and domain names registered in the U.S. by non-state parties are treated differently to disputes over domain names between two non-U.S. claimants before a non-U.S. registrar[122]. Hence, the establishment of an independent dispute resolution process on the basis of international law could be valuable. Additionally, accountability provisions as well as criteria to protect third parties should be specially addressed[123].

IV. Outlook

The importance of Internet governance has been widely acknowledged and international discussions continue. By providing a forum for dialogue between the different stakeholders of the Internet community, the IGF substantially contributes to this process and upholds moral pressure for the implementation of Internet governance objectives.

Important outcomes have been achieved with the establishment of a working definition of Internet governance and an international consensus on a multi-stakeholder approach. However, a lot of work still needs to be done. A major issue lies in finding an international understanding on the architectural and constitutional principles for a future governance framework, bearing in mind the particularities of the Internet. Such key principles should serve as guidelines and self-constraints for further policy-action; in addition, their acknowledgment would enable the representation of the Internet community on the international level.

In order for Internet governance procedures to become globally accepted and supported, specific focus should be set on transparency and legitimacy issues. Furthermore, internationalization of the process should be aimed at. An international Internet governance body may be able to provide solutions to achieve equal opportunities for all world regions. However, in the light of the obduracy reigning between the proponents and the opponents of an international Internet governance body, a deadlock expanding into further important areas such as those addressed in the IGF has to be avoided by all means. This outcome would not only hinder significant negotiations, but also question the IGF itself; therefore, this issue should be taken out of the way of other discussions for which IGF could be an adequate forum.

An ideal Internet governance body should build on existing specialized mechanisms

119 See Franck, Fairness, note 4 above, 25 ss.
120 Weinberg, note 12 above, 252-257.
121 Weinberg, note 12 above, 231 ss.
122 See Mayer-Schönberger/Ziewitz, note 23 above, 194-195.
123 See also a list of aspects to take into consideration when referring to self-regulatory approaches in particular in Weber, Regulatory Models for the Online World, note 8 above, 109.

in terms of efficiency. It should realize representation of the Internet community and enable co-operation and dialogue between the different stakeholders. Furthermore, it should adhere to rules providing procedures for «real» consensus with bargaining power of all of the involved parties and comply with judicial review procedures, accountability provisions, etc. It seems clear, that the present entity, ICANN, cannot continue without at least responding to the international critics, which will not lessen any time soon.

Time will tell if the establishment of an international Internet governance body is going to succeed. Until then, the focus should be directed towards the acknowledgment and enhancement of existing discussions on the different aspects of Internet governance, particularly in the fields where the will to advance endures. ■

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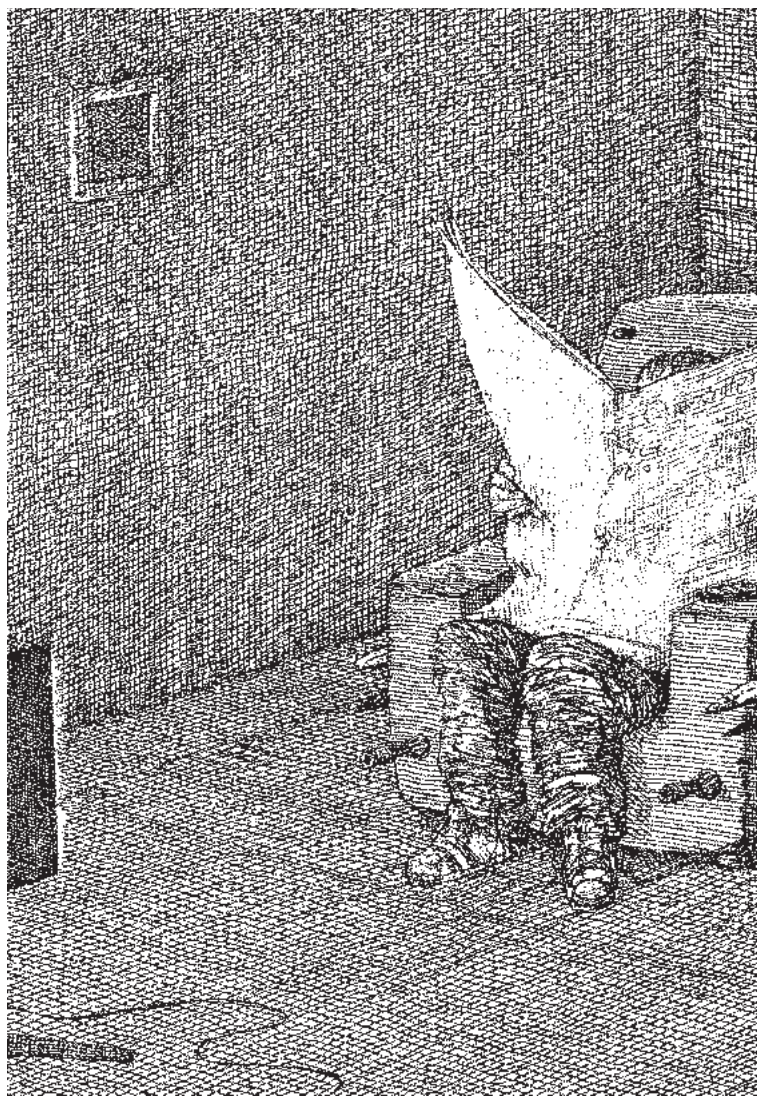

Martial Leiter