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Global Information Law – Some Systemic Thoughts

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A. Introduction

This paper on "global information law" is not dealing with one or a limited number of specific issues of trade governance in the digital age. Rather, the aim of this paper is to provide for a broad overview on the international legal framework that is concerned with new forms of cross-border communication and information. We thus follow, at least to some extent, the early approach of *Charles Henry Alexandrowicz* in his 1971 book on "The Law of Global Communications".[1] In addition to introducing and clarifying the term "global information law", this paper identifies, first, relevant actors, second, areas of regulation and third, underlying normative concepts of the international information order. In this regard, the paper is an invitation for further discussions on some broader systemic issues of governance in the digital age. It is thus an attempt not to solve concrete problems, but to enhance our understanding of international communication and information.

B. Preliminary Remarks on the Notion "Global Information Law"

Global or international "communication" in the sense it was understood by, *e.g.*, *Alexandrowicz*, may be defined as any trans-border interaction of governments, corporations or individuals. In this broad sense, global communication encompasses, *inter alia*, international air-, land and sea traffic, trans-border transactions of goods and services, and intergovernmental communication in its various informal and diplomatic forms.[2] In the present context, communication has to be seen in a more narrow sense of one-way or multiple cross-border analogue or digital transmission of information via any available means, *i.e.* cable, terrestrial or satellite. The notion of a world information and communication order has been used in line with this understanding since the 1970s. Due to the convergence of media and thus a focus on the act of transmission, today it seems more appropriate to focus on information instead of communication. International or global information law is thus concerned with any cross-border transmission of information in the indicated sense and is part of the broader concept of the information society.

However, speaking of global information law and a global information order does not imply that we are in a position to identify a single, coherent and comprehensive legal order of global information. Instead, "global information order" *only* refers to the multitude of actors and steering instruments of public international law, private contractual law and soft law being relevant in the different fields of global communication and information. This is in line with the understanding of the legal implications of

* This paper is based on a presentation given at the World Trade Forum 2010 of the World Trade Institute (WTI), Bern, Switzerland, on 3/4 September 2010. The paper will be published also in the conference report of the World Trade Forum.

[1] *Alexandrowicz*, The Law of Global Communications.

[2] See, *e.g.*, *Delbrück*, in: Thesaurus Acroasium XV, 77 *et seq.*; *Tietje*, Internationalisiertes Verwaltungshandeln, 424 *et seq.*

the information society as articulated during the World Summit on the Information Society (WSIS) of 2003/2005.[3]

C. Historical Aspects

Even though information technology and thus also global information law seem to be phenomenon of the recent time of globalization, one has to realize that the history of international communication and information is quite old. Most important in this regard is the 19th century. Due to the rapid development in the technology and its accompanying new possibilities for cross-border communication – the invention of the Morse code, the telegraph and the installation of the first transatlantic cable in 1858/1866[4] –, international organizations were created to administer the emerging challenges and problems. The International Telegraph Union was established in 1865 and after several changes in its treaty-based constitution, it continues to operate today as the International Telecommunication Union (ITU).[5] The Universal Postal Union (UPU) followed in 1874.[6] International unions not only came into existence in the field of communication, but also in other areas of administrative concern closely connected to communication and information,[7] *e.g.* the International Union of Railway Freight Transportation (1893), the International Maritime Committee which has held annual conferences since 1897, the Metric Union (the International Bureau of Weights and Measures) established 1875 in Paris, the Unions for the Bern and Paris Convention which merged in 1892 and is now known as the World Intellectual Property Organisation (WIPO), the Union for the Publication of Customs Tariffs of 1890 and the Permanent Commission for the Sugar Convention established in 1902.[8]

It is interesting to see that the regulatory challenges in the areas of communication and information in the 19th century not exclusively, but to a large extent shaped early debates on international administrative law. Most famous in this regard is the book "Public International Unions, their Work and Organization: A Study in International Administrative Law" by *Paul Reinsch*, published in Boston in 1911.[9] It seems to be

[3] See WISI Outcome, Documents 2005, available at: <http://www.itu.int/wsis/outcome/booklet.pdf> (last visited on 31 January 2011).

[4] For a comprehensive assessment see, *e.g.*, *Tegge*, Die Internationale Telekommunikations-Union.

[5] For details on the ITU see *Noll*, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2, 1379 *et seq.*; *Tegge,* Die Internationale Telekommunikations-Union, passim.

[6] For details on the UPU *Weber*, L., in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 4, 1235 *et seq.*

[7] For historical aspects on this development see *Bindschedler*, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2, 1289 (1292 *et seq.)*; *Weber*, A., Geschichte der internationalen Wirtschaftsorganisationen.

[8] For details see *Reinsch*, AJIL 1 (1907), 579 *et seq.*; for a detailed empirical assessment on all international organizations established between 1815 and 1964 see *Wallace/Singer*, International Organization 24 (1970), 239 *et seq.*

[9] For a comprehensive assessment on the historical development of international/transnational administrative law see *Tietje*, in: Dilling/Herberg/Winter (eds.), Transnational Administrative Rule-Making, 23 *et seq.*

that this historical importance of law on international communication and information is not always realized while discussing today "global administrative law" (GAL).[10]

With regard to substance, already the mentioned early legal frameworks and institutions in the area of communication and information were influenced by tensions between free flows of information on the one hand and sovereign rights of states to control cross-border flow of information on the other. Moreover, also factual limitations on global information flows became obvious early in modern history because of monopolies on international information created by, *e.g.*, *Reuters* (1851 London), *Havas* (1835 Paris), and the *Associated Press* (1846 New York). However, the first real international conflicts with regard to control and restriction on cross-border flow of information only occurred after radio transmission become common in the 1920s. Next to the issue of war propaganda in relation to radio transmissions, with the formation of the Soviet Union, the use and role of communication and information in different political systems became a serious issue already in the 1920s.

International conflicts on cross-border communication and information continued and even increased after World War II. However, the focus of the respective conflicts shifted from tensions between capitalist and socialist countries to north-south conflicts. After the rapid development of satellite technology in the 1960s, and namely the emerging problem of "overspill" of satellite transmissions, developing countries strongly argued in favour of possibilities to protect their cultural identity against "western" influence. This development led to the call for a "New World Information and Communication Order" (NWICO or NWIO) in the 1970s as part of the larger debate on a "New International Economic Order". The debate on a NWIO was dominated by the demand of developing countries for comprehensive possibilities to restrict cross-border information and communication and transfer of technology on the one hand, and the opposing calls of the "western" world, namely the US, for a human right of free flow of information.[11] Both, today's "digital divide" and current attempts in several countries to restrict the use and the content of internet communication cause very similar problems.

The historical perspective on global information law is certainly not intended to suggest that today's challenges in the area of communication and information are identical to those 100, 40 or even 30 years ago. Today's challenges to intellectual property rights, with regard to net security, liberalization of international services in the communication area, etc., create entirely new problems. However, it is not only worth, but necessary to study the history of global information law and policy in order to understand why, *e.g.*, the attempt of the World Summit on the Information Society of 2003/2005 to establish a world information and communication order causes so many problems. Trying to establish a governance order of global communication and information, as it was the idea of the World Summit on the Information Society and as it is still today with regard to the follow-up process, is facing systemic challenges quite similar to the discussion on a NWIO in the 1970s. Two main issues that cause problems may be highlighted again: First, the tension between cultural, political,

[10] For details on the GAL project see: <http://www.iilj.org/GAL/> (last visited on 31 January 2011).

[11] For further details on the entire topic see *Tietje*, in: Hans-Bredow-Institut (eds.), Internationales Handbuch Medien, 15-40.

socio-economic, etc. sovereignty on the one hand, and free flow of information on the other. Second, the inherent international/global dimension of information and communication inevitably causes an institutional governance structure of a multitude of governmental, intermediate and non-governmental actors.

D. Actors

Talking about international law in a classical sense implies to identify the subjects of international law being relevant for a specific area of regulation. This approach, however, is not appropriate while discussing governance structures. As the global information order in the present context is understood not to be of a comprehensive nature of one legal order, but rather as a network,[12] the focus has to be on all relevant actors, *i.e.* not only on subjects of public international law. This rather broad perspective is crucial in order to comprehensively analyse and discuss regulatory structures of global information law.

States are of course still very important actors in the global information order. The importance of regulatory autonomy of states is highlighted, *e.g.*, in the preambles of the Constitution of the International Telecommunication Union (ITU)[13] and the GATS.[14] However, as information and communication has an inherent cross-border dimension, regulatory autonomy of states is highly restricted in practice. Already the historical development in the 19th century indicated that any regulation in the area of information and communication is dependent on international cooperation. Structures of international cooperation thus emerged shortly after the emergence of global communication technologies. Most important in this regard is probably the ITU with its 191 member states. Even though the ITU with its three sectors, Radio Communication (ITU-R), Standardization (ITU-T), and Development (ITU-D), for a long time had been concerned primarily with "technical" aspects of international information and communication, this has shifted to increasing tasks also with regard to content. The role of the ITU with regard to the World Summit is evidence of this development. However, the technical dimension of the work of the ITU remains important not only concerning the concrete work carried out, but also as regard the non-political aspects of this work. It was due to this technical and non-political character

[12] On network structures in the international systems and there relevance for public international law see, *e.g.*, *Slaughter*, A New World Order, 3 *et seq.*; *Möllers*, in: Oebbecke (ed.), Nicht-Normative Steuerung in dezentralen Systemen, 285-302; *Nowrot*, Netzwerke im transnationalen Recht und Rechtsdogmatik, 5 *et seq.*

[13] "While fully recognizing the sovereign right of each State to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of all States, the States Parties to this Constitution, as the basic instrument of the International Telecommunication Union, and to the Convention of the International Telecommunication Union (hereinafter referred to as "the Convention") which complements it, with the object of facilitating peaceful relations, international cooperation among peoples and economic and social development by means of efficient telecommunication services, have agreed as follows…", available at: <http://www.itu.int/net/about/basic-texts/index.aspx> (last visited on 31 January 2011).

[14] "Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives…".

of the ITU that one of the few cooperation agreements concluded by the WTO with another international organisation is with the ITU.[15] Moreover, the ITU is interesting for broader governance issues because of its ability to contingently adjust to new technological and/or political challenges. ITU has thus undergone several reform processes in the last decades. Moreover, the important role of ITU in governance processes in the global information order is characterized by the fact that not only states are members of the organization, but also 562 sector members and 156 associates, most of them being of a non-governmental nature. ITU is thus a prime example of public-private partnership in global governance.

Further important actors in the area of global communication and information are part of the UN family. ECOSOC has to be mentioned first in this regard, as it is responsible for the WISI follow-up process.[16] However, one should also not forget UNESCO with its special programme on "Communication and Information" and its concrete work with regard to, *e.g.*, freedom of information.[17] Moreover, UNCTAD has a programme on "Information and Communication Technologies (ICT)"[18] that is important for developing and least developed countries. As a further UN actor, one should mention UNCITRAL for legal issues of e-commerce[19] and WIPO[20] with regard to intellectual property rights. Next to the WTO but on a plurilateral level, the OECD is of course also carrying out important work with regard to communication and information.[21]

Other important actors are of an intermediate or purely private nature. This is true, *e.g.*, for numerous international and regional standardization bodies, including ICANN, and several civil society groups.[22] Moreover, important functions for international communication and information are carried out by the different satellite organisations (INTELSAT; ITSO; INMARSAT; ARABSAT; EUTELSAT; INTERSPUTNIK). All of them have been privatized and/or undergone major reforms in the last 15 years.[23] The thus obvious importance of non-state actors in the area of information and communication is further highlighted, *e.g.*, if one considers the activities of the International Chamber of Commerce with regard to e-commerce. Since the development of the "Uniform Rules of Conduct for Interchange of Trade Data by

15 Agreement between the International Telecommunication Union and the World Trade Organization, WTO Doc. S/C/11 of 21 September 2000.

16 See, *e.g.*, Assessment of the progress made in the implementation of and follow-up to the outcomes of the World Summit on the Information Society, ECOSOC Resolution 2009/7 of 24 July 2009.

17 See, *e.g.*, *Mendel,* Freedom of Information: A Comparative Legal Survey.

18 See UNCTAD, Information Economy Report 2010, United Nations Publications: UNCTAD/IER/2010, available at: <http://www.unctad.org/en/docs/ier2010_embargo2010_en.pdf> (last visited on 31 January 2011).

19 UNCTAD Working Group IV, see: http://www.uncitral.org/uncitral/en/commission/working_groups.html (last visited on 31 January 2011).

20 <http://www.wipo.int/portal/index.html.en> (last visited on 31 January 2011).

21 See, *e.g.*, OECD, Information Technology Outlook 2010.

22 For an assessment on numerous different actors in the area of communications, electronics, and media see: *Tietje/Brouder* (eds.), Handbook of Transnational Economic Governance Regimes, 503 *et seq.*

23 See, *e.g., Lyall/Larsen*, Space law: a treatise, 199 *et seq.*

Teletransmission" (UNCID) in 1987, ICC has started several initiatives on different aspects of e-commerce being relevant for the international business community.[24]

Finally, at the end of this short and certainly not comprehensive account of actors in the global information order, one must not forget the individual. This actor is central to today's means of communication, namely the power that individuals now have within the system. Moreover, the individual is increasing recognized in the global information order as a subject of international law, namely with regard to free flow of information as a human right. Moreover, even if one is not (yet) ready to grant the individual a legal position in the global information order, namely the economic dimension of international communication and information depends on individual activities. Indeed, the purpose of many of the binding and non-binding rules and principles of the various regimes which affect global information and communication as part of economic processes "[i]s to produce certain market conditions which would allow … individual activit[ies] to flourish".[25]

E. Substantive Principles and Rules

Even though the global information order is understood in the present context not to be one comprehensive and single international legal order, but rather characterized by a network structure, one may identify some core regulatory structures shaping global information and communication.

From a legal perspective, it is first of all important to highlight that, after the failure of establishing a "New World Information Order" in the 1970s, the WSIS of 2003/2005 also failed in this regard. All results of the WSIS, *i.e.* namely the "Geneva Declaration of Principles", the "Geneva Plan of Action", the "Tunis Commitment" and the "Tunis Agenda for the Information Society", are non-binding and moreover, in terms of substance, do not establish a comprehensive global order of information and communication. This, however, does not mean that one should ignore the WSIS and its outcome in such different areas as human rights, development issues, net and frequency administration, administration of the internet, net-security, and general issues of social and economic development.[26] An attempt for more, *i.e.* efforts towards a comprehensive global information order, failed because of different political perspectives, namely with regard to the human right aspect of information and communication.

For the time being, the ITU legal order is still at the centre of a global information order. The ITU legal order is also an important example of international administrative law. This is also true for the European Conference of Postal and Telecommunications Administrations (CEPT) on the regional level. The work of these organi-

[24] On the activities of the EBITT Commission of the ICC see: <http://www.iccwbo.org/policy/ebitt> (last visited on 31 January 2011).

[25] *Cf.* WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 22.12.1999, WT/DS152/R, para.7.73; for a comprehensive assessment see *Tietje/Nowrot*, Forming the Centre of a Transnational Economic Legal Order?, 321-351.

[26] For details see the different contributions in: *Benedek/Pekari* (eds.), Menschenrechte in der Informationsgesellschaft.

sations is supplemented by additional standardization activities of several intermediate and non-governmental institutions. One may say that the technical basis for economic activities on formerly analogue is now increasingly focused on digital trade markets.

A prominent role in that part of the global information order that deals with economic issues is of course played by the WTO legal order. This concerns different issues regulated by GATT law, such as trade with IT products and namely the "Information Technology Agreement", indirect e-commerce with regard to goods delivered as physical products, and the cultural exception clauses in the goods area of Art. III:10, Art. IV, and Art. XX GATT 1994. Moreover, e-commerce and other aspects of economic activities in the area of global information and communication are intensively regulated by the GATS. In this regard, in addition to general rules and commitments of GATS ("technological neutrality"), the special telecommunications legal regime of the GATS, the rules on financial services, and the moratorium on duties on electronic transactions of WTO members are important. Equally important and closely connected to respective work of WIPO are the principles and rules of TRIPS. However, in addition to highlighting the importance of WTO for global information and communication, it is also important to notice that there is not much progress on the work programme for electronic commerce of 1998.[27]

Even though the WTO legal order plays an important role for trade in the digital age, other regimes are at least equally important. With regard to public international law treaties, the increasing number of Preferential Trade Agreements (PTAs) with explicit e-commerce provisions and respective work within the framework of preferential trade areas has to be mentioned. A first example in this regard is ASEAN and its "e-ASEAN Framework Agreement" of 24 November 2000, on the basis of which until recently comprehensive measures for harmonisation member states' domestic legislation on e-commerce have been adopted and implemented.[28] The East African Community (EAC) has started a similar project in January 2008 and established the "EAC Regional Task Force on Cyber Laws". Concerning treaty provisions in PTAs, the free trade agreement between the USA and Jordan of 24 October 2000[29] probably was the first treaty of this kind with an explicit provision on e-commerce (Art. 7). Even more comprehensive rules on e-commerce can be found in all PTAs concluded

[27] For details see, i.a., Work Programme on Electronic Commerce, State of Play and Reports by the Chairpersons, WTO-Dok. WT/GC/103 of 7 December 2005; Sixth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 7 and 21 November 2005, WTO-Dok. WT/GC/W/556 of 30 November 2005; Work Programme on Electronic Commerce, WTO-Dok. WT/GC/W/555 of 21 November 2005.

[28] The text of the e-ASEAN Framework Agreement is available at: www.aseansec.org/6267.htm (last visited on 31 January 2011); for details on the entire project see: UNCTAD, Information Economy Report 2007-2008 – Science and Technology for Development: The New Paradigm of ICT, 2008, 321 *et seq.*, available at: <http://www.unctad.org/en/docs/sdteecb20071_en.pdf> (last visited on 31 January 2011).

[29] In force since 17 December 2001, reprinted in: I.L.M. 41 (2002), 63 *et seq.*; see also already the „U.S.-Jordan Joint Statement on Electronic Commerce" of 7 June 2000, available at: <www.jordanusfta.com/documents/joint_statement_on_e-commerce.pdf> (last visited on 31 January 2011); *Nsour*, Fordham International Law Journal 27 (2003), 742 *et seq.*, at 748 *et seq.*

by the USA since then.[30] Similar, comprehensive chapters on e-commerce are contained, *e.g.*, in the Canada-Peru FTA of 29 May 2008 and in the Canada-Columbia FTA of 21 November 2008. Rules on e-commerce are also part of the "ASEAN–Australia–New Zealand Free Trade Area" (AANZFTA) of 27 February 2009.[31] Moreover, including chapters or at least certain provisions on e-commerce in PTAs is also common practice of the EU while negotiating and concluding respective treaties. Good examples in this regard are the Economic Partnership Agreements with ACP countries.[32] However, the EU approach towards e-commerce and PTAs is, just as with regard to WTO law, characterized by a strict opposition towards any trade liberalization concerning audiovisual services. This prevents any real liberalization of e-commerce.[33]

In addition to multilateral and plurilateral trade law affecting the economic dimension of global information and communication, several regulatory structures concerning international electronic business transactions have to be considered. Examples in this regard are the UNCITRAL "Model Law on Electronic Signatures" of 12 December 2001[34] and the "United Nations Convention on the Use of Electronic Communications in International Contracts", which has been drafted in the framework of UNCITRAL and has been adopted by the UN-GA on 23 November 2005.[35] UNCITRAL remains today an important player in the area of global information and communication, as evidenced by its report of March 2009 on "Promoting Confidence in Electronic Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods".[36]

In addition to contract law in the digital age as an essential regulatory issue of global information law, a broad range of different challenges that are related to net-security is of importance for the international business community. Aspects of net-

[30] Chapter 14 US-Singapore Free Trade Agreement of 6 May 2003; Chapter 15 US-Chile Free Trade Agreement of 6 Juni 2003; Chapter 16 US-Australia Free Trade Agreement of 18 May 2004; Chapter 14 US-Morocco Free Trade Agreement of 15 Juni 2004; Chapter 13 US-Bahrain Free Trade Agreement of 14 September 2005; Chapter 14 US-Oman Free Trade Agreement of 19 Januar 2006; Chapter 15 US-Peru Free Trade Agreement of 12 April 2006; Chapter 14 USA-Panama Free Trade Agreement of 28 June 2007; Chapter 15 US-South Korea Free Trade Agreement of 30 July 2007; all agreements are available at: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited on 31 January 2011).

[31] Vgl. Chapters 15 Canada-Peru Free Trade Agreement and Canada-Colombia Free Trade Agreement, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/En%2015%20Colombia%20FTA%20-%20%20E%20Commerce.pdf> (last visited on 31 January 2011). For details on Chapter 10 AANZFTA see: <http://dfat.gov.au/fta/aanzfta/index.html> (last visited on 31 January 2011).

[32] See, *e.g.*, Chapter 6 (Art. 119 *et seq.*) Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ EU No L 289/I/3 of 30 October 2008.

[33] For details see, *e.g.*, *Wunsch-Vincent*, The WTO, the Internet and Trade in Digital Products: EC-US perspectives.

[34] Available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html> (last visited on 31 January 2011).

[35] UN Doc. A/RES/60/21 of 9 December 2005.

[36] Available at: <http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf> (last visited on 31 January 2011).

security such as data protection and prevention and prosecution of cyber-crime are subject to regulatory attempts by, *e.g.*, the Council of Europe, the OECD, and different UN institutions.[37]

Next to all the mentioned different regulatory structures of a technical and/or substantive economic nature, human rights are part of the global information order. In this regard, the human right to active and passive freedom of information is of crucial importance. This right guarantees the freedom to obtain any information from publicly available sources both on the domestic market and abroad. Moreover, the freedom to transmit information in all available forms domestically and internationally is also protected. The legal basis of the right to active and passive freedom of information can be found in several international human rights treaties, such as the Covenant on Civil and Political Rights and the European, African and American Human Rights Conventions. Based on this and also with a view to the Universal Human Rights Declaration, there is strong support for an additional basis of the right to freedom of information in customary international law.[38]

The recognition of the right to freedom of information as such does not seem to be a major problem in the international community. However, the question on justified restrictions of this freedom is causing tensions among states for centuries already. For a long time, respective discussions have been influenced by the east-west confrontation of different political and social systems. Today, the respective discussions shifted more to issues of cultural identity and transfer of technology. Considering the long-standing debate on legitimate restrictions on freedom of information, it seems to be important that the international community reaches some consensus on this. It is thus unfortunate that the WSIS 2003/2005 failed in this regard.

The inherent tension of different and conflicting interests that is related to the human right of freedom of information can be studied while looking at the UNESCO "Convention on the Protection and Promotion of the Diversity of Cultural Expressions" that entered into force on 8 March 2007.[39] The Convention explicitly highlights the importance of a human rights approach also with regard to global information and communication. The relevant Art. 2 (1) reads as follows:

> Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

Although freedom of information as a human right is thus recognized by the Convention, the entire purpose of the Convention, as laid down in its different sub-

[37] For further details see *Tietje/Nowrot*, Das Internet im Fokus des transnationalen Wirtschaftsrechts, 328-366.

[38] For details on the human right of freedom of information see *Schmalenbach*, in: Benedek/Pekari (eds.), Menschenrechte in der Informationsgesellschaft, 183 *et seq.*

[39] Available at: <http://portal.unesco.org/culture/en/ev.php-URL_ID=33232&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last visited on 31 January 2011).

stantive provisions, is to enable states to enact and implement restrictive measures in order to protect the diversity of cultural expressions. As such an approach is of course highly problematic, the Convention was drafted in very vague terms. Indeed, one may say that the Convention contains hardly any strict legally binding provisions. The legal value of most parts of the Convention is questionable.[40] This is also true for Art. 20 of the Convention which deals with possible conflicts with other international agreements, namely WTO law. Because of its vague language, the provision does not really help in order to solve problems that arise out of possible tensions between trade liberalisation on the one hand, and cultural diversity being possibly affected by liberalised trade on the other.[41]

Notwithstanding the UNESCO Convention, customary international law provides for the possibility to restrict the human right of freedom of information. This is indicated already by Art. 19 (3) that provides for justified restrictions of the freedom of information with regard to (1) "[r]espect of the rights or reputations of others" and (2) "[t]he protection of national security or of public order (ordre public), or of public health or morals". Without going into details on the interpretation of these prerequisites, one has to emphasize that with regard to the protection of cultural values, the freedom of information may only be restricted in case of a clear and present danger[42] for the cultural identity of a society (nation). Whether such a situation is given has to be decided under strict scrutiny of the principle of proportionality.[43] This also means that no justification is possible with regard to reasons not mentioned in Art. 19 (3) International Covenant. Thus, namely economic considerations or issues concerning transfer of technology may not legitimately put forward in order to justify restriction on the freedom of information. Therefore, protecting a national industry in the information or entertainment sector towards foreign competitors in order to keep the production of cultural values in the domestic sphere would not be legitimate.

F. Freedom of Information and Governmental Regulation of Global Pubic Goods

Global information law can be construed as a global legal order based on certain principles and rules; this has been demonstrated in the previous section. However, talking about a specific legal order, whether on the national or the international level, requires also identifying – at least to some degree – the normative values such an order is based on. This is important, *e.g.*, in order to be clear on the necessary intensity of governmental regulation.

I. Freedom of Information

As already indicated, freedom of information is the most important normative value of the global information order. Freedom of information as both, having an ob-

[40] For details see *Neuwirth*, HJIL 66 (2006), 819 *et seq.*
[41] For details see *ibid.*
[42] *Cf. Schenck v. United States*, 249 U.S. 47 (1919).
[43] For details see *Delbrück*, in: Wolfrum (Hrsg.), Recht auf Information, 181-200.

jective normative value and being an individual right is recognized in contemporary public international law. Notwithstanding some political controversies on details, this has also been recognized in the final documents on the WSIS 2003/2005.[44]

In historical perspective, the discussion on freedom of information centred for some time on the question of whether such a right – either as an objective principle or an individual right – actually existed. This discussion has been settled for some time already. Since about the middle of the 1970th, the main controversies have been on legitimate restrictions on any "free flow of information", namely within UNESCO and ITU concerning a NIWO, and within the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS). However, even though the start of this debate can be traced back quite some time, the main issues of it are relevant until today. In different contexts, "free flow of information" versus "prior consent" is still at the heard of any debate on global communication and possible restrictions. This is true with regard to the already mentioned issue of protection of cultural identity, but also, *e.g.*, concerning possible political censorship on the internet[45] or printed publications.[46] What changed, however, and the final documents of the WSIS 2003/2005 are evidence of this, is that the ideological debate of the old times has shifted to a more pragmatic approach on specific aspects of the information society.

The "freedom of information" dimension as a core element of the global information order, is important namely in two perspectives. First, freedom of information as both, an individual right and an objective legal principles, has by virtue of Art. 31 (3) (c) VCLT legal importance for the interpretation and application of any multilateral and plurilateral international treaty, namely WTO law. Moreover, the freedom of information perspective gives legal guidance as to challenges concerning the level and the intensity of domestic and international regulation of global information. This issue will be discussed in the next and final section of this paper.

II. Level and Intensity of Regulation

As any matter with cross-border relevance and implications, global information and communication is a challenge for regulation in the context of multilayered governance. This concerns both, the appropriate level of governance (domestic/international) and its intensity on a scale from purely private self-regulation to intensive mandatory governmental regulation. Concerning global information and communication, issues of possible regulation occur with regard to almost any aspect of both, technical transmission and content. To name just one example in this perspective one may point to the debate on net-security as an important aspect of economic

[44] *Leuprecht*, in: Benedek/Pekari (eds.), Menschenrechte in der Informationsgesellschaft, 23 *et seq.*; on the human rights perspective see also *Benedek*, in: Benedek/Bauer/Kettemann (eds.), Internet governance and the information society, 31 *et seq.*

[45] Widely debated, *e.g.*, with regard to China. See, *e.g.*, <http://www.amnestyusa.org/business-and-human-rights/internet-censorship/page.do?id=1101572> (last visited on 31 January 2011).

[46] See, in a wider context, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363.

transactions in the digital age. Whether net-security with regard to such different issues as electronic payments, illegal gambling, or documentation of consent to a contract, shall be subject to private self-regulation of the "digital community", or domestic, regional or international governmental regulation, is an ongoing debate.

It is not the aim of this paper to clearly identify what issues should be regulation on which level of governance in the complex system of trade in the digital age. However, it is important to highlight that different to, *e.g.*, financial regulation with its specific feature of inherent domestic embeddedness of financial market products, information and communication is inherently and comprehensively global. Moreover, as indicated, information and communication is subject to freedom of information as an internationally recognized right. Thus, information and communication is comprehensively a global public good.[47] This means that international cooperation and thus international regulatory approaches towards protecting and providing the respective global public good are necessary. This also means that there is a strong presumption in favour of international governmental regulation instead of private self-regulation. Just to be clear: the necessary public goods' approach in global information law does not mean that any regulatory issue in this field calls for international governmental action. Depending on the specific circumstances of the matter in question, one may certainly come to the conclusion that in light of the principle of subsidiary an international non-governmental or a regional or domestic governmental or non-governmental regulation is better suited to deal with the respective regulatory challenge. However, as indicated, different to other governance areas, a (rebuttable) presumption calls for international governmental regulation, *i.e.* international cooperation.

G. Conclusions

This paper demonstrates that from a historical perspective and with regard to the current legal situation, information and communication is subject to comprehensive global legal structures. In this regard, the paper calls for coherence in any approach to issues of global information and communication. Coherence concerning global information law is possible as certain normative values in this regulatory area may be identified. The right to freedom of information is most important in this regard. This and the broader characterisation of global information and communication as a public good determine respective legal concepts and the interpretation and application of concrete legal rules in this area.

[47] See, *e.g.*, *Maskus*, Information as a Global Public Good, in: Expert Paper Series Six: Knowledge. Expert Paper Series, 59-111; *Jerichow*, in: Andersen/Lindsneas (eds.), Public Goods and Human Rights, 311 *et seq.*; *Lindholt/Joergensen*, in: Andersen/Lindsneas (eds.), Public Goods and Human Rights, 327 *et seq.*

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