

# Multi-stakeholder policy development within the IGF

by Jeremy Malcolm<sup>1</sup>

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## *Introduction*

My contribution to the first session of the first meeting of the Internet Governance Forum is the doctoral thesis that I am presently writing on the topic *Civil Society's Role in the Collaborative Development of Transnational Law Within the Internet Governance Forum*.

The central theme of the thesis may be summarised in three points:

- The IGF is entering an existing regime of Internet governance that is presently dominated by civil society bodies, such as the IETF in technical matters and ICANN in matters of resource allocation. There is no single equivalent body that yet dominates governance of the Internet in respect of public policy matters, but the IGF, if it gains sufficient authority by building its legitimacy amongst Internet users, could become that body.
- This process of building legitimacy is dependent upon the IGF living up to its mandate to initiate “a transparent, democratic, and multilateral process, with the participation of governments, private sector, civil society and international organizations”. On the other hand for the IGF to privilege the participation of government representatives over that of non-governmental stakeholders would limit its legitimacy as well as its effectiveness.
- In developing a structure and processes to enable it to live up to its mandate, the IGF can learn from the experiences of civil society bodies already involved in Internet governance such as the IETF, from other multi-stakeholder governance networks such as ICANN to some extent, and from the scholarly literature on collaborative models of decision-making, including the literature on deliberative democracy.

Rather than attempting to abridge the thesis into a form suitable for presentation here, I will instead simply excerpt a few passages of particular relevance to the topic given in this document's title, and otherwise direct interested readers to the URL at which the thesis is progressively being published as it is written:

<http://www.malcolm.id.au/thesis/>

This URL is a Wiki site, which like other such sites, is designed to facilitate participation from the community. Instructions on how to do so are available on the site. It should be noted that as at the date of these remarks (2 August), chapters 1 through 3 of the thesis have been completed, though it is hoped the balance will be near to completion by the time of the IGF's first meeting.

Below, then, appear a selection of excerpts from the draft thesis bearing on the topic of multi-stakeholder policy development within the IGF. Full references for the passages excerpted are available in the thesis at the URL given above.

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## ***Governance and public policy***

The agreement calling for the IGF's inception (the "Tunis agenda") draws a distinction between "international public policy issues pertaining to the Internet," which are to be developed "by governments in consultation with all stakeholders", and "the day-to-day technical and operational matters, that do not impact on international public policy issues", which are to be dealt with by "relevant international organisations" with "no involvement" by government.<sup>4</sup>

The distinction is, however, a simplistic one, as technical and policy issues are not so cleanly separated. For example, the decision of ICANN (which, as will be explained below, is the authority responsible for the administration of the root of the Internet's Domain Name System) to introduce a new top-level Internet domain .xxx was seen by governments as a public policy issue, to the extent that they called for the decision to be reversed.<sup>5</sup> ... There is a web of interrelation between technical and public policy issues, that makes it difficult for any stakeholder included in a forum such as ICANN or the IGF to be disengaged from involvement in their governance.

This is all the more so since the IGF's recommendations are explicitly "non-binding", which means that states involved in that process lack the coercive power that is a typical feature of government regulation. In fact since the process is to be "multilateral, multi-stakeholder, democratic and transparent" with "full involvement" of "all stakeholders involved in this process", governments do not, at least not in principle, enjoy any position of preeminence in policy formation.<sup>6</sup> Neither should they, if the IGF's legitimacy and effectiveness are to be assured.

## ***Mechanisms of governance***

Governance is a broader term than government,<sup>42</sup> and can be accomplished through a broader variety of mechanisms than the legislative, executive and judicial acts that government performs. A closer synonym for governance may be "management", and in the literature of public administration Rhodes has isolated three mechanisms by which governance may be exercised: hierarchies, markets and networks.<sup>43</sup>

The reference to hierarchies as a form of governance includes the use of laws and bureaucratic regulation to control behaviour. Markets are a mechanism of governance in that the behaviour of consumers can be regulated by the basic economic laws of supply and demand. Networks are a more complex hybrid form of governance which involves partnerships of trust between governments, the private sector and the community, and collaborative decision-making procedures such as will be examined in detail in Chapter 4. Pal has suggested that governance by network is epitomised by the emergent forms of governance found on the Internet.<sup>44</sup> But more particularly for our purposes, the structure of the IGF embodies the concept of governance by network very well.

From a parallel but slightly broader perspective, Lessig has identified four mechanisms by which governance can be exercised: laws, markets, social norms and code (the last of which he also describes as architecture or technology).<sup>45</sup> The first two of these are essentially synonymous with Rhodes' hierarchies and markets, and the effect of the third and fourth have essentially been dealt with in the preceding section when describing respectively the social and architectural forces of the Internet that guide users' behaviour online.

A slightly modified synthesis of Rhodes' and Lessig's typologies of control would then suggest that governance can be exercised by means of rules (that is, laws or hierarchies), norms, markets, architecture (that is, the broadest sense of code) and networks.

### ***Governance by network***

In a way, networks are an amalgam of all of the other methods of governance. The multistakeholder network proposed for the IGF involves governments, within whose power it is to create domestic legal rules, the private sector whose involvement is key to the operation of markets, civil society which has a role in articulating and developing norms, and international organisations which include those involved in setting Internet standards that form the Internet's technical architecture.

Even prior to the IGF's formation, networks have already proved one of the most promising mechanisms for bridging the gap between cyberspace and national legal systems. This is demonstrated in the case of Memoranda of Understanding (MOUs) entered into between international stakeholders to coordinate their joint efforts to address an international public policy issue. Such MOUs are generally not treaties (and therefore not international law per se), but agreements between executive agencies, supported where applicable by their respective domestic legislation.<sup>63</sup> On the issue of spam, for example the Australian Communications and Media Authority (ACMA) has entered into a number of MOUs with its counterparts in other countries, in which the signatories undertake to coordinate their efforts to combat the spam problem.<sup>64</sup> One of these MOUs, the London Action Plan, includes signatories from executive agencies of twenty countries, and nine private sector signatories.

What is key to the successful operation of governance networks is the involvement of all stakeholders. The IGF in particular, is (or should be) essentially a microcosm of the Internet itself. After all, what is the Internet, underneath its technological architecture, but a network of interrelationships between civil society, the private sector, international organisations, and—but certainly not dominantly—governments?

It is therefore surprising and disappointing that the Tunis agenda states, "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". To so restrict authority for the development of international public policy, particularly where related to the Internet, is short-sighted and fallacious. Rhodes writes:

The socio-cybernetic approach highlights the limits to governing by a central actor, claiming that there is no longer a single sovereign authority. In its place, there is the multiplicity of actors specific to each policy area; interdependence among these social-political-administrative actors; shared goals; blurred boundaries between public, private and voluntary sectors; and multiplying and new forms of action, intervention and control.

Governance is the result of interactive social-political forms of governing.<sup>65</sup>

Moreover, it so happens that the network model of governance in this sense quite faithfully mirrors the manner in which the Internet has been governed from the beginning. The IETF, W3C and ICANN all describe their processes as being based

around "consensus" between all interested stakeholders.

### ***Legal governance***

Legal governance is ... the development of international public policy on the Internet. Which of the mechanisms of governance is to predominate in this field remains an open question, as so far the methods employed have been quite eclectic (or erratic, to be more critical). The initiation of the IGF heralds the possibility of a more consistent, network-based model of governance being applied to manage international public policy issues on the Internet.

...

The formation of the IGF for the first time provides those practising administrative governance and standards development with a formal entity with which to engage in the explication of international public policy norms that impact their activities. The fact that there may in many cases be no clear division between the practice of administrative governance or standards development on the one hand, and the development of public policy on the other, does not render the typology impotent, but merely reinforces the importance of multistakeholder involvement in decisions—administrative, technical or legal—on which public policy issues impinge.

### ***Legal governance by networks***

The need to be accountable to a broad range of stakeholders rules out the reliance on norms, markets, or architecture as the principal mechanisms of legal governance, because policy-making undertaken through these mechanisms alone is too often invisible and unamenable to stakeholder input. Such policy-making may for example be driven, in the case of markets, by the "invisible hand of commerce",<sup>325</sup> or in the case of architecture by unexamined accidents of network design that conflict with more fundamental social values, or in the case of norms by prejudice or vigilantism. In other words, these mechanisms lack legitimacy as mechanisms of legal governance.<sup>326</sup>

Of the remaining mechanisms, rules and networks, both have the potential to be legitimate, depending in the first case on how the authority of the rule-maker is derived (which will be discussed in chapter 3 at Section 3.4.1), and in the second on how effectively the network includes its stakeholders (a question to be examined in more depth in chapter 4). Importantly, the fact that a body was established to act using networks does not prevent it from attempting to act using rules instead, and neither does the fact that a body was established with legal authority to act using rules, preclude it from using the mechanism of networks instead.

To give an example ... intergovernmental organisations, which have traditionally claimed authority to make rules through the democratic legitimacy they draw from their composition by national governments, are not precluded from adopting the alternative governance mechanism of networks, involving stakeholders who do not form a democratic polis that the governments can plausibly claim to represent. This chapter's survey of the criticisms and limitations of governance by rules suggests that this is indeed a more effective model for intergovernmental organisations to adopt than traditional hierarchical rule-making, and we have seen it in action in fora such as the London Action Plan.

In fact increasingly, even in contexts other than the Internet, international law is being made through networks rather than through rules as in years past. And the reverse may also be true: that legal governance exercised through networks can, regardless of whether the organisation leading the process is traditionally intergovernmental in character, become international law.

### ***International law***

If Internet governance is to be exercised by networks, the status of those networks in the international legal system will determine whether their actions are likely on the one hand to be accepted, or on the other to be undermined (or simply ignored) by states. Although the geographical nexus that characterises governance through rules by states may on some accounts be anachronistic and next to irrelevant to life in cyberspace, even citizens of cyberspace still hold dual citizenship with the state in which they are physically located. Those states will be more likely to honour the actions of networks of Internet governance if those actions can somehow claim legitimacy in the international legal system.

...

New Haven scholars contend that international law is characterised by the conjunction of authority and control; that is, the authority of a decision-maker to posit an obligation, as perceived by those to whom it is directed, and the control of their actual behaviour by the posited obligation.<sup>331</sup> Put more simply, international law can be found wherever a lawmaker's claim to exercise authority is accompanied by submission to it in practice. Thus for the New Haven scholar, expectations of authority can be drawn not only from states, but from members of the international community at large.<sup>332</sup>

Another school of international legal scholarship more receptive to the inclusion of non-state actors as sources of authority, and which also seeks to unify the study of domestic and international, public and private law, is described as the study of "transnational legal process",<sup>333</sup> "transnational law"<sup>334</sup> or "global law".<sup>335</sup>

As radical as these schools of international law may be to the mainstream scholar, in many ways they are commonplace to the liberal student of international relations.

### ***Regime theory***

As defined by regime theory (which falls within the neo-liberal institutionalist camp), regimes are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>350</sup>

Participants in regimes may include either state or non-state actors (in which case they may be respectively described as international or transnational regimes),<sup>351</sup> or a mixture of both. ...

Recall, from the Introduction to Chapter 2, the WGIG's definition of Internet governance (repeated in the Tunis Agenda):

Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes

that shape the evolution and use of the Internet.<sup>356</sup>

The WGIG is here, implicitly but unmistakably, identifying Internet governance as a regime. And this is clearly what it is: a regime in which both state and non-state actors (those identified in Chapter 2) participate.<sup>357</sup>

### ***Actors in international law***

In the post-globalisation era, the world is returning to a pre-Westphalian state in which multiple overlapping spheres of legal authority co-exist. No longer is the authority in question that of kings, knights, guilds, cities, and the Pope, but that of states, multinational corporations, international organisations and transnational civil society groups. Hall and Biersteker write:

We find it telling that at the beginning of the twenty-first century there are so many examples of sites or locations of authority that are neither states, state-based, nor state-created. The state is no longer the sole, or in some instances even the principal, source of authority, in either the domestic arena or in the international system.<sup>363</sup>

This condition, aptly dubbed "new medievalism", will be discussed further at Section 3.2.5. But suffice it for now to say that reflecting the new reality of globalisation and the accordant diffusion of legal authority, there is growing pressure on intergovernmental bodies such as the United Nations to open up their processes to broader public participation.<sup>364</sup>

The Tunis Agenda therefore identifies four groups of stakeholders who are to participate in Internet governance: governments, the private sector (which it also refers to as "business entities"), civil society and intergovernmental organisations (also referred to as "international organisations"). This largesse is not extended to the Internet governance regime in recognition of the distinctive features of cyberspace that call for a different approach to governance, but simply in recognition that as the Secretary-General has acknowledged, "the goals of the United Nations can only be achieved if civil society and Governments are fully engaged".<sup>365</sup>

### ***Governments***

One of the characteristics of traditional authority is that citizens' recognition of the state's authority is largely habitual,<sup>584</sup> so that states do not actually need to exercise physical coercion in order to secure widespread compliance.

Increasingly however, in the post-Westphalian age, states must ground their legitimacy in something more than tradition, by showing that their authority has been conferred democratically (which is a legal-rational basis, for Weber). For example, democratic rule is now an important criterion for the recognition of a new state, particularly if it wishes to exercise the unfettered right to participate in international affairs.<sup>585</sup> The primary ground upon which a state authority is now seen as legitimate is therefore that its government represents the interests of its citizens.

This is not to say however that the state fully and transparently represents all of the interests of its citizens, for if it did there might be no need of the other other three stakeholder groups. To so argue would assume that once the people have

vested their authority in the state, they have somehow disposed of it altogether. The contrary position is that there remains "the possibility of authority and legitimacy being relocated and the right to engage in coercive action thereby being redefined."<sup>586</sup> For one thing, the Internet has facilitated citizens' creation of and participation in new transnational civil society networks which coincide with no one state's territorial reach. ...

Thus states, whilst legitimate in their sphere, cannot be the only legitimate participants in international governance.

### ***Private law***

This is not as revolutionary a notion as it might sound. In medieval times, the "law merchant" or *lex mercatoria* was a system of law developed and enforced by merchants themselves, which enjoyed primacy over domestic law in the regions (mostly along trade routes) where it was applied.<sup>409</sup> The medieval law merchant did not derive its force from the consent of sovereign states, but operated independently and alongside the domestic law of the region. As Cutler explains,

[t]his gave rise to a dualistic system of commercial governance: the regulation of local transaction under the local systems of law and the regulation of wholesale and long-distance transactions under the autonomous law merchant system.<sup>410</sup>

This is not to say that domestic law of a particular region was suspended where the law merchant had effect. Rather, the authority of each legal system overlapped, and it is this characteristic of private lawmaking that is found also in its modern analogues. Jensen writes:

States and individuals may be members of different communities for different purposes. Just as we might understand the nation-state as an association between people who share a common language and cultural identity for the purposes of their mutual security and well-being, we might understand the various forms of transnational interaction (which include, but are not limited to, commerce and intellectual exchanges between citizens of different nation-states) as providing the germ for the emergence of numerous communities extending across state boundaries. Each of these communities would possess its own norms of conduct, expressed as either formal rules in treaties and commercial contracts or simply unexpressed mutual understandings. Such norms would enjoy legitimacy because their observance facilitates orderly interaction between members of the community and because they represent the opinion of the many rather than the rationally constructed will of the few.<sup>411</sup>

Thus there are today specialised transnational business communities that create and enforce their own transnational norms and rules, much as the merchants of medieval times did. Indeed these have been described as the "new law merchant" (or as transnational commercial law, transnational economic law, the law of private international trade, and international business law).<sup>412</sup>

### ***Civil society***

Much like the private sector, civil society has been active in influencing the development of international law since the 18th century, particularly in areas such

as the abolition of slavery, the pursuit of peace, worker solidarity and free trade.<sup>438</sup> Civil society was also central in the development of the international law of intellectual property, with the Berne Convention having been drafted by governments based upon the proposals of International Literary and Artistic Association, a civil society organisation headed by Victor Hugo.<sup>439</sup>

Civil society remains active in influencing the shape of international law today; in fact its effectiveness in doing so has only continued to increase through the use of technologies such as the Internet.<sup>440</sup> For example, civil society's participation was central to the success of climate change negotiations,<sup>441</sup> the prohibition of commercial whaling,<sup>442</sup> and the establishment of the International Criminal Court.<sup>443</sup> Since these issues cut across national boundaries, transnational NGOs have directly participated in international negotiations rather than through the intermediation of governments. As Charnovitz puts it,

It is illogical to tell an NGO like the ICC or the International Confederation of Free Trade Unions to channel its concerns through its own government. Such an instruction negates the purpose of the organization.<sup>444</sup>

Thus civil society has won permanent representation at a variety of intergovernmental organisations and conferences, including the World Bank's Panel of Inspection hearings on environmental issues, and with some false starts, the WSIS.<sup>445</sup> At the United Nations Conference on the Human Environment held in Stockholm, Sweden in 1972, there were more NGO representatives present than governments, and by 1987 in Montreal they were not merely observing but addressing plenary sessions in their own right.<sup>446</sup> ...

In 1994, then Secretary-General Boutros Boutros Ghali addressed NGOs in the following terms:

I want you to consider this your home. Until recently, these words might have caused astonishment. The United Nations was considered to be a forum for sovereign states alone. Within the space of a few short years, this attitude has changed. Non-governmental organizations are now considered full participants in international life.<sup>448</sup>

Taken a step further, whilst normally civil society's actions merely contribute to the formation of international law that must in the end be created by agreements between states,<sup>449</sup> there are cases in which NGOs have negotiated agreements with governments in their own right. For example, principles of the Declaration of Panama regarding tuna fishing standards was negotiated between a group of five environmental NGOs and Mexico in 1995, before being signed by eleven other governments.<sup>450</sup> Greenpeace also negotiated an agreement with France over damages to be paid to Greenpeace for the sinking of the Rainbow Warrior.<sup>451</sup>

Taken a step further still, civil society's role in international legal governance can bypass governments altogether. For example, it was civil society, including AIDS activists and organisations such as Doctors Without Borders/Médecines Sans Frontières, that were largely responsible for pharmaceutical companies agreeing to reduce the price of AIDS drugs to Africa and other third world regions during 200–001.<sup>452</sup> This was a case in which the private sector and civil society together achieved a public policy outcome without state intervention at all.

...

The preferable view is that it is not just the expertise that civil society brings, but rather the values it holds, that justifies its participation in international governance. It therefore draws its legitimacy from the promotion of substantive values for their own sake,<sup>593</sup> which is a value-rational ground. Put in more familiar terms, to include civil society in governance because of its expertise would be an instrumental justification for doing so (and doubtless private sector consultants could fulfil that role just as well), whereas to include it by reason of its promotion of substantive values is a normative justification.

On the face of it, this seems to overlap with the legitimacy of states, as are not democratic governments intended to provide a mechanism for the representation of the substantive values of their citizens? Perhaps so, but as noted above, that is not to say that those citizens thereby forfeit their right to form other communities of interest through which to express their values in other fora, that may transcend the state's boundaries. States legitimately represent only the interests that happen to be located within the state. How then can they be the sole sovereign agents, when the governed may choose delegate their sovereignty outside and across its borders too? Post writes,

Normative Liberal theory does not merely give "non-governmental organizations" a place at a negotiating table whose shape and agenda is defined by existing state actors; it places non-governmental institutions of all kinds and states on equal footing and asks, as a threshold matter: to which institution(s) has the "sovereign" delegated its power?<sup>594</sup>

The argument can be taken further: that NGOs are actually better representatives of their constituents' interests than are states, because they have "the function of representing people acting of their own volition, rather than by some institutional fiat".<sup>595</sup> There will be no reason for the formation of an NGO if its members' interests are already adequately represented by their states. But inevitably there are interests that states inadequately represent, and for which NGOs have become the dominant representatives.

Take for example Amnesty International<sup>596</sup> in representing the interests of political prisoners (whose interests are by definition ignored by their states), the International Campaign to Ban Landmines<sup>597</sup> in campaigning against the use of landmines (against the military interests of states), and Greenpeace<sup>598</sup> in lobbying for environmental protection (against states' economic interests).

These are not isolated cases, but examples of a systemic problem inherent in the concentration of authority in state organs. Just as the free market imperfectly achieves the value of efficiency to which it aspires (let alone other social values), so too the state, although it may be structured along democratic lines and aspire to fairly represent its citizens' interests, is inclined to represent powerful interests more successfully than those of social minorities and the economically powerless.

...

Thus the basis of transnational civil society's legitimate authority in international governance is that it acts as a check on the power of the state to the extent that the state's authority fails to adequately represent the interests of its citizens—particularly including interests that cut across states. Indeed, the Secretary General of the United Nations in 1994 acknowledged NGOs as "a basic form of popular representation in the present day world" that is "a guarantee of the political legitimacy of those international organizations" in which they

participate.<sup>603</sup>

### ***New medievalism***

The foregoing discussion of the contributions made not only by governments and intergovernmental organisations, but also by the private sector and civil society to the development of international law, are illustrative of the fact that the preeminence of the state's authority has receded since the zenith of the Westphalian age, and is continuing to do so.

In fact, as noted at Section 1.3.2, there are those who predict that the ongoing processes of cultural and economic globalisation, led by advances in information technology that erode the power of states (and equally indeed other territorially-based constructs such as national markets),<sup>489</sup> will lead to the irrelevance of nation states.<sup>490</sup> It is no longer fantastic to claim that the international actors of old are experiencing a crisis of relevance as non-state actors develop their own regulatory arrangements, their own law-like standards, their own arbitration systems, and so on.

Rosenau describes "a multi-centric world composed of diverse 'sovereignty-free' collectivities *which* has evolved apart from and in competition with the state-centric world of 'sovereignty-bound' actors", in which the "authority of states is regarded as undergoing relocation to proliferating actors in the multi-centric world—either 'outwards' to supranational and transnational collectivities or 'inwards' to subnational actors".<sup>491</sup>

Some have gone so far as to portend "the end of the nation state".<sup>492</sup> Hedley Bull, as long ago as 1977, in describing what he called a "neomedieval system" of international relations in emergence stated

that the demise of the states system is taking place as a consequence of the technological unification of the world—of which the multinational corporations and the non-state groups which conduct international violence are only particular expressions, and which is bound to lead to the politics of "spaceship earth" or of the "global village" in which the states system is only a part.<sup>493</sup>

On this account, governance in the post-Westphalian world occurs through a system of networks between authorities with "overlapping and competing competencies"<sup>494</sup>—international bodies, governments, corporations, civil and political organisations and citizens, mediated by technology.

...

It is not so much the death of states that is heralded by the new medieval age, but rather the fact that they will no longer be privileged over other actors in international fora. They are neither capable of being so privileged, as the governance of many transnational issues is literally outside their competence,<sup>500</sup> nor are they entitled to be so privileged, as their legitimate authority does not extend to those who have neither participated in nor consented to their lawmaking.<sup>501</sup> States are now required, not merely as a matter of courtesy or protocol, but as a lynchpin of their legitimacy and therefore their authority, to cooperate with other international actors as equal partners.

## ***Transnational law***

For present purposes, transnational law comprises those forms of international governance that exist apart from formal state or intergovernmental institutions, or as Rosenau puts it, "regulatory mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority".<sup>572</sup>

...

Twining writes,

*A ius humanitatis*, a transnational *lex mercatoria*, Islamic law, transnational humanitarian and human rights law, and, in a different way, some new regional orderings, and even parts of public international law itself are all arguably more or less clear examples of the amorphous category "non-state law". ... [A]n account of the phenomenon of law in the contemporary world would for most purposes be incomplete if it did not treat of [these] legal families and legal cultures.<sup>573</sup>

Whilst one might demur at whether some of these examples do or should have the status of law, the criteria by which their claim to do so can be assessed should surely be derived empirically rather than by the formulistic application of a doctrine inherited from Westphalia that only admits of hard international law and the domestic law of governments as law. So, what is law, fundamentally?

H L A Hart's classic examination of this question in *The Concept of Law* concluded that a legal system is a system of primary and secondary rules—primary rules governing conduct that are generally obeyed by the citizens, and secondary rules governing how primary rules are made, amended, repealed, interpreted etc, that are accepted by public officials.<sup>574</sup> But Hart did not claim to offer a definitive definition of law,<sup>575</sup> and indeed he did not, as by his own concession his conclusions were problematic for international law which lacked many of the features of a fully developed legal system, yet was widely recognised as law.

A more recent attempt to accommodate diverse legal phenomena within a single framework is Tamanaha's *A General Jurisprudence of Law and Society*, in which he reassesses Hart, abstracts out some of the conceptual underpinnings of his *Concept of Law*, and concludes simply that "Law is whatever people identify and treat through their social practices as law".<sup>576</sup> If this sounds familiar, it may be the echo of the authority and control test of the New Haven School, or even the *opinio juris* test for the existence of customary international law, as all of these are to a large degree restatements of the same recurrent theme, expressed with greater or lesser generality.

Enough has been said for the contention of this paper to be made plain: that the formal defining criteria of international law are too narrow to be complete (or perhaps even useful) in the post-Westphalian age, as they leave a gaping hole between international law and domestic law, for which there is no conceptually consistent reason, and to which orthodox international lawyers are wilfully blind.

The concept of transnational law as law fills that hole, allowing non-state actors and their private law the conceptual place in international society that they already, plainly, possess in practice. It is primarily transnational law, and only incidentally (if at all) international law, that is the product of international legal governance by network.

## ***Internet governance as transnational law***

The acceptance of the regime of Internet governance as an autonomous legal order is shown both in the words of international actors—the very words of the Tunis Agenda acknowledge it<sup>721</sup>—and also through their actions, such as concluding agreements with ICANN and their passage of domestic and international instruments that complement rather than seeking to trump or trammel the existing regime.<sup>722</sup> (A like case is the way in which states recognise and support the new law merchant through accession to the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration which reinforce the transnational commercial arbitration regime.)

Recognition of Internet governance as a regime is not limited to the United Nations. It is also recognised by scholars such as Spar who considers it as a private international regime (but allows that the private sector will control "not the Internet of course, but their own growing corners of commerce and communication ... through a combination of formal and informal rules, administrative and technical means"),<sup>723</sup> and Franda who considers it an international regime in formation, driven by the "eclectic and flexible nature of the technology",<sup>724</sup> in which the parameters of its governance are shaped by "a wide variety of private business firms, governments, universities and scientific, professional and epistemic communities spread across the globe".<sup>725</sup>

However the terminology of regime theory, being rooted in international relations theory, obscures something very important about Internet governance that has been lost since we have ceased to speak of its reception into customary international law, and that is the scope for the institutions of Internet governance to be seen as law (for a regime is nothing other than transnational law, restricted to a single issue—area<sup>726</sup>).

It is important to make that point, because if it is not made, it is implicitly being claimed that governance of the Internet is fundamentally dependent for its force upon the old Westphalian system of international and domestic law. While it is true that some of the institutions present in Internet governance remain loosely tied to that system (ICANN to the United States government, the IGF to the United Nations), it is vital to comprehend that the transnational law that they create is not so tied, loosely or otherwise.

This is not to say that the two systems of law cannot interact. They can, and will, and do. But the fundamental point is that the transnational law of Internet governance need not collapse if states ceased to take any part of it. It need not even do so even if states ceased to recognise it, as they do at present, for it is settled that a state's failure to recognise an independent and coexistent system of law does not extinguish it.<sup>727</sup>

Having said that, in practice the fate of the nascent regime of Internet governance as it matures under the leadership of the IGF remains a matter of speculation. Whilst it does have the potential to flourish into a fully formed transnational legal institution that would survive cut free of its roots, there is also the risk that it will become dominated by state hegemony and be absorbed into the old international legal system.

It is important that the IGF does not allow this to happen, that it lives up to its mandate to initiate "a transparent, democratic, and multilateral process, with the

participation of governments, private sector, civil society and international organizations", rather than becoming not just another intergovernmental organisation beholden to its Westphalian masters.

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## Notes

- [4] WSIS, *Tunis Agenda for the Information Society* (2005), paragraphs 68, 69, 77
- [5] McCullagh, Declan, *Bush Administration Objects to .xxx Domains* (2005).
- [6] WSIS, *Tunis Agenda for the Information Society* (2005), paragraphs 29, 73, 77
- [42] Rosenau, J and Czempiel, E. (eds), *Governance Without Government: Order and Change in World Politics* (1992), 4
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