

# FROM FREE FLOW OF INFORMATION TO CIVIL SOCIETY'S PARTICIPATION IN THE INFORMATION WORLD<sup>1</sup>

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## I. New Information and Communication Order

### 1. The Development of a “New World Information and Communication Order”

The attempt to introducing principles of governance in respect to information services, now transmitted by way of the Internet, is insofar not completely new as the issue of the information flow has been a discussion topic for many decades.<sup>2</sup> The Internet is a new online medium, but traditional media also exercise cross border information services which have called for an applicable legal framework.

After the decolonization<sup>3</sup> became wide-spread effective, the world was divided both along an East-West and a North-South axis in the 1970s.<sup>4</sup> Since global flows of news and information were subject of intense debates in international fora<sup>5</sup> already in the early seventies of the last century, a group of block-free countries discussed the idea of a “New World Information and Communication Order” (NWICO)<sup>6</sup> that grew out of the International Economic Order of 1974.<sup>7</sup> After its launch at the Non-aligned Summit of 1973 in Algier, calling for united action in the field of mass communication,<sup>8</sup> it became soon obvious that the NWICO would have to be incorporated into a broader concept of a third world development policy.<sup>9</sup> Being built on a political approach<sup>10</sup> the “new world information and communication order” implied far-

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<sup>1</sup> This contribution is based on and further developed from a presentation, held in Budapest on 12 April 2010 about „Internet Governance - Past and Future Prospects“, and a presentation, held in Paris on 19 November 2010 on the subject of „30 years of communication geopolitics: actors and flows, structures and divides“.

<sup>2</sup> I would like to thank my research assistant Ulrike I. Heinrich for her valuable support in the preparation of this article.

<sup>3</sup> In the 1950s and 1960s many former colonies attained their independence which led to the emergence of a third force alongside the so-called capitalist and socialist countries.

<sup>4</sup> See C. PADOVANI/K. NORDENSTRENG, From NWICO to WSIS: another world information and communication order?, *Global Media and Communication* Vol. 1(3) 2005, pp. 264-272, at p. 267, available at: [http://www.uta.fi/jour/laitos/From\\_NWICO\\_to\\_WSIS.pdf](http://www.uta.fi/jour/laitos/From_NWICO_to_WSIS.pdf).

<sup>5</sup> See U. CARLSSON, The Rise and Fall of NWICO - and Then?, From a Vision of International Regulation to a Reality of Multilevel Governance, Venice 2003, at p. 2, available at: <http://www.bfsf.it/wsis/cosa20dietro20al20nuovo20ordine.pdf>.

<sup>6</sup> The text of this subchapter contains excerpts of R. H. WEBER, From “Many Voices One World” to “Information Society”, *Computer Law Review International (CRi)* 2004, at pp. 97-104.

<sup>7</sup> See CARLSSON, *supra* note 5, at p. 10.

<sup>8</sup> See PADOVANI/NORDENSTRENG, *supra* note 4, at p. 264.

<sup>9</sup> See G. HEDEBRO, *Communication and Social Change in Developing Nations*, Ames 1982, at p. 13; the United Nations General Assembly also confirmed in Resolution 37/94 the close connection between economic and informational order.

<sup>10</sup> The documents of the movement's meetings concerning information and communication have the character of political statements, resembling statements of foreign policy and doctrine out of the field of international politics; see CARLSSON, *supra* note 5, at p. 10.

reaching reforms of the existing order, including all kinds of information,<sup>11</sup> all the media,<sup>12</sup> and all forms of communications technologies.<sup>13</sup>

At the same time, the Soviet Union proposed to release a “Mass Media Declaration” under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>14</sup> Aiming at the development of globally acceptable guidelines for the role of mass media in the international system<sup>15</sup> this attempt provoked the opposition of Western and Northern countries which were afraid that the principle of the “free flow of information” could be jeopardized.<sup>16</sup> Subsequently, parallel to the negotiations on a possible Declaration, at the Nairobi Conference of the UNESCO in 1976, the idea prevailed that it would be wise to start inquiries about the factual background of the information and communication order.

After that, in December 1977, an International Commission for the study of information and communication problems, appointed by the UNESCO and chaired by Nobel laureate Sean MacBride, began its work on compiling an impressive Report under the title “Many Voices One World”.<sup>17</sup> Already during the inquiry process of the MacBride-Commission, the participants of the UNESCO General Conference agreed in November 1978 on the “Declaration on the Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War”.<sup>18</sup> The agreement on the Mass Media Declaration has been achieved in relatively short time due to the fact that the developed countries offered infrastructure help to the developing countries for their willingness to withdraw some substantive contents requests.

## 2. Many Voices One World

Later, in 1980, the MacBride-Commission published the aforementioned report (Mac- Bride-Report) which purpose consisted in the description of a possible “new world information and communication order” being defined as a process, not actually as a given set of conditions and practices.<sup>19</sup> Containing much more substance than the Mass Media Declaration and being based on the fundamental ideas of NWICO the MacBride-Report addresses a large number of matters, in particular the following topics:<sup>20</sup>

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<sup>11</sup> Encompassing political, social, economic and technical information.

<sup>12</sup> Including Press, radio, TV, film, data banks, etc.

<sup>13</sup> See CARLSSON, *supra* note 5, at p. 12.

<sup>14</sup> See UNESCO Doc. 17C/Res. 4.113.

<sup>15</sup> See CARLSSON, *supra* note 5, at p. 9.

<sup>16</sup> See L. R. SUSSMAN, What the North Wants from UNESCO: Mediator and Catalyst, UNESCO Sources, October 1989, at p. 13.

<sup>17</sup> Many Voices One World, Report of the MacBride Commission, Paris 1979, available at: <http://unesdoc.unesco.org/images/0004/000400/040066eb.pdf>

<sup>18</sup> Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, 28 November 1978.

<sup>19</sup> Foreword to the MacBride-Report, *supra* note 17, by Director-General M’Bow, xviii.

<sup>20</sup> MacBride-Report, *supra* note 17, at pp. 14/15 and 254.

(1) *Strengthening independence and self-reliance*: The MacBride-Report<sup>21</sup> considers adequate communication policies as key topics of independence and self-reliance, for example an unalienable right to better life, the improvement of self-reliant communication capacities, the elaboration of the basic communicative needs by the world-wide population, and the particular challenges for future international research and development.

(2) *Social consequences of the NWICO and new tasks*: Furthermore, the MacBride-Report<sup>22</sup> suggests integrating communication into development, facing the potential and danger of the technological challenge, strengthening the cultural identity, reducing the commercialization of communication, and improving the access to technical information.

(3) *Professional integrity and standards*: The MacBride-Report<sup>23</sup> puts much emphasis on the responsibility of journalists, an improved international reporting (full and factual presentation of news), and the protection of journalists.

(4) *Democratization of communication*: Additionally, the MacBride-Report<sup>24</sup> acknowledges the importance of human rights, of the removal of communication obstacles (incl. media concentration), of media diversity and choice in the content of communication (decentralized and diversified media) as well as of the integration and participation of the whole population in the communication process.

(5) *Fostering international co-operation*: The MacBride-Report<sup>25</sup> elaborates on possible partners for development allowing to overcome economic discrepancies, on the strengthening of collective self-reliance being a cornerstone of a communication order as well as on international mechanisms facilitating multi-national actions and international understandings for communicative co-operation.

(6) *Provision of more extensive financial resources in favor of less developed countries*: According to the MacBride-Report<sup>26</sup>, the scarcity of available resources for communication developments makes it necessary to identify the respective priorities and to look for additional international financing. Possible means could be resources deriving from surplus profits on raw materials, an international duty on the use of electromagnetic spectrum and geostationary orbit space or a duty on the profits of transnational corporations producing transmission facilities.

After the publication of the MacBride-Report only a fairly limited discussion took place within the UNESCO; the General Conference of 1980 in Belgrade solely took note of the Report without initiating special action, the sole exception being the incorporation of the “International Programme for the Development of Communication” according to Recommendation 78 of the Report.<sup>27</sup> Moreover, the topic of the information and communication order has become less relevant in the eighties of the last century due to the

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<sup>21</sup> MacBride-Report, supra note 17, at pp. 254 ss.

<sup>22</sup> MacBride-Report, supra note 17, at pp. 258 ss.

<sup>23</sup> MacBride-Report, supra note 17, at pp. 261 ss.

<sup>24</sup> MacBride-Report, supra note 17, at pp. 265 ss.

<sup>25</sup> MacBride-Report, supra note 17, at pp. 268 ss.

<sup>26</sup> MacBride-Report, supra note 17, at pp. 274/275.

<sup>27</sup> UNESCO Doc. 21C/Res.4/19.

fact that the UNESCO has come into a vital financial crisis. Being charged with “survival plans”,<sup>28</sup> the UNESCO did not anymore concentrate on the NWICO. Without having funds to subsidize the communication infrastructure of less developed countries,<sup>29</sup> subsequently the information and communication order disappeared from the political agenda.

## II. World Summit on the Information Society (WSIS)

### 1. From MacBride to WSIS

With the rise of the Internet in the nineties of the last century, regulatory needs became apparent again since more and more actors felt a need for more regulation.<sup>30</sup> At first instance, the main topics concerned the design and architecture of the technical infrastructure as well as the allocation of addresses (domains).<sup>31</sup> Today, the management of domains as names in the online world is of utmost practical, commercial, and strategic importance.<sup>32</sup>

Taking up the discussion of a global information and communication order<sup>33</sup> the International Telecommunications Union (ITU) passed a resolution in 1998 proposing the idea of a World Summit on the Information Society (WSIS) under the auspices of the United Nations.<sup>34</sup> In 2001, the ITU Council endorsed the approach of holding the Summit in two phases, the first part in Geneva in 2003, the second part in Tunis two years later.<sup>35</sup> This led to the adoption of the General Assembly Resolution 56/183,<sup>36</sup> which set as objective of the WSIS the development of an international “common vision and understanding of the information society” and the adoption of a declaration of fundamental principles for the creation of an information society which is truly global in participation and benefits.

In the first phase, the Geneva Conference in December 2003 enacted the Geneva Declaration of Principles<sup>37</sup> and the Geneva Plan of Action<sup>38</sup> which define this common vision and a framework for measures to be taken in order to make this vision a reality. In 2005 the Tunis World Information Society Summit followed; designed to discuss the development of the principles established in Geneva, the participants of the Tunis Summit adopted the Tunis

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<sup>28</sup> In 1983 the United States cancelled their membership in UNESCO for financial and political reasons as of the end of 1984, followed one year later by the United Kingdom.

<sup>29</sup> See WEBER, From „Many Voices One World“ to „Information Society“, supra note 6, at p. 98, with further references.

<sup>30</sup> For a basic overview of the regulatory problems see R. H. WEBER, *Regulatory Models for the Online World*, Zurich 2002, at pp. 101 ss.

<sup>31</sup> See R. H. WEBER, *Shaping Internet Governance: Regulatory Challenges*, Zurich 2009, at pp. 27 ss.

<sup>32</sup> See W. KLEINWACHTER, *Internet Governance: Auf dem Weg zu einem strukturierten Dialog*, in: KLUMPP/KUBICEK/ROSSNAGEL/SCHULZ (eds.), *Medien, Ordnung und Innovation*, Berlin/Heidelberg/New York 2006, at pp. 215-226.

<sup>33</sup> For further details see R. H. WEBER, *Towards a Legal Framework for the Information Society*, Zurich 2003, at pp. 26/27.

<sup>34</sup> Resolution 73 of the ITU Plenipotentiary Conference; for further details on the historical developments see J. Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum*, Perth 2008, at pp. 324-329.

<sup>35</sup> Resolution 1179, ITU Council 2001, available at: <http://www.itu.int/wsis>.

<sup>36</sup> UN General Assembly Resolution 56/183, 31 January 2002, UN Doc.A/Res/56/183.

<sup>37</sup> Geneva Declaration of Principles, 12 December 2003, available at: <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

<sup>38</sup> WSIS: Plan of Action, 12 December 2003, available at: <http://www.itu.int/wsis/docs2/tunis/off/7.html>.

Commitment<sup>39</sup> and the Tunis Agenda,<sup>40</sup> outlining a medium-term future for global Internet governance and adapting the working definition of Internet governance with special emphasis on the fact that Internet governance includes more than Internet naming and addressing.

## 2. WSIS-Fundamentals

The Geneva Declaration of Principles of December 2003 (WSIS)<sup>41</sup> summarizes the major objectives of an information society serving the needs of the whole world-wide population; thereby, the following key principles focusing on information and communication technologies (ICT) merit special attention:

- i. The role of governments and all stakeholders in the promotion of ICT for development is becoming increasingly important and requires joint efforts.
- ii. Information and communication infrastructure is an essential foundation for an inclusive information society.
- iii. The provision of access to information and knowledge for the whole population must become a mandatory target for regulators.
- iv. The capacity to acquire the necessary skills and knowledge in information technologies including continuous education should be strengthened.
- v. The building of confidence and security in the use of ICT is becoming crucial (trust framework).
- vi. An enabling environment at national and international levels is an important tool for good governance (incl. intellectual property protection and standardization).
- vii. An improvement of ICT applications can bring benefits in all aspects of life.
- viii. The promotion of cultural diversity and identity, linguistic diversity and local content serves the common heritage of humankind.
- ix. The freedom of the media and the freedom of information should be guaranteed.
- x. The promotion of the ethical dimensions of the information society (incl. solidarity, tolerance) is of essence.
- xi. International and regional co-operation should be improved.

In addition, the international community agreed at the sequel in Tunis that an Internet Governance Forum (IGF), a multi-stakeholder platform for the discussion of public policy issues related to the Internet, should be created and that the UN Secretary General should convene a so-called “process of enhanced co-operation” between governments with the full involvement of all stakeholders in order to assure that the management of the critical Internet resources is executed in accordance with the principles defined in the first phase of the WSIS.<sup>42</sup>

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<sup>39</sup> WSIS: Tunis Commitment, 18 November 2005, available at: <http://www.itu.int/wsis/docs2/tunis/off/7.html>

<sup>40</sup> WSIS: Tunis Agenda for the Information Society, 18 November 2005, available at: <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>.

<sup>41</sup> Geneva Declaration of Principles, supra note 37.

<sup>42</sup> See WEBER, supra note 31, at pp. 66-71 with further references; Geneva Declaration of Principles, supra note 37.

### **III. From NWICO to WSIS and IGF: New Perspectives**

The strengthening of self-reliance of countries, the democratization of communication and the provision of more extensive financial resources, as proclaimed in the context of the NWICO, have become an actual “digital divide”-topic in the WSIS-discussions.

#### **1. Eliminating Weaknesses**

In the time from the NWICO to the WSIS socio-political transformations have taken place leading to changes in the structure of the international system and in the political climate.<sup>43</sup> Whereas the NWICO predominantly followed a political approach, the WSIS rather built on an information technology approach allowing to reach a broader part of civil society.<sup>44</sup> Indeed, compared to the approach of the WSIS the MacBride-Report and thus the NWICO followed a rather idealistic approach. The considerations were based on the idea of common values and common aims of the countries in the sphere of communications. A typical example can be seen in the objective to grant the non-commercial forms of mass communications in expanding information systems a priority over commercial activities; even a reduction of the commercialisation of communication was recommended.<sup>45</sup>

Furthermore, expectations of good-will in sponsoring, cost reduction and preferential tariffs for developing countries are expressed without getting into details of the respective activities. In addition, the objective of fostering the exchange of technical information between developed and developing countries assumes in principle that all countries have equal rights and full access to available information which does not correspond to the situation in practice.

Moreover, the MacBride-Report does not clearly indicate whether the developing countries should have a primary responsibility for undertaking the necessary changes to overcome their dependence in the field of communications. In theory, several approaches can be chosen, for example bilateral arrangements with developed countries or co-operative efforts among themselves. Some of the described weaknesses have been tackled in the context of the WSIS-framework as outlined hereinafter; however, further efforts are needed in order to implement a fair and equitable information and communication order.

#### **2. Strengthening Commitments**

##### **2.1 Overcoming Imbalances**

Both the MacBride-Report and the WSIS-Principles prominently address the problems related to imbalances and inequalities between developed and developing countries by using a slightly different terminology: While the MacBride-Report refers to the elimination of a “communication gap”,<sup>46</sup> the WSIS-Principles envisage to realize the objective of an “inclusive [...] Information society”.<sup>47</sup> Nevertheless, the terms “communication gap” and

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<sup>43</sup> See PADOVANI/NORDENSTRENG, supra note 4, at p. 266.

<sup>44</sup> PADOVANI/NORDENSTRENG, supra note 4, at p. 268.

<sup>45</sup> MacBride-Report, supra note 17, at p. 260.

<sup>46</sup> MacBride-Report, supra note 17, at p. 14.

<sup>47</sup> Geneva Declaration of Principles, supra note 37, para 1.

“inclusive society” are not identical: Thirty years ago, the developing countries were afraid that the mass media of the Northern and Western countries would exercise an “agenda setting function”<sup>48</sup> since between 80 % and 90 % of the transmitted information were produced by a few media agencies of developed countries<sup>49</sup> and due to a lack of financial means the developing countries were not in a position to counterbalance this situation.<sup>50</sup> Now, the “digital divide” is looked at from the angle of individual participation since still not everybody is able and/or capable of using the new information technology. Insofar, the goal of bridging the digital divide in and among countries continues to be an important issue on the political agenda with special emphasis on universal and affordable access as a key component of any far-reaching strategy.

## 2.2 Promoting Human Rights

A further important point in the policies for the advancement of the information society is the development of human resources capable of responding to the demands of the information age; thereby, the objectives must include the promotion of literacy and skills through education and training as well as the encouragement of the use of information technology to offer innovative learning opportunities.

As to that, both the MacBride-Report and the WSIS-Principles underline the fundamental meaning of human rights,<sup>51</sup> especially the freedom of information and the right of having access to information. Nevertheless, the general observation can be made that within the context of the WSIS human rights are more broadly interpreted than within the NWICO-based MacBride-Report 25 years earlier.

The re-affirmation of human rights in the WSIS-Principles can be crystallized around the following goals in an open society:<sup>52</sup>

- i. Everyone should be able to acquire basic information and electronic education, in order to master social transformations in all their practical and civic aspects.
- ii. Access to public data without charge is a necessary condition enabling everyone to exercise his/her civil rights.
- iii. Access to infrastructure under adequate economic conditions must be guaranteed by supporting the possibility of being a provider as well as a consumer of information.
- iv. The respect of intellectual property should be interpreted in view of the right to education and knowledge; furthermore, intellectual work and ideas, including

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<sup>48</sup> See E. MENGHETTI, Die völkerrechtliche Stellung des internationalen Satellitenfernsehens im Spannungsfeld von Völkerverständigung und Propaganda: Bestrebungen zur Kontrolle von grenzüberschreitenden Informationsflüssen, Zürich 1991, at pp. 22/23, 147.

<sup>49</sup> See M. MASMOUDI, Voie libre pour un monde multiple, Paris 1986, at p. 52.

<sup>50</sup> MASMOUDI, supra note 49, at p. 19.

<sup>51</sup> MacBride-Report, supra note 17, at pp. 256,265; Geneva Declaration of Principles, supra note 37, paras 4/5.

<sup>52</sup> See also WEBER, supra note 33, at pp. 84/85 and Human Rights in the Information Society (HRIS) Caucus, Towards an Information and Communication Society Respectful of Civil and Political Rights, as well as Economic, Social and Cultural Rights of Citizens, 31 May 2003, available at: [http://www.itu.int/dms\\_pub/itu-s/md/03/wsispc3/c/S03-WSISPC3-C-0115!!PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/md/03/wsispc3/c/S03-WSISPC3-C-0115!!PDF-E.pdf).

programming methods and algorithms, are not suitable to be monopolized by legal or technical measures.

In elaborating a legal framework specifically for the needs of the new information society, common standards adequately protecting human rights must become a basis for future discussion.<sup>53</sup>

A further issue pointed out by the MacBride-Report and again being reflected in the WSIS-Principles is the importance of education structures, covering formal schooling systems and distance learning opportunities.<sup>54</sup>

### **2.3 Fostering Education and Culture**

In addition, issues of cultural heritage, cultural diversity, and cultural identity remain key topics since the preservation of cultural heritage is a crucial component of the identity and self-understanding of human beings.<sup>55</sup> A digital divide only seems to be avoidable if people living in different geographical areas can preserve their cultural customs and identity. The creation, processing, dissemination, and conservation of local content is thus of utmost importance; developments of local content, suited to domestic or regional needs, will encourage and stimulate social and economic participation, not only as users, but also as providers and creators, thereby narrowing the digital divide that accentuates disparities in the delivery of information and knowledge to the world population.<sup>56</sup>

### **2.4 Supporting Information and Communication Technologies**

Finally, both the MacBride-Report and the WSIS-Principles acknowledge the importance of the technological infrastructure.<sup>57</sup> In this context aspects like open access, open standards, open source software and the wide spread availability of access points play a role.<sup>58</sup> Only if networks and information services are accessible ideally by each member of the society, can the desired information and communication order be achieved. Insofar the WSIS-Principles speak about an “inclusive” society.<sup>59</sup> The world-wide availability of information infrastructures cannot be realized without further efforts of the developed countries in expanding more extensively financial resources to developing countries; insofar, it should not be overlooked that new technologies are not necessarily more expensive; in particular mobile communication can often overcome the problems of fixed- line communication.

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<sup>53</sup> See also WEBER, *supra* note 33, at p. 85.

<sup>54</sup> MacBride-Report, *supra* note 17, at p. 256; Geneva Declaration of Principles, *supra* note 37, para 29.

<sup>55</sup> All national languages should be promoted even while selecting some, where necessary, for more wide-spread use in communications, higher education, and administration.

<sup>56</sup> For further details to the preservation of cultural heritage see WEBER, *supra* note 33, at pp. 138 ss.

<sup>57</sup> MacBride-Report, *supra* note 17, at p. 255; Geneva Declaration of Principles, *supra* note 37, para 8.

<sup>58</sup> Weber, *supra* note 33, at p. 96; W. KILIAN, *Structural Aspects of Internet Regulations*, CRi 2007, at pp. 7/8.

<sup>59</sup> Geneva Declaration of Principles, *supra* note 37, para 1.

### 3. Improvements by the IGF

As already mentioned, within the second phase of the WSIS in Tunis<sup>60</sup> the international community agreed, that an Internet Governance Forum (IGF),<sup>61</sup> a multi-stakeholder platform for the discussion of public policy issues related to the Internet, should be created and that the UN Secretary General should convene a so-called “process of enhanced co-operation” between governments with the full involvement of all stakeholders in order to assure that the management of the critical Internet resources would be handled in accordance with the principles defined in the first phase of the WSIS.<sup>62</sup> Whereas the IGF, although there are still ongoing discussions about the scope of its mandate and the appropriateness and benefit of the IGF’s ability to produce recommendations, is widely considered of being a valuable innovation, the process of “enhanced co-operation” is seen much more controversial by the international community.<sup>63</sup> While most stakeholders of the industrialized countries have the view that an “enhanced co-operation” is already happening in the framework of existing institutions and mechanisms, many of the stakeholders of developing countries still expect the development of a new institution or mechanism in which this “enhanced co-operation” would be realized.

The establishment of this new annual forum for multi-stakeholder dialogue on public policy issues related to the Internet was proposed by very carefully formulating its mandate.<sup>64</sup> One of the IGF’s key innovations was the fact, that it is not only open to all interested stakeholders in terms of participation. It is also open to all interested stakeholders in its very design, in the definition of its format and structure, and also in the decisions on what issues will be discussed at the IGF. The Inaugural Meeting of the IGF took place in Athens from October 30 to November 2, 2006, bringing together various stakeholders from civil society, private sector, governments, and international organizations on equal footing and on a voluntary basis. The openness as well as the absence of procedural rules and provisions in envisioning the adoption of resolutions enabled valuable open dialogues and non-binding approaches to current topics among actors who would otherwise barely have encountered one another.

After Athens, by now the sixth meeting of the IGF was held in September 2011 in Nairobi continuing the dialogues. During the more than six years since its establishment, the IGF has been appraised as an innovative experiment in global governance, but has also been subjected to criticism.<sup>65</sup>

From a general point of view it can be said, that the IGF has been successful insofar as it has filled an institutional vacuum by providing a global platform for discussion of Internet-related public policy issues. There is also a wide consensus about the value of having such a platform for multi-stakeholder policy discussions; unlike in intergovernmental institutions or in

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<sup>60</sup> See II.1 above

<sup>61</sup> The text of this subchapter contains excerpts of R.H. WEBER/T. SCHNEIDER, *Internet Governance and Switzerland’s Particular Role in its Processes*, Zurich 2009, at pp. 23/24.

<sup>62</sup> See Geneva Declaration of Principles, *supra* note 37, at paras 67-78.

<sup>63</sup> See J. MALCOLM, *Appraising the Success of the Internet Governance Forum* (21<sup>st</sup> November 2008), available at: <http://www.internetgovernance.org>; WEBER, *supra* note 31, at p. 71.

<sup>64</sup> See Geneva Declaration of Principles, *supra* note 37, at paras 72/73, 76.

<sup>65</sup> MALCOM, *supra* note 63, at p. 1.

private-driven mechanisms, the IGF is one of the very few fora in which civil society has more than the theoretical possibility to express its views. Representatives of civil society are among the possible drivers shaping the process and its outcomes, including in the form of so-called dynamic coalitions.<sup>66</sup> Many noted that the involvement of all stakeholders has improved, but the participation of stakeholders from developing countries should be further enhanced.

Nevertheless, some stakeholders from industrialized countries criticized the setting of the IGF as a forum of pure discussions and exchange of views and experience without any power in decision-making. The IGF structure is still young and rather weak and is not yet fully accepted by all stakeholders, especially by those forces that would prefer to discuss in an intergovernmental setting without having to listen to critical and sometimes undiplomatic voices from civil society. This landscape of diverging interests and expectations, but also the very limited resources that the IGF secretariat has at its disposal leave only a thin line for the IGF to operate successfully.

Notwithstanding these reservations, the IGF has become an institution of a unique value already after six years of existence. Praising the success of IGF meetings so far, participants considered the support of debates and dialogues as one of the IGF's greatest values<sup>67</sup> leading to a shared understanding and development of solutions. Furthermore, real-time transcription was provided from all meetings facilitating remote participation efficiently.

#### **IV. From Digital Divide to a Right of Development**

The present WSIS-situation does not suffice to realize a fair and equitable information and communication order. Moreover, development issues need to be taken into account to a further extent.

##### **1. Notion of the Digital Divide**

The term “digital divide” originated as a catch-phrase in US national studies of inequalities in access to information and communication. However, there is no single general abstract definition of the digital divide; indeed, the digital divide is a dynamic and multifaceted construct, which mainly depends on the factors and indices used to measure and analyse the inequalities in information and communication technologies’ areas.<sup>68</sup> Particularly the following basic elements are mentioned in connection with the digital divide problems:<sup>69</sup> (i) The digital divide is a dynamic concept, which evolves over time; (ii) there is no single

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<sup>66</sup> For further details see WEBER/SCHNEIDER, *supra* note 61, at p. 43.

<sup>67</sup> Canadian Internet Registration Authority (CIRA), Synthesis Paper, Open Consultations, Internet Governance Forum, 22 November 2010, available at: [http://www.intgovforum.org/cms/2010/open\\_consultations](http://www.intgovforum.org/cms/2010/open_consultations). synthesis.22.11.10.pdf, II 5.

<sup>68</sup> R. H. WEBER/V. MENOUD, *The Information Society and the Digital Divide - Legal Strategies to Finance Global Access*, Zurich 2008, at p. 3; R. KARIYAWASAM, *International Economic Law and the Digital Divide - A New Silk Road*, Cheltenham/Northampton 2007, at pp. 24 ss.

<sup>69</sup> WEBER/MENOUD, *supra* note 68, at p. 5.

divide, but rather multiple divides are to be differentiated; (iii) the main factor causing these divides is wealth.

At the international level, the Organization of Economic Co-Operation and Development (OECD) has explained the digital divide as “gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access ICT and their use of the Internet for a wide variety of activities”.<sup>70</sup> Insofar a digital divide can exist between developed and less developed countries and even within a developed country itself due to issues of universal service and access, geography and differing levels of poverty.<sup>71</sup>

Nevertheless, the digital divide could also be understood through the closely-linked mirror-inverted concept “digital opportunity”.<sup>72</sup> Subsequently to the WSIS, the notion has been elaborated that all stakeholders’ commitments would have to exist in the attempt to turn the digital divide into a digital opportunity for all.<sup>73</sup>

## **2. Concretization of the Digital Divide**

### **2.1 Political Approach**

In the context of the New World Information and Communication Order (NWICO), four “Ds”, mainly driven by political considerations, have been identified and discussed in the past:<sup>74</sup>

(1) *Democratization*: Instead of the previous “one-way flow” a “two-way exchange” should be possible, i.e. measures are to be taken which ensure a more equitable balance of the news flows between countries.

(2) *Decolonization*: The respect of developing countries’ cultural identities must be underlined by the acknowledgement of their self-determination and the principle of non-interference.

(3) *Demonopolization*: Information and communication technology enterprises may not reach a monopoly in technologically less developed countries and each country must have the right to develop its own independent information system.

(4) *Development*: Information and communication technologies are vital and the demand for a more just distribution of the resources requires the development of independent information systems.

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<sup>70</sup> OECD, Understanding the Digital Divide, Paris 2001, at p. 107, available at: <http://www.oecd.org/dataoecd/38/57/1888451.pdf>.

<sup>71</sup> R. KARIYAWASAM, Next Generation Networks: A New Digital Divide?, International Journal of Innovation in the Digital Economy, July-September 2010, pp. 1-21, at p. 6.

<sup>72</sup> WEBER/MENOUD, supra note 68, at pp. 5/6.

<sup>73</sup> Geneva Declaration of Principles, supra note 37, para 10.

<sup>74</sup> CARLSSON, supra note 5, at pp. 12/13.

With the advent of the Internet, the political approach directed to the treatment of mass media has lost importance and has been replaced by a more individualistic approach looking at participation possibilities in civil society.

## 2.2 Civil Society Approach

Looking less at the information and communication tools and particularly at the recipients, five “As” as key prerequisites for bridging the digital divide can be defined:<sup>75</sup>

(1) *Awareness*: Those who are not aware of the Internet and of the new communication technologies and those who are not aware of the merits of computers and online access will not be able to benefit from the chances created by the new technologies and take advantage of the digital opportunities.

(2) *Access*: The Internet creates many unprecedented opportunities for people (also for people with disabilities); therefore, access to the Internet and the new technologies is paramount to survive personally and professionally.

(3) *Affordability*: In many less developed countries, the costs of hardware and software and the interconnection fees are so high that Internet access remains out of reach for many people, a situation which needs to be overcome.

(4) *Availability*: Even if having Internet access, many people might not be able to find the information that is relevant to their lives and communities, i.e. to obtain the actually relevant information. An additional barrier to digital participation is language, even if now other languages aside from English can be used in the Internet, thereby mitigating the problem.

(5) *Adaptability*: Access to information technologies and Internet content is useful only if people are able to adapt to the changing environment and to use the new technological tools effectively; computer illiteracy, technophobia, and cyberphobia are posing significant barriers to participation in the online world.

Based on these general principles, showing that the empowerment of civil society to become involved in information exchanges can create “soft power”,<sup>76</sup> a new notion of a right of development can be taken at hand.

Surprisingly similar is the approach of the Committee on Economic, Social and Cultural Rights of the Economic and Social Council: In its General Comment No. 21 of December 21, 2009, the Committee - in interpreting Art. 15 para 1 (a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stating a right of everyone to take part in cultural life - mentions as elements of individual participation the availability of access, the

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<sup>75</sup> P. K. YU, Bridging the Digital Divide: Equality in the Information Age, *Cardozo Arts & Entertainment Law Journal*, Vol. 20, 2002, 1-52, at pp. 8 ss; see also WEBER, *supra* note 31, at pp. 251/52.

<sup>76</sup> YU, *supra* note 75, at pp. 15/16.

accessibility of culture, the acceptability, the adaptability, and the appropriateness of the realization of a specific human right.<sup>77</sup>

### 3. On the Way to a Right to Development

#### 3.1 Right to Development

On the basis of the general human rights' understanding, a right to development must be introduced. Already Art. 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 sets out the following legal obligation: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adopting of legislative measures". Notwithstanding some queries as to whether this provision imposes obligations on states that are immediately justiciable,<sup>78</sup> the general meaning is well accepted and the provision is undoubtedly directly applicable.

Similarly, Art. 15 para 1 (a) ICESCR on the right to take part in the cultural life is considered to constitute obligations of the states, in particular the obligation to respect, the obligation to protect and the obligation to fulfill; therefore, states are obliged to take specific measures aimed at achieving respect for the right of everyone to freely choose his own cultural identity, to enjoy freedom of opinion and expression, to have access to his own cultural and linguistic heritage and to freely take part in any decision-making process.<sup>79</sup>

Moreover, for the last almost 50 years, a growing body of thoughts from developing countries in the area of international law tried to establish a legal right to development. These attempts culminated in the UN Declaration on the Right to Development (RTD)<sup>80</sup> stating that the right to development is a human right (Art. 1).<sup>81</sup> Despite being in force for more than 20 years, the Declaration, not being a legally binding instrument, is suffering from a lack of implementation and the political will required for international co-operation.<sup>82</sup>

In particular in the field of information and communication technologies, the right to development merits more support from the developed countries, based on a human and cultural-centred approach, asking for example the following questions:<sup>83</sup> What is to be the level of the impact of ICT development? On whom does such development impact? On what do ICT impact?

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<sup>77</sup> General Comment No. 2, Forty-third session, November 2-20, 2009, E/C.12/GC/21.

<sup>78</sup> See *KARIYAWASAM*, supra note 68, at pp. 292/93; however, see now the Draft General Comment No. 34 of the Human Rights Committee (hundredth session, Geneva, October 11-29, 2010) of November 25, 2010, CCPR/C/GC/34/CRP.5, at pp. 4/5.

<sup>79</sup> See General Comment No. 1, supra note 77, at pp. 11-13.

<sup>80</sup> Resolution 4/128 of 4 December 1986.

<sup>81</sup> I. *BUNN*, The Right to Development, Implications for International Economic Law, *American University International Law Review*, Vol. 15, 2000, at pp. 1425 ss; S. *MARKS*, The Human Right to Development: Between Rhetoric and Reality, *Harvard Human Rights Journal*, Vol. 17, 2004, at pp. 137 ss.

<sup>82</sup> *KARIYAWASAM*, supra note 68, at p. 261.

<sup>83</sup> See *KARIYAWASAM*, supra note 68, at p. 267.

### 3.2 Financing for the Right of Development

The realization of a right to development needs financing. In the meantime, many studies outline the different possibilities for improving the financing in favor of less developed countries.<sup>84</sup> Furthermore, many political initiatives have been taken (apart from the WSIS in particular the Monterrey Consensus of March 2002 and Doha Declaration on Financing for Development of December 2008).<sup>85</sup> The WSIS suggests in its Tunis Agenda the establishment of a special ICT Opportunity Index and a Digital Opportunity Index.<sup>86</sup> Another proposal consists in the introduction of a RTD-Development Compact by which less developed countries would enter into a special agreement with the international community to seek assistance and co-operation in meeting their development goals.<sup>87</sup>

Looking at ICT financing strategies it cannot be overlooked that the market alone does not suffice to ensure equitable, fair and adequate ICT development; therefore, a strong case for international intervention exists to ensure that financing for ICT development is forthcoming.<sup>88</sup> Aspects for ICT development financing strategies are the identification of the various ICT areas requiring financing, the improvement of the leveraging and the mobilization of existing financial sources, the exploration and mobilization of new and alternative sources for financing as well as the work with the private sector and the development countries.<sup>89</sup> An example can be the support of mobile financial services as increasingly important social means.<sup>90</sup> A new system should incorporate elements such as (i) stakeholders' and actors' interests and influence; (ii) infrastructure and means of access; and (iii) capacity building, contents and applications; these elements should be implemented concurrently at all levels of the international policy-making processes.<sup>91</sup>

Finding financial means that would provide sufficient resources for achieving global access and realizing a fair and equitable information and communication order can appear to be a daunting task. Leveraging and mobilizing the instruments at disposal requires a focused and strong international consensus that is not always present. However, there are many financial mechanisms in place, which could, with few amendments and betterments, make substantial flow of funds available to invest in ICT projects. No instrument alone is able to contribute sufficient resources; however, several mechanisms combined could, together, supply a necessary funding and answer developing countries' needs with respect to ICT infrastructure and services development.<sup>92</sup> If such financing instruments would be in place the chances increase that the present digital divide will be overcome and that the whole (global) society will be able to take advantage of an adequate information and communication order.

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<sup>84</sup> For an extensive overview see *WEBER/MENOUD*, supra note 68, at pp. 63 ss.

<sup>85</sup> For further details see *WEBER/MENOUD*, supra note 68, at pp. 254 ss.

<sup>86</sup> See <http://www.itu.int/ITU-D/ict/partnership/>.

<sup>87</sup> *KARIYAWASAM*, supra note 68, at pp. 305/306.

<sup>88</sup> *WEBER*, supra note 31, at pp. 259/60.

<sup>89</sup> *WEBER*, supra note 31, at p. 261

<sup>90</sup> See R.H. *WEBER*, *Regulatory Framework for Mobile Financial Services*, in: Telecom Regulatory Authority of India (ed.), *Mobile Applications for Inclusive Growth and Sustainable Development*, Delhi 2010, at pp. 87 ss.

<sup>91</sup> *WEBER/MENOUD*, supra note 68, at p. 58.

<sup>92</sup> For further details see *WEBER/MENOUD*, supra note 68, at pp. 179-182.

### 3.3 Overcoming the Risk of a New Digital Divide

Notwithstanding the aforementioned actions the risk of a new digital divide should not be underestimated since current important developments<sup>93</sup> in Internet architecture will be (i) the exhaustion of Internet Protocol version 4 (IPv4) addresses<sup>94</sup> combined with the rollout of new IPv6<sup>95</sup> addresses in near future and (ii) the migration of existing Internet networks to Next Generation Networks (NGN). The term “Next Generation Networks” refers to key architectural evolutions in telecommunication and access networks structured in the way that one network handles multiple types of traffic such as voice, data and multimedia by encapsulating all information and services into packets and thus bringing the benefits of faster and more efficient communications to the end-users. Even if this technical development enables operators to provide a wide spectrum of services within one or simultaneously several layers there is a risk of creating a much more complex market environment in which for example an operator may have market power on one layer, but not on another.<sup>96</sup>

The migration to these NGNs is taking place now in the developed countries. Since the digital divide is as much about network access as having the latest technology,<sup>97</sup> the challenge of the developing world is to gain access to these new NGN in order to avoid a new digital divide. The right to development must encompass the ability for the whole society to participate in these new technologies and financial resources should be made available to the less developed countries facilitating the provision of the respective infrastructures.

## V. Outlook

The fact that the NWICO did not cause any political movement or follow-up actions is to be seen in the light of certain weaknesses of the old project. In particular, the NWICO followed a rather idealistic approach, based on common values and common aims of the countries without regard to the technological and economic aspects of mass communication. This unilateral view also underestimated the “digital divide” problem. Now, the “digital divide” is looked at from the angle of individual participation; therefore, the goal of bridging the “digital divide” in and among countries has gained critical importance on the political agenda.

In the NWICO, expectations of goodwill in sponsoring, cost reduction and preferential tariffs for developing countries were expressed without getting into details of the respective

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<sup>93</sup> See KARIYAWASAM, *Next Generation Networks: A New Digital Divide?*, supra note 71, at p.4.

<sup>94</sup> The current Internet Protocol (IP) addressing system, Internet Protocol version 4 (IPv4), is at risk to be unable to satisfy all IP address requests made by the present and future Internet hosts, since the demand for IP addresses increased in the course of the last 15 years and the architecture of addresses, constituted according to IPv4, is a limited resource. As IPv4 only makes available about 4 billion IP addresses, a capacity shortage is anticipated in a timeframe of between 2011 and 2012; for further details see R.H. WEBER/U.I. HEINRICH, *J P Address Allocation through the Lenses of Public Goods and Scarce Resources Theories*, scripted, vol. 8(1), 2011, 70-91, at p. 70.

<sup>95</sup> IPv6 was recommended as the next generation IP addressing scheme for implementation. The design of IPv6 aims at providing quantitative and qualitative advantages compared to the current IPv4. IPv6 is told to make available about 600 billion IP addresses. Unfortunately, the two Internet protocols are currently not fully compatible; for further details see R.H. WEBER/U.I. HEINRICH, supra note 94, at p. 71.

<sup>96</sup> KARIYAWASAM, *Next Generation Networks: A New Digital Divide?*, supra note 71, at p. 6.

<sup>97</sup> See KARIYAWASAM, *Next Generation Networks: A New Digital Divide?*, supra note 71, at p. 9.

activities. In the WSIS discussions, however, partly based on the UN Millennium Development Goals, stronger attention is devoted to the financial means. The vague proposal of the NWICO era to introduce an international tax or duty which has not been taken up in the political arena has gained importance in the WSIS framework: past experiences have shown that it might be more difficult to levy taxes than to agree on specific contributions to be made by the developed countries. Furthermore, the efficient investment of funds, also related to a new emerging approach of a right to development, is intensively discussed in international organizations and an adequate support for the establishment of a proper (fixed or mobile) infrastructure is now on the political agenda.

## SUMMARY

### **From Free Flow of Information to Civil Society's Participation in the Information World**

ROLF H. WEBER

Thirty years ago, the developing countries were afraid that mass media of the Northern and Western countries would exercise an “agenda setting function” in the information production and transmission. Due to a lack of financial and technological means the developing countries were not in a position to counterbalance this situation. In the meantime, the “digital divide” is looked at more from the angle of individual participation; the goal of bridging the “digital divide” in and among countries has gained critical importance on the political agenda in view of the realization of an inclusive society. While some substantive topics, addressed by the NWICO, have remained important over three decades and again been tackled in the framework of the WSIS, some other topics only emerged during the last decade.

## RESÜMEE

### **Vom freien Informationsfluss bis zur Mitwirkung der Zivilgesellschaft an der Informationsgesellschaft**

ROLF H. WEBER

Vor dreißig Jahren hatten die Entwicklungsländer die Bedenken, die Massenmedien der entwickelten Welt würden bei der Schaffung und Weiterleitung von Informationen, die in den Entwicklungsländern zur Verbreitung gelangen, einen inakzeptabel großen Einfluss ausüben. In dieser Zeit hatten die Entwicklungsländer weder die finanziellen Mittel, noch waren sie auf dem Stand der Technik, um solche Tendenzen aufzuhalten.

Neuerdings geht es für die Entwicklungsländer mehr um die Frage der „digitalen Kluft“ aus der Sicht der Mitwirkung des Individuums. Da die Verwirklichung der Informationsgesellschaft zu einem wichtigen politischen Ziel geworden ist, legen die Politiker ein größeres Gewicht darauf, dass die digitale Kluft innerhalb eines Landes und zwischen den Ländern abnimmt. Einige Fragen, die in den siebziger und achtziger Jahren bei der Verkündung des Programms der neuen Weltinformations- und Kommunikationsordnung (NWICO) untersucht worden waren, sind auch noch heute, nach drei Jahrzehnten, aktuell und wurden Anfang der Zweitausenderjahre auf den Weltgipfeln zur Informationsgesellschaft (WSIS) diskutiert. Andere im Beitrag diskutierte Fragestellungen haben erst im vergangenen Jahrzehnt die Aufmerksamkeit auf sich gelenkt.