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Review Essay

The Internet and Public International Law — Worlds Apart?

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Abstract

An international law dimension of the Internet seems to be emerging. This dimension is not limited to the framework of constraints of existing international law on national or regional efforts towards Internet regulation, but is also about the creation of new international law. It is increasingly clear that various international organizations already compete with each other on this turf of international Internet regulation. If the crucial aspect of Cyberspace regulation is code, as Lessig argues, then the question will be: How can we make sure that code is not hijacked by powerful private vested interests or by countries more advanced in computer technology, thereby imposing their values on others. One answer would be to take the questions about code to the arena of public international law. All will depend on the will of the international community — and, particularly, the will of individual states — to insist on dealing with the subject of Internet regulation as a subject of ‘valid international interest’ in the public international law arena on a truly multilateral basis.

If there is a link between the factual dimension of a given subject and the need for an international regulatory perspective on this subject, then the Internet is a natural topic for the international lawyer. In spite of this, it seems that so far the Internet has not been the subject of extensive scholarly public international law research.¹ Although scholars have started thinking extensively even about how cyberspace affects administrative law,² corresponding reflections are few and far between in the realm of public international law. Still, the different strategies of how to deal with the

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¹ Recent contributions to the topic of the Internet and international law include: Grewlich, *Governance in ‘Cyberspace’ — Access and Public Interest in Global Telecommunications* (1999); Ibusuki (ed.), *Transnational Cyberspace Law* (2000), focusing on economic transnational aspects; Wedgwood, ‘The Internet and Public International Law: Cyber-Nations’, 88 *Kentucky Law Journal* (2000) 957.

² Hoffmann-Riem and Schmidt-Alßmann (eds), *Verwaltungsrecht in der Informationsgesellschaft* (2000).

Internet from a public international law perspective become more and more visible. The logical first step towards linking cyberspace and international law has been to ask what restrictions international law imposes on domestic law efforts to regulate the Internet.

This is the approach adopted by Patrick G. Mayer in *Das Internet im öffentlichen Recht (The Internet and Public Law)*,³ the book version of a doctoral dissertation in law submitted to Tübingen University. The book is mainly about German administrative law dealing with the Internet: the Federal Telecommunications Statute (*Telekommunikationsgesetz*, TKG), the Federal Statute on Information and Communication Services (*Informations- und Kommunikationsdienstegesetz*, IuKDG), the Teleservices Statute (*Telemediengesetz*, TDG) and the Mediaservices Interstate Agreement (*Mediendienste-Staatsvertrag*, MDStV). The underlying thesis of the author is that self-regulation of the Internet should play a more important role. Public international law aspects of the Internet are only dealt with on 20 pages of the 265-page book (pp. 111 *et seq*), under the aspect of what international law constraints domestic Internet regulation has to comply with. European law is examined separately (pp. 124 *et seq*).⁴

The author suggests distinguishing four categories of international law aspects that have to be taken into consideration: principles, general international treaty law, international communication treaties and international initiatives to regulate the Internet.

As to principles, the author first states briefly that the ‘free flow of information’ is not generally recognized as an international law principle, then turns to the principle of non-intervention, relating them to issues such as hacking, assaults on the infrastructure of states and intervention through mere intrusion by communication. As for Internet-related general treaty law, Mayer points to the area of human rights law, in particular to the freedom of speech and freedom of information provisions in the 1948 United Nations General Declaration and of the International Covenant on Civil and Political Rights. We are told that international treaty law aiming specifically at communication activities has not managed to reach a consensus on material standards. The main international instrument of relevance here is the treaty establishing the International Telecommunications Union (ITU); the author also mentions the Convention Concerning the Use of Broadcasting in the Cause of Peace, established under the auspices of the League of Nations in 1936, and communications-related provisions in bilateral agreements such as the Treaty on German–American Friendship of 1954 and agreements on cultural exchange. Turning to his final category, international law initiatives to regulate the Internet, the author first goes back to the ITU and outlines the ITU’s attempts to get involved in Internet regulation; which have mainly been efforts to participate in the domain name system

³ Patrick G. Mayer, *Das Internet im öffentlichen Recht. Unter Berücksichtigung europarechtlicher und völkerrechtlicher Vorgaben* (Berlin: Duncker & Humblot, 1999) 265 pp., DM 98.

⁴ For a comprehensive description of European law aspects of the Internet, see Kloepler and Neun, ‘Rechtsfragen der europäischen Informationsgesellschaft’, *Europarecht* (2000) 512; for a conceptual analysis, see F.C. Mayer, ‘Europe and the Internet: The Old World and the New Medium’, 11 *EJIL* (2000) 149.

administration with a view to establishing digital technical standards. Those standards have not gone very far, partly, according to Mayer, because of the dominance of US computer, network and telecommunications industries. Then, he briefly outlines the WTO/GATS aspects of Internet regulation, which, above all, concern deregulation of and access to telecommunications markets. Finally, UNESCO is described as an international organization that has been strongly committed to the issue of a new information world order for some time, trying to define a new, more important role for itself after the end of the Cold War. What is missing from this public international law *tour d'horizon* are the WIPO⁵ and the G8⁶ efforts concerning the Internet.

Mayer's approach is not to explore further the relationship between the Internet and international law and the question of how the Internet may change international law; he takes international law as a given framework from a German, municipal regulatory point of view.

A quite different view is adopted in a book published by UNESCO, *Les dimensions internationales du droit du cyberspace*.⁷ UNESCO and its possible motivation to get involved in the cyberspace issue, briefly mentioned in Patrick Mayer's brief overview on public international law aspects of Internet regulation, is explained in detail by Teresa Fuentes-Camacho, a UNESCO lawyer, in the introduction to the UNESCO book. Unlike Mayer, she does not refer to UNESCO's post-Cold War quest for a new role. She stresses the responsibility of the United Nations system for the development of international law in the electronic era in general, and the role of UNESCO as the only UN specialized agency with 'interdisciplinary competences' in particular, acknowledging the need for cooperation with the Council of Europe, the EU, the OECD, the ITU, UNCITRAL, WIPO and the WTO. It is not without some irony that, of all UN specialized agencies, it should be UNESCO, of which the US is not a member state (any more), that aims to play a role in Internet regulation. After all, the Internet was a US invention and is still dominated by the US.

After the introduction, six studies dealing with different aspects of the relationship between international law and the Internet are presented. They all start out from the question raised by the General Conference of UNESCO in 1997 on the necessity of an international agreement on cyberspace. Elizabeth Longworth's analysis of a legal framework for cyberspace (pp. 11–87) is the most comprehensive study in the book, which covers most aspects of the relationship between public international law and cyberspace. She raises questions such as the necessity for a new international treaty defining the legal regime of cyberspace, the notion and structure of cyberspace, customary law in cyberspace, the settlement of disputes in cyberspace and international cyberspace courts, the prospects of defining cyberspace as an international space such as the high seas or the Antarctic, and the idea of an international

⁵ See <http://wipo2.wipo.int/process/eng/processhome.html>.

⁶ See the references at <http://www.g7.utoronto.ca>.

⁷ UNESCO (ed.), *Les dimensions internationales du droit du cyberspace* (Paris: Editions UNESCO, 2000) 284 pp., FF 170.

organization dealing with cyberspace. Her conclusion is that there will be a multidimensional, decentralized mode of governance of the Internet, with the need for states to make a sustained effort to carry on an international dialogue on the issue. The other studies in the book also raise fundamental questions concerning the notion of law in cyberspace (Yves Poulet) or cover more specific issues such as freedom of speech and access to information from an international point of view (Gareth Grainger), the parallels between outer space, governed by international law, and cyberspace (Ann Maria Balsano), responsibility in cyberspace (Pierre Trudel) and the notion of morality in cyberspace (Christina Hultmark). Having read all these studies, though, one is left without a clear regulatory perspective. Internet regulation on the public international law level turns out to be a complex issue with numerous aspects, escaping a simple answer to the question raised by the UNESCO General Conference on the necessity and feasibility of an international Internet agreement.

At this point, it may be useful to go back to the question of what regulating the Internet is all about, which brings me to Larry Lessig's book, *Code is Law*, published in 1999.⁸ Lessig is a law professor at Stanford Law School who has been writing extensively on cyberspace law since the mid-1990s and who has also been involved in the Microsoft antitrust case (against Microsoft). His approach is basically that the euphoric view that prevailed during the 1990s of cyberspace as a place of freedom that cannot be regulated and that is more or less immune to control, has turned out to be wrong (p. 5). He stresses that cyberspace is a technical construct that is established by 'code'. Code can be software, architecture and protocols, and it constrains behaviour (pp. 89 *et seq*; pp. 104 *et seq*), and code can create a place of far-reaching control as technical architecture can regulate individual freedom as much as any legal rule. Lessig detects a trend towards more and more regulation through code under the influence of commerce, which according to him is not inevitable, as there is a choice as to what cyberspace will be like and what freedoms it will guarantee: the choice is all about architecture, 'about what kind of code will govern cyberspace, and who will control it and what values that code embodies' (pp. 61 *et seq*). According to Lessig, governments have a wide range of tools they can use to regulate, and cyberspace expands this range: by regulating the code writing, governments can indirectly achieve regulatory ends, often without suffering the political consequences that the same ends pursued directly would have (p. 99). However, Lessig does not bring his argument to a satisfactory conclusion and does not inquire about the appropriate arena for this kind of regulatory problem: from an international law perspective, the most intriguing aspect of Lessig's book is that he barely mentions international law at all, instead he remains focused on intra-American dichotomies such as West Coast (computer) code versus East Coast (legal) code. If it is correct that liberty in cyberspace will not come from the absence of the state, but from the state of a certain kind, as Lessig claims (p. 5), the question arises whether that authority should be that of one particular state or whether it should not be exercised by the community of states on the international level. A striking example in that context that Lessig does not deal

⁸ Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999) 230 pp., USD30.

with, but which is very instructive from a public international law point of view, is ICANN, the Internet Corporation for Assigned Names and Numbers, which has existed since 1998 and is a private non-profit organization incorporated under Californian law. ICANN is responsible for the control of the domain name system, the distribution of IP addresses, the development of new standards for Internet protocols and the organization of the root-server system of the Internet; it also reaches into the realm of general technical standards and protocols of the Internet. European initiatives to attribute these matters to an appropriate internationally constituted and representative body have not been successful. Although ICANN is internationally oriented, as its bylaws provide for geographic diversity of the members of the board, the problem remains that ICANN is incorporated under Californian law and is subject to US jurisdiction. ICANN has repeatedly been subject to US Congress scrutiny: after US House of Representatives hearings in June 1999 over fees levied by ICANN, Congress scheduled hearings in February 2001 to determine whether the organization's selection process for new generic top-level domain names is thwarting competition.⁹ As ICANN is recognized as the final authority on matters of domain names by WIPO,¹⁰ we have the noteworthy situation that an international organization defers to a corporation subject to a US jurisdiction and under US Congress scrutiny. If code is law, the ICANN example shows to what extent law-making/code-making is not only threatened by vested economic interests, which are Lessig's major concern, but also vulnerable to unilateral control of states.

What conclusion can be drawn from this brief glimpse into contemporary Internet literature? A prediction made some years ago by a US Internet scholar was that the Internet would change international law because it would erode the dominance of traditional sovereign states.¹¹ This has not become reality yet.¹² At least, an international law dimension to the Internet seems to have emerged. This international law dimension is not limited to the framework of constraints of existing international law on national or regional efforts at Internet regulation: it is also about creating new international law. The UNESCO book makes it obvious that different international organizations already compete with each other on this turf of international Internet regulation. If Lessig is right and if the crucial aspect of cyberspace regulation is code, then the question will be how we can make sure that the code is not hijacked by powerful private vested interests or by countries more advanced in computer technology than others, thus imposing their values on others. One answer would be to take the questions about code to the arena of public

⁹ See <http://www.house.gov/commerce/news107/01122001.htm>.

¹⁰ See <http://wipo2.wipo.int/process/eng/processhome.html> for more details. See also the position of the European Community and its member states on the WIPO efforts, <http://www.ispo.cec.be/eif/dns/wiporf2.html>.

¹¹ Perritt, 'The Internet is Changing International Law', 73 *Chicago-Kent Law Review* (1998) 997.

¹² See, in that context, Kaiser, 'Wie das Internet die Weltpolitik verändert', *Frankfurter Allgemeine Zeitung*, 10 January 2001, 8, who already sees a significant loss of national governments' capacities to determine developments of their respective societies.

international law.¹³ In the end, it will all depend on the will of the international community¹⁴ — and, in particular, the will of individual states — to insist on dealing with the subject of Internet regulation as a subject of ‘valid international interest’¹⁵ in the public international law arena on a truly multilateral basis. The decision to engage in this kind of effort is a political one.

¹³ See Lessig, *supra* note 8, at 206, who expects the emergence of a fairly unified regulation through code, while the law remains in flux, causing a shift in regulatory power ‘from law to code, from sovereigns to software’.

¹⁴ See, in this context, Simma and Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *EJIL* (1998) 266.

¹⁵ The notion is borrowed from a response to the US Government’s Green Paper on Internet Names and Addresses of 1998 by the European Commission and the Council on behalf of the European Community and its Member States of 16 March 1998, <http://www.ispo.cec.be/eif/policy/govreply.html>.