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Legal Interoperability as a Tool for Combatting Fragmentation

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ABOUT THE GLOBAL COMMISSION ON INTERNET GOVERNANCE

The Global Commission on Internet Governance was established in January 2014 to articulate and advance a strategic vision for the future of Internet governance. The two-year project conducts and supports independent research on Internet-related dimensions of global public policy, culminating in an official commission report that will articulate concrete policy recommendations for the future of Internet governance. These recommendations will address concerns about the stability, interoperability, security and resilience of the Internet ecosystem.

Launched by two independent global think tanks, the Centre for International Governance Innovation (CIGI) and Chatham House, the Global Commission on Internet Governance will help educate the wider public on the most effective ways to promote Internet access, while simultaneously championing the principles of freedom of expression and the free flow of ideas over the Internet.

The Global Commission on Internet Governance will focus on four key themes:

- enhancing governance legitimacy — including regulatory approaches and standards;
- stimulating economic innovation and growth — including critical Internet resources, infrastructure and competition policy;
- ensuring human rights online — including establishing the principle of technological neutrality for human rights, privacy and free expression; and
- avoiding systemic risk — including establishing norms regarding state conduct, cybercrime cooperation and non-proliferation, confidence-building measures and disarmament issues.

The goal of the Global Commission on Internet Governance is two-fold. First, it will encourage globally inclusive public discussions on the future of Internet governance. Second, through its comprehensive policy-oriented report, and the subsequent promotion of this final report, the Global Commission on Internet Governance will communicate its findings with senior stakeholders at key Internet governance events.

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EXECUTIVE SUMMARY

The recently developed term "legal interoperability" addresses the process of making legal rules cooperate across jurisdictions. Legal interoperability can facilitate global communication, reduce costs in cross-border business and drive innovation, thereby creating a level playing field for the next generation of technologies and cultural exchange.

Legal interoperability is realized in a matter of degrees, as many options exist between a full harmonization of normative rules between jurisdictions and a complete fragmentation of legal systems. These two extremes are not reflected in either the law in the books or the law in action, and the ideal is usually between the two poles, depending on the given circumstances. Too high a level of legal interoperability would cause difficulties in the management of the harmonized rules and disregard social and cultural differences, while too low a level could present challenges for smooth (social or economic) interaction. In cyberspace, legal interoperability should be designed to function on four broad layers of complex systems: technology, data, human elements and institutional aspects.

Examining it from a structural perspective, legal interoperability can be implemented through a top-down or bottom-up approach. While a bottom-up approach would require large-scale, multi-stakeholder coordination (but without harmonization or management by central authorities), it would still be more successful than a top-down approach through existing or new international organizations. As far as the degree of legal interoperability is concerned, a distinction between harmonization, standardization, mutual recognition and other approaches (such as reciprocity or cooperation) is possible. These regulatory models should be mapped with the existing sources of law, identifying the most appropriate instrument for a given substantive topic.

If international treaties are not possible, policies should still aim to accept general principles — such as human rights declarations or no-harm undertakings between states — as an acknowledged source of international law. The lowest level of legal interoperability is reached in cases of cooperation that can at least be achieved on an enlarged regional level (such as through the Council of Europe's Convention on Cybercrime) or through Internet service providers' (ISPs') codes of conduct.

Legal interoperability is a very complex issue and the monetary costs of non-interoperable laws in a highly networked world will increase. If an adequate level of legal interoperability is not achieved and a far-reaching fragmentation of legal jurisdictions prevails, the likelihood of dominant states enlarging the geographical scope of their laws through extraterritorial application increases. Due to this complexity, nuances in the design of rule-making processes must gain importance so that unintended consequences of regimes that are not legally interoperable can be avoided.

INTRODUCTION

INTEROPERABILITY IN GENERAL

The term interoperability is commonly understood in the infrastructure context, namely as a tool to interconnect networks. In general, open standards and interoperable systems make life easier and increase efficiency. Interoperability functions can be identified on four broad layers of complex systems (Palfrey and Gasser 2012, 5-6): technology — the ability to transfer and render data and other information across systems, applications or components; data — the ability to read the data; human elements — the ability to communicate, for example, through a common language; and institutional aspects — the ability to work together (Weber 2014, 143).

In a broad sense, conditions for non-restricted interoperability can encompass access to the decision-making processes, transparent and undistorted procedures, pro-competitive goals, objective and relevant criteria for technology selection, and renunciation of over-standardization (Brown and Marsden 2013, 28-29). In a narrow sense, interoperability between networks refers to the possibility of easily linking different legal structures; insofar, a too low level of interoperability leads to a non-optimal level of interconnectedness.

An open and interoperable environment can stimulate innovation since state censorship and private control of general value chains might make innovation difficult; the wider the choice available to users, the higher their ability to take advantage of their freedoms, even without a guarantee of fundamental rights (Weber 2014, 144). Usually, a combination of legal instruments is needed to reach optimal levels of interoperability in practice, depending on the applied or developed architecture; for example, cloud computing, smart grids or the Internet of Things (Palfrey and Gasser 2012, 160, 232–51).

From a theoretical perspective, interoperability issues can be mapped by differentiating between government-driven measures and private-sector-led approaches on the one hand, and unilateral and collaborative approaches on the other (ibid., 14). Governmental actions encompass the disclosure of information, a transparency regime or public procurement rules; private initiatives include reverse engineering, licensing, technical collaboration and open standards initiatives (Weber 2014, 144). In a layer model, legal operability must be put into the appropriate relation to other layers, for example, the organizational, semantic and technical layers (European Commission 2010, 21).

LEGAL INTEROPERABILITY

Legal interoperability addresses the process of making legal rules cooperate across jurisdictions, on different subsidiary levels within a single state or between two or more states. Whether new laws should be implemented or existing laws adjusted or reinterpreted to achieve this interoperability depends on the given circumstances (Palfrey and Gasser 2012, 178-79). In view of the increasing fragmentation of the legal environment in cyberspace, efforts must be undertaken to achieve higher levels of legal and policy interoperability in order to facilitate global communication, to reduce costs in cross-border business, and to drive innovation and economic growth. Interoperable legal rules can also create a level playing field for the next generation of technologies and cultural exchange (Weber 2014, 153; Gasser and Palfrey 2012, 132-33).

This paper examines the rising debate of legal interoperability and discusses the different regulatory models available in order to make legal rules interoperable. Theoretically, legal interoperability can be looked at from the angles of substance or procedure. This paper focuses on the issue of substantive or normative concerns and does not address procedural structures in detail (for example, legal jurisdiction or multi-stakeholder participation).[1]

The degree of legal interoperability depends on the material issue at stake. For example, harmonized legal rules are important for the implementation of the Domain Name System (DNS); however, less unification appears to be needed in the field of cultural expression. Therefore, this paper addresses the following questions:

- What relevance and facets does legal interoperability have in the context of Internet governance?
- How should a matrix of the available regulatory models be designed in the Internet governance framework, and which segments of regulatory intervention could be distinguished?
- How can substantive legal interoperability be used as a tool to combat fragmentation?

CHARACTERISTICS AND IMPORTANCE OF LEGAL INTEROPERABILITY

LEGAL INTEROPERABILITY AS A NORMATIVE TOOL

The supranational realization of the process of legal interoperability (as the process of making legal rules work together across jurisdictions) can fluctuate between two poles: full harmonization and a complete fragmentation on a bilateral, plurilateral or multilateral level. In the first scenario, all laws would be the same everywhere; in the second, the legal systems would be so different in each country that economic, social and cultural interactions become impossible (Palfrey and Gasser 2012, 181). Obviously, the two extremes do not correspond to reality, as the law does not reflect them; depending on the circumstances, the ideal is usually between the two poles, i.e., closer to harmonization or to fragmentation as required by practical considerations. In addition, public policy issues can play a role (European Commission 2010, 22). An in-between level of legal interoperability can usually be considered as good policy (Palfrey and Gasser 2012, 184).

In order to give some guidance to the applicable normative system, the legal community has developed rules on conflicts of law. These rules help determine which legal system should be applied in a given case. However, the rules on conflicts of law (private international law) do not overcome the substantive differences in national legal orders (and therefore do not lead to legal interoperability), they *only* give guidance on how to determine the applicable normative rules. This assessment does not mean that such rules do not have any impact on the substantive contents of interoperable legal systems, but their influence is of an indirect nature. As a consequence, venue selection by the parties and public interest exceptions to such selection gain practical importance.

The normative objective of legal interoperability consists of the attempt to combat legal fragmentation caused by different national law systems. However, national rules are a consequence of the sovereignty principle and, therefore, are legitimate to the extent of the justified scope of sovereignty (Weber 2014, 7–12). In addition, the more legal interoperability is achieved, the narrower the scope of legal competition between nation-states will be; consequently, a fragile equilibrium must be balanced out.

ADEQUATELY STRUCTURED DEGREES OF LEGAL INTEROPERABILITY

The relationship between law and interoperability must be understood as a multidirectional network. Legal interoperability should make systems work together, but not make the systems all the same, since regulatory competition can be advantageous and productive provided the best normative order prevails (Palfrey and Gasser 2012, 179). Furthermore, changes in the legal order and/or in the interoperability regime have an impact on the design of the relationship between the two.

Higher levels of legal interoperability usually require a more careful design of governmental regulations and a disclosure of the rules in order to increase legal certainty (ibid., 178). The highest level would be reached in the case

1 For further details on multi-stakeholder participation, see Weber (2014, 126–35).

of a total harmonization of normative rules. However, a total harmonization should not be the approach to follow in all cases since, on the one hand, such a framework could not take into account the cultural diversity of societies in the global online world and, on the other, would be a utopian wish in reality. Moreover, it is important to find the appropriate degree of legal interoperability (instead of an all-or-nothing solution) considering the substantive principles (such as freedom of expression or privacy) in different circumstances.[2]

Consequently, legal operability is a matter of degrees (ibid., 183): a very high level of legal interoperability could cause difficulties in the application of the harmonized rules on the national level (for example, due to the difficulty of reaching harmonized interpretation methods), while a very low level of legal interoperability could provoke challenges in respect of the smooth (social or economic) interaction (ibid., 2). As in the case of the appropriate level of interconnectedness, the rule makers have to find the optimal degree of legal interoperability.

COST-BENEFIT ANALYSIS OF LEGAL INTEROPERABILITY

In the information society in particular, legal interoperability drives innovation, competition, trade and economic growth (Palfrey and Gasser 2012, 182); furthermore, costs associated with doing business across borders are reduced. This assessment can be seen in the example of non-founding countries entering the World Trade Organization (WTO) in 1994. These countries are usually obliged to large-scale changes in many business laws relevant for international trade as negotiated in the so-called "accession protocol."[3] Even if total harmonization is not envisaged and regularly not achieved, an increased degree of legal interoperability as acknowledged by a WTO applicant facilitates cross-border trade.

Besides economic factors, higher levels of legal interoperability can also help secure freedom of expression and foster diversity of other fundamental rights, as well as lead to better laws (ibid., 179, 183). This function is mainly realized by international organizations such as the United Nations or the Council of Europe.[4] An example of this is the prohibition of child labour as stated by the UN Convention on the Rights of the Child.[5] As far as the freedom of expression is concerned, ISPs have gained increased legal certainty on a regional level by way of the E-Commerce Directive implemented by the European Union in 2000.[6]

IMPLEMENTATION OF LEGAL INTEROPERABILITY

Legal interoperability can be implemented by applying a top-down model or a bottom-up process. As far as the intensity of achieving legal interoperability is concerned, a distinction between harmonization, standardization, mutual recognition and other approaches is possible.

TOP-DOWN AND BOTTOM-UP APPROACHES

A top-down approach necessarily requires the establishment of a global agency, for example, the United Nations or any of the UN special organizations. Usually, such an approach generates the implementation of large bureaucracies (Palfrey and Gasser 2012, 184-85). In the context of Internet governance, the International Telecommunucation Union (ITU) appears to be the most prominent top-down actor; however, as the experience of the World Conference on International Telecommunications in Dubai showed in December 2012, the attempt to agree by consensus on new rules, not even directly related to Internet governance, failed and common visions of global norm-setting did not evolve (Weber 2014, 102-03).

A bottom-up process to achieve legal interoperability must be based on a step-by-step model that encompasses the major concerned entities and persons of the substantive topic (Palfrey and Gasser 2012, 185). The NETmundial, held in Sao Paulo in April 2014, embodied a relatively successful bottom-up process, wherein the various stakeholders are principally granted equal rights in the negotiation processes of the final non-binding declaration.[7] The Global Network Initiative, which encompasses major Internet and information technologu companies, can also be seen as a bottom-up model. Generally speaking, a bottom-up approach requires a large amount of coordination, but no harmonization or management by central bodies; thereby,

2 For further details, see the Case Studies section on page 10.

3 The protocols for new members since 1995, including commitments in goods and services, are available at www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

4 See, for example, the Council of Europe's Declaration by the Committee of Ministers on Internet Governance Principles, which invites its member states to comply with basic online fundamental freedoms by, among others, referring to the protection of all fundamental rights (principle 1), the responsibilities of states (principle 3) or the empowerment of Internet users (principle 4), available at https://wcd.coe.int/ViewDoc.jsp?id=1835773.

5 Additional obligations in connection with child labour are contained in various International Labor Organization declarations.

6 This is the "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')." See http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031.

7 "NETmundial Multistakeholder Statement," April 24 2014, available at http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf.

coordination processes can be time-consuming and somewhat cumbersome.

REGULATORY MODELS AIMING AT LEGAL INTEROPERABILITY

HARMONIZATION

Regulatory harmonization (a pillar of legal interoperability) can generally be defined as the legal model for institutionalizing a desired cooperation by confining actors and policies into the normative corset of rights and obligations (Weber 2009, 651, 658). Harmonization depicts the process of the unification of law, which often follows a previous approach of standardization. Therefore, harmonization should not be qualified as a contrast to standardization, but rather as a further step in the direction of legal convergence (ibid., 659). Harmonization can emerge in different degrees; for example, EU directives do not prescribe specific wordings for national legislation, but certain results that need to be achieved.

Harmonization as an objective does not necessarily define the type of national law that is employed. Moreover, on the basis of a cost-benefit analysis of the different forms of regulations, the choice must be made which regulatory technique is best suited for which type of legal issue (ibid.). The regulatory concept of harmonization also involves critical issues, one of which is the unification of the many existing national regulatory models. In practice, the choice is often made for the benefit of the legislation and regulatory practices of the most dominant state, which might contrast a large part of the global community. If the whole global community is involved in the preparation of harmonizing laws, there is a significant risk for a regulatory race to the bottom, as long as there is no need to tackle a duly acknowledged factual problem. If regulatory harmonization takes place on a relatively low level and in a generalized manner (an effect of the "highest common denominator"), the rules leave space for creative individual interpretation and compliance, which, in turn, leads to legal uncertainty (Weber 2009, 659).

STANDARDIZATION

Standardization is usually defined as a regulatory approach that is based on widely accepted good principles, practices or guidelines in a given area; standards may also relate to the usual behaviour of the "reasonable man" (Miller 2007). Three types of standardization can be distinguished: technical, economic and legal. Technical standardization leads to technical interoperability. Economic standardization means that sellers would offer more interchangeability of their products than what is necessary and legally required. Legal standardization can be defined as an understanding approved by a recognized body that provides for common and repeated application, usually in the form of rules or guidelines. Mostly, legal standards express or stand for a general direction or a behavioural value, with which the average human or commercial entity is expected to comply. In order for a standard to be effective, it is necessary that it addresses the concerned persons on all levels of business activities (Weber 2009, 660).

Standardization constitutes an important element in the process of regulating certain ways of behaviour: on the one hand, standardization encompasses the notion of making coherent, diverging technical characteristics; on the other hand, many standards qualify as soft law (Weber 2014, 22–32) that, even if lacking a legitimate authority for adoption and enforcement, provide a concrete and normatively relevant benchmark for the behaviour of the concerned community. Insofar, standardization can be seen as a first step to a later harmonization.

An important role in the context of standardization is played by standard-setting organizations (SSOs) developing international standards. Most SSOs are established as private entities (for example, as associations) and composed of national standards bodies; in the cyberspace field, the ITU is an exception as a treaty-based organization established as a permanent agency of the United Nations and driven by national governments as the primary members. In the Internet world, the most prominent SSOs are the Internet Engineering Tast Force and the World Wide Web Consortium. The development of technical standards is usually concerned with interface standards making different systems interoperable; nevertheless, it cannot be overlooked that in many areas of technology, rigorous competition exists between different SSOs vying for leadership. SSOs can also contribute to the legal interoperability of contractual provisions and terms of service (Tamm Hallström and Boström 2010).

MUTUAL RECOGNITION

Mutual recognition originally involved the assessment of comparability or equivalence of regulatory measures. Later, this assessment was converted into an independent legal principle.[8] Put more simply, mutual recognition is the consent to compromise a country's regulatory autonomy by it accepting that another state's regulation is "good enough" or satisfactory; in other words, mutual recognition acknowledges that different national requirements can be interchangeable in order to be domestically applied (Weber 2009, 661-62). The principle of mutual recognition is widely accepted as a cross-border rule based on the concept that, even in the absence of harmonization, the foreign state has applied its norms with diligence and precaution, making them adequate for domestic application elsewhere.

8 Based on the decision of the European Court of Justice in Cassis de Dijon, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, Judgment of the Court of 20 February 1979, Case 120/78.*

Table 1: Normative Sources and Regulatory Concepts

Source of Law	Regulatory Models				
	Harmonization	Standardization	Mutual recognition	Reciprocity	Cooperation
Treaty law	ITU		EU E-Commerce Directive		Council of Europe Cybercrime Convention
Customs/standards		IETF technical standards			
General principles	Human rights declarations or recommendations			No-harm principle between states	
Self-regulation	ICANN DNS, Global Network Initiative	ISPs' codes of conduct		Data protection framework for business entities	ISPs' codes of conduct

Source: Author.
Note: Blank squares indicate that there is no instrument available.

Mutual recognition plays a crucial role in the European Union, where the "single passport" system within the region requires the need for privileged or facilitated market access across borders (ibid., 662). On a global level, the WTO's General Agreement of Trade in Services partly relies on the principle of mutual recognition, for example, with financial services. However, mutual recognition should be considered a second-best solution after harmonization or standardization, if legal interoperability is not achieved.

OTHER APPROACHES FOR LEGAL INTEROPERABILITY

Reciprocity: This is a traditional principle in international law that attempts to achieve equilibrium between two countries regarding certain legal aspects. It generally refers to the balance of concessions to be sought in cross-border negotiations. Reciprocity is due to the commitments undertaken bilaterally if and to the extent agreed by the concerned parties. More recently, however, states are reluctant to apply reciprocity since this model only encompasses a narrow scope of legal interoperability and might also violate the most-favoured-nation principle in international instruments, for example in the context of the WTO.

Cooperation: In order to overcome the disparity of different legal regimes, regulators partly settle their responsibility by defining clear mandates and by agreeing on cooperation among themselves. Cooperation between different agencies can manifest in collective regulatory rules or at least lead to the agencies coordinating their efforts in designing, applying and enforcing different regulatory issues (Weber 2009, 664). But this approach is rather individualistic and often spontaneous. Based on the circumstances, agencies try to find an adequate solution to the occurring problem. This approach can make sense in a particular situation; however, cooperation does not contribute to an improvement of legal interoperability.

MAPPING OF REGULATORY MODELS

Mapping the different regulatory models and sources of law is outlined in Table 1, which contains some of the legal instruments available in the Internet governance context.

This table should be viewed in light of the substantive topics of Internet governance[9] and needs further elaboration, even if the allocation of functions and activities is difficult to establish due to social and cultural perceptions. It can be stated that legal interoperability would be increased if substantive topics can be moved up and to the left. Nevertheless, it must be taken into account that lower-level arrangements that are actually applied and enforced can be more efficient than unexecuted higher-level theoretical models.

A method to potentially address the issue of "adequate" or "optimum" levels of legal interoperability could be to apply different regulatory models and mechanisms (according to the given circumstances) that can enable, based on past experience, certain levels of legal interoperability within certain contexts. Consequently, the assessment of the degree and scope of legal interoperability, as well as its method of approach, depends on the substantive topic at hand. In order to illustrate this theoretical assessment, two case studies on freedom of expression and data protection principles are presented below to examine how the requirements of legal interoperability could be fulfilled.

9 For an overview of the topics see DeNardis and Raymond (n.d., 11-12).

PROCEDURAL ISSUES

As previously mentioned, legal interoperability is mainly an issue of cross-border coherence of normative orders, but procedural aspects can also play a role. The venue selection allows parties to choose the preferred normative order; venue selection is limited by public interest exceptions that restrict this choice and give a prevailing force to a specific national law. The venue selection can lead to legal interoperability within a private group, in the sense that all group entities are acting on the basis of the same normative order.

Another issue concerns the dispute resolution requirements. Depending on the resolution mechanism, a higher level of acceptance to a newly established substantive normative order can be achieved. The term "dispute resolution mechanism" should be understood broadly, including not only traditional proceedings, such as arbitration, but also all conceivable forms of mediation (Weber 2014, 148). Arbitration has reached legal interoperability due to the fact that enforcement of arbitral awards is possible according to the provisions of the 1958 New York Convention. New forms of alternative dispute resolution mechanisms should be taken into account, however, if the binding effects of norms can be achieved in the given circumstances. Dispute resolution mechanisms can be necessary to clarify which legal obligations are potentially incomplete or inadequate. For example, even if a suitable forum for complaints in cyberspace is not yet available, consideration should be given to the implementation of new structures dealing with the settlement of the disputes (Weber 2012, 9-10).

CASE STUDIES

From a conceptual perspective, five major features of global Internet governance can be distinguished: the arrangements of the technical architecture, the Internet governance infrastructure, the privatization of governance mechanisms, the Internet control points as sites of global conflict and the regional initiatives addressing geopolitical strategies (DeNardis 2014, 7–19). In other words, Internet governance encompasses the design and administration of the technologies necessary to keep the Internet operational and the enactment of substantive policies around these technologies (ibid., 6). From this broad array of issues, many examples could be chosen for an elaboration of the strengths and weaknesses of legal interoperability,[10] but the cases discussed here are freedom of expression and the data protection framework.

FREEDOM OF EXPRESSION

A challenging topic in the context of legal interoperability is the conciliation of the different understandings of, and the manifold cultural approaches to, freedom of expression. Freedom of expression is a fundamental right that is acknowledged in many international instruments (such as the United Nations and through regional conventions), but the provisions often contain a reservation allowing the implementation of state legislation based on the principle of public order. Interpretation of this reservation is subject to social and cultural perceptions, and therefore legal interoperability is unlikely to be achieved. For example, the likelihood of the First Amendment to the United States Constitution (which includes the freedoms of religion, speech, the press and association) becoming the rule in China or the Middle East is extremely low (Palfrey and Gasser 2012, 181). However, even if the cultures of societies involved in cross-border activities are relatively similar (such as with Europe and the United States), substantial problems can occur. The most famous cases dealing with freedom of expression were *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France (LICRA) v. Yahoo!,* and Google and the right to be forgotten.

THE CASE OF YAHOO!

Yahoo! operated an auction business from its California base offering thousands of items of Nazi memorabilia for sale. LICRA, a French anti-racism and anti-Semitism organization, started legal action against Yahoo!, alleging that the company was violating French law by providing access to these materials through its website. Essentially, the French courts not only acknowledged their jurisdiction (competence) in a case against a US company, but also applied French law prohibiting a US firm from operating auctions that sell "critical" goods to French citizens in violation of French law.[11] Consequently, the freedom of advertising for some goods as emanation of the freedom of expression was restricted.

THE CASE OF GOOGLE

In May 2014, the Court of Justice of the European Union (CJEU) requested that Google Spain remove a link providing information about a seizure of assets

10 For an overview of issues, see the respective list published by the Berkman Center of Harvard Law School, available at http://cyber.law.harvard.edu/research/interoperability. A practical and important topic concerns the license interoperability; for further details see Morando (2013). Difficult questions also arise in connection with cyber security, these issues being a particularly sensitive area of achieving legal interoperability (see Palfrey and Gasser 2012, 188-89).

11 The Tribunal de grande instance in Paris confirmed the illegal nature of the sale of Nazi-era memorabilia under French law in 2000 (thereby approving the competence of the French courts in a complaint against the US firm Yahoo!; decision RG:00/0538 of May 22, 2000 and November 22, 2000). Later, Yahoo! began legal action in the United States, arguing that the sale's prohibition would contradict the First Amendment of the US Constitution.

of a Spanish citizen some 15 years ago.[12] The decision was based on the EU Data Protection Directive being interpreted beyond its wording as containing a "right to be forgotten."[13] Google's argument that the removal of the link would contradict the fundamental right of freedom of expression as guaranteed by different international legal instruments as well as by the US Constitution did not convince the CJEU. On the contrary, the CJEU regarded the individual's interest in removing links with personal information that is inadequate, irrelevant or excessive as being more important than the public's interest in getting access to that kind of information. According to the CJEU, the economic interests of the search engine do not justify the interference with a person's right to data protection; that is, the freedom of expression can be legitimately limited in the interests of privacy.

IN SEARCH OF ALTERNATIVES: CODES OF CONDUCT

These cases show that far-reaching legal interoperability can hardly be achieved by harmonization of law through international instruments. However, in this context, ISPs have the option to agree on codes of conduct standardizing intervention practices; contrary to a mandatory provision, codes of conduct do not legally oblige their addressees, but take full effect as voluntary self-regulation. A practical realization of this approach can be seen in the efforts of the Global Network Initiative attempting to incentivize Internet and IT companies to comply with some commonly accepted standards (such as freedom of expression or privacy).

Having been constructed by engineers, the Internet and its content, services and applications are based on technology rather than on legal instruments; anyone should be able to design new Internet content using publicly and freely available protocols and software (Brown and Marsden 2013, 7-8). Being a public common good that is based on the good conduct of its users, Internet pioneers since the beginning of the World Wide Web realized that most Internet functions required trust.[14] Too much control from national or international legislators would impair the free development of the Internet, which in turn would be contrary to the Internet's basic principle of being a global medium with an infinite spectrum and low barriers to entry.

Accordingly, self-regulation and minimal state involvement appear to be more efficient regulatory instruments to "regulate" the Internet than international treaties (ibid., 2). In other words, legal interoperability might be improved on the basis of ISPs' codes of conduct containing rules in respect of the freedom of expression; however, this "improvement" also carries the risk that private actors are empowered to technically design the scope of a fundamental right. In Table 1, the most ideal approach seems to consist in standardization based on a self-regulatory regime.

DATA PROTECTION FRAMEWORK

Privacy can be examined from technical and legal perspectives. The increase in technical interoperability raises concerns that it may make systems less secure. However, security problems are not related to interoperability as such but rather, in what interoperability makes possible (Palfrey and Gasser 2012, 77). As in the case of legal interoperability, the optimal degree of technical interoperability varies depending on the circumstances; consequently, engineers need to implement designs of selective interoperability or limited interoperability (ibid., 79-80). The main emphasis in the following sections is on the legal interoperability of data protection rules.

In view of the massive growth in the complexity and volume of transborder data flows, accompanied by a change in the nature of such transfers, theoretically, global privacy rules should be available. In practice, however, data protection laws are very different in the various regions of the world, and a harmonization of these rules is not expected in the near future (Weber 2013, 1–3). The lack of harmonized global rules governing transborder data flows causes several risks: business challenges, particularly in outsourcing transactions; technological challenges in view of the growing data warehouses and increased data mining; and security challenges, since large data collections are a threat to security (Gunasekara 2009, 147, 154–63).

From a theoretical perspective, the harmonization of data protection standards would certainly facilitate the transborder flow of information. Globally, however, such an objective is not likely to be achieved, even if some progress has been made on the harmonization of rules on a regional level, for example, among EU member states. Additionally, pressure to harmonize data protection standards comes from international trade law: different levels of protection can jeopardize the cross-border rendering of services, particularly IT and electronic commerce services (Weber 2013, 5).

Due to the complexity of technology, such as cloud computing, regulations become difficult to implement and their enforcement is cumbersome. Therefore, regulations should enable individuals and businesses to reach a high

12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of the Court of May 13, 2014, case C-131/12.

13 Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

14 See the Internet Society's Internet Code of Conduct, available at www.isoc.org/internet/conduct/.

level of compliance at a reasonable cost; besides, regulators are called on to design norms that are more efficient. In this context, transparency could facilitate the decision-making processes for businesses considering how to handle transborder data flows. Transparency could be increased by making all relevant texts of national laws and regulations on data protection, particularly on transborder data flows, available in different languages on the Internet; by providing regular and timely updates of the respective legal rules; and by designating a contact point in the government to which questions about transborder data transfers can be addressed (ibid., 6).

With respect to the increase of transborder data flows, the "traditional" geographical approach of looking at the risks caused by the country or location to which the data are to be transferred no longer seems to be appropriate (ibid.). Moreover, an organizational model should be implemented that examines the risks caused by the holder (controller) of the data that are being transferred. This model would substantially address the fact that the data holder is responsible for the proper treatment of data when shipped abroad. Consequently, the organizational model burdens the data holder with the task of ensuring that the processing of data in another country is executed in accordance with the relevant data protection standards. This concept is based on the accountability principle: the appropriate level of protection is to be fulfilled by binding corporate rules or to be contractually designed by the parties involved (ibid.).

Consequently, and for good reasons, the draft for a new General Data Protection Regulation of the European Union puts a great deal of emphasis on binding corporate rules (BCR).[15] In principle, each member of an organization has to sign the BCR, which should contribute to the realization of a minimum level of protection. The BCR standards must be internationally binding within the concerned organization; incorporate the material data processing rules; provide for a network of measures ensuring compliance with the applicable rules, for an internal complaints-handling process and for an auditing program; ensure suitable training for employees; and be enforceable by the beneficiaries of the BCR (Weber 2013, 12; Moerel 2012).

By acknowledging the validity of the BCR, the requirement that some principles must play an important role in data protection is realized; corporate law solutions as a self-regulatory mechanism can be a valid substitute for legislative measures and can establish a higher level of privacy than contested or ineffective multilateral treaty arrangements (Weber 2013, 12; Gunasekara 2009, 174-75).

Table 1 shows the most ideal approach to be the reciprocity model based on a self-regulatory framework.

OUTLOOK

Legal interoperability is a very complex issue, and the costs of non-interoperable laws in a highly networked world will increase. The multiplicity of regulatory actors bears the risk of incoherent rule making; this risk is even enforced if regulatory actors try to expand their activities beyond their original mandate (Weber 2009, 682). Rule makers should, therefore, be smart about the design of law in view of the global information exchange (Palfrey and Gasser 2012, 177, 191, 256). Indeed, the exploration and development of the substantive and structural dimensions of the nascent concept of legal interoperability (as a "third way" between fragmentation and harmonization) merit increased attention.

The key objective is the attempt to achieve interoperable rules that create a level playing field for the next generation of technologies and social exchange. If an adequate level of legal interoperability is not achieved and a far-reaching fragmentation prevails, the likelihood also increases that dominant states are inclined to enlarge the geographical scope of their laws by having them applied in an extraterritorial manner. This kind of legal harmonization would be to the detriment of non-dominant societies.

Currently, the efforts in analyzing the different available regulatory models' strengths and weaknesses are in a state of infancy. For the time being, the traditional legal reality still consists of fragmentation, based on the sovereignty principle. This model must be changed, at least to a certain degree. Technical standardization and common understandings — with respect to generally applicable principles such as the no-harm, shared responsibility, good faith or ethical behaviour principles — need to be developed. Not every area of Internet governance needs the same level of harmonization, coordination or standardization.

Further research and thinking is needed. In particular, the procedural dimension of legal interoperability should also be explored, in addition to efforts toward its normative elements. In this regard, innovative operational approaches[16] to legal cooperation are especially important whenever online interactions involve multiple jurisdictions at the same time and a convergence of laws is difficult to achieve. Different regulatory models that can serve the purposes of the manifold substantive topics are available, and nuances in the design of rule-making processes will gain importance. The unintended consequences of not having legally interoperable regimes must be avoided.

15 To view the unofficial consolidated version of the General Data Protection Regulation from June 28, 2014, see www.delegedata.de/wp-content/uploads/2014/06/DS-GVO-konsolidiert.pdf.

16 On this issue, see the work conducted within the Internet & Jurisdiction Project facilitated by Bertrand de la Chapelle and Paul Fehlinger in Paris, available at www.internetjurisdiction.net.

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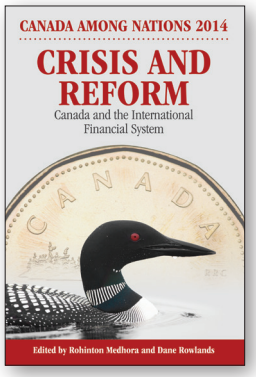

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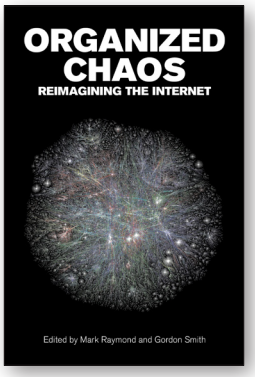

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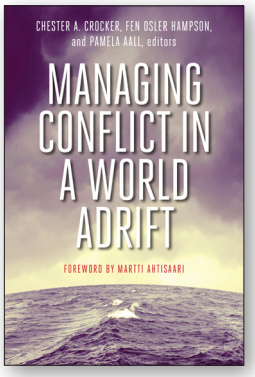

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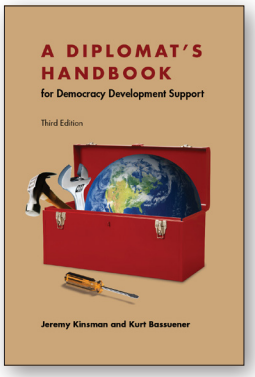

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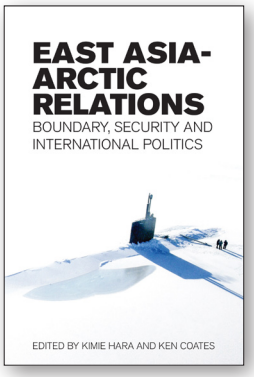

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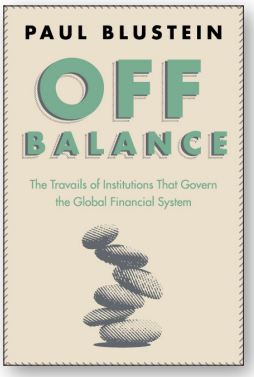

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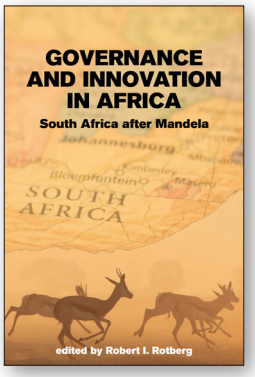

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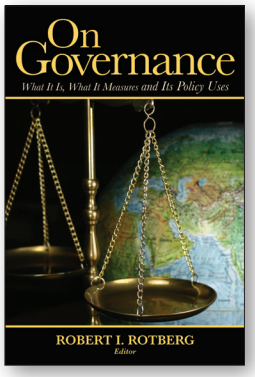

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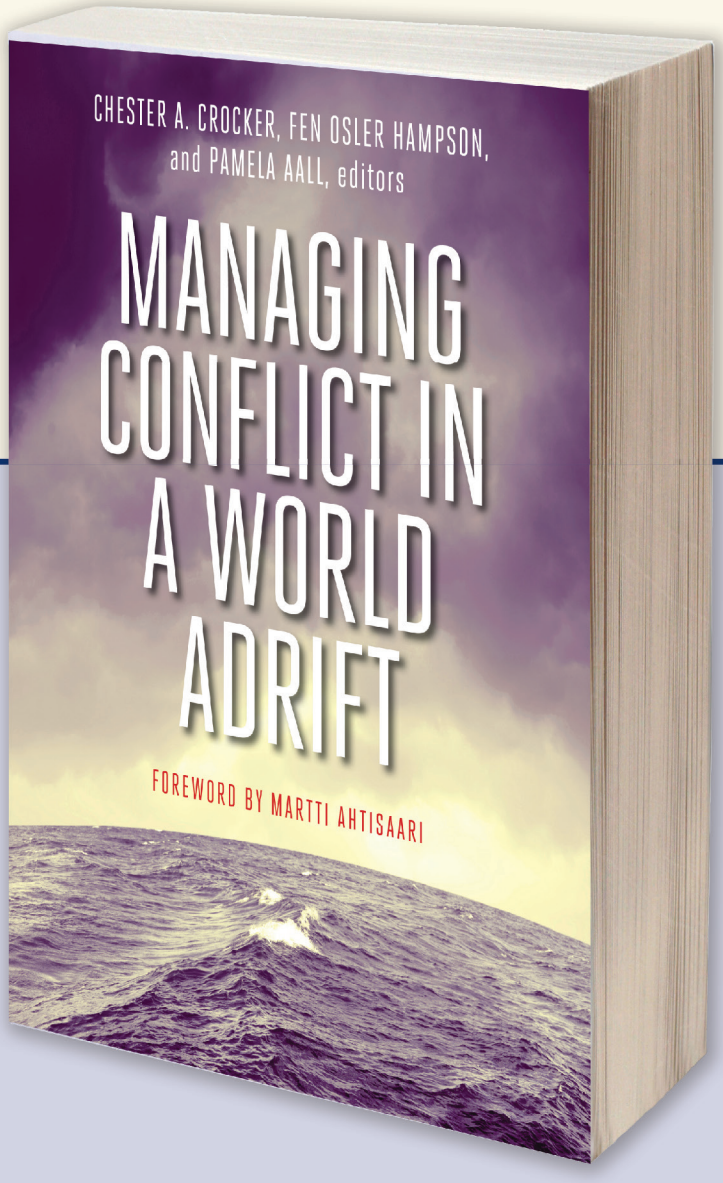

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