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**Internet Regulation: A Hard-Law Proposal**

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## **INTERNET REGULATION: A HARD-LAW PROPOSAL**

**Antonio Segura-Serrano\***

### **ABSTRACT:**

This paper aims to analyze Internet regulation as a case-study of International Soft-law. Further, it posits the idea that a different approach in this realm is possible under the spotlight of the Common Heritage of Mankind (CHM). In the first part of the paper, the study demonstrates that the soft-law approach, which is itself looming in International Law at large, has dominated the main areas of Internet regulation to date. Existing regulation in the areas of privacy protection, the protection of intellectual property rights together with the struggle against harmful content confirm it. On the contrary, a hard-law proposal is put forward in this paper suggesting that the CHM, itself a principle, a legal regime and a concept, is applicable to the Internet with the aim of achieving a more democratic governance within this domain.

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## 1. INTRODUCTION

This analysis aims to study the current regulation affecting the Internet field and to make a proposal. There is an array of questions related to this new technology that national laws and International Law have addressed in various forms. We would like to focus only on some substantial issues, such as: freedom of speech and the fight against harmful content; the protection of intellectual property rights against piracy and the promotion of public domain information, and privacy rights and the protection of personal data *vis-à-vis* the commercial use of collected data. Although there are other possible questions to be discussed (education, cybersecurity, taxation, electronic commerce and contracts, etc.), the issues chosen will give the measure of the differences between national legal regimes, and reveal the present role of International Law with respect to the Internet. The test will be whether Internet regulation accommodates to the new liberal theory on normativity, which is based on the premise that in the globalization era the main actors (and subjects) in the law-making process and to which international norms must be devoted are individuals and private groups.

In the second part of this paper, we shall consider a hard-law proposal. Because the Internet is important not only for each and every country in the world, but also because it is so crucial for the well-being of people in developed and developing countries alike, it seems fair to ask about the future governance of the Internet. In this regard, International Law may add to the discussion by introducing a very interesting concept, the concept of the “common heritage of mankind”. The analysis of this concept may be useful in answering various questions, such as who rules the Internet, or who is entitled to appropriate the Internet, and how it should be governed.

In the next section we will only give an outline of the soft-law debate. Although the concept of soft-law has been with us for some time now, it has been recently used to introduce a normative change under the guise of privatization and self regulation on the basis of the needs posed by the globalization age. In the third section, we will analyze in turn the issues of privacy, intellectual property and harmful content, as a case study of soft-law. In the last section, we will carry out a detailed examination of the common heritage of mankind as a principle, a legal regime and a concept, to be applied to the Internet field.

## 2. INTERNATIONAL SOFT-LAW

Soft-law has been around for quite some time in International Law and has come to the fore sporadically, reflecting specific challenging processes in international relations. On the one hand, soft-law has been offered as an alternative to classical law-making when the global arena has found a stalemate, i.e., the historical difficulties experienced in the effort to produce international regulation regarding the North-South confrontation. On the other hand, soft-law has been proposed as a part of a new project that may be labeled the liberal theory, where globalization is the historical context disabling traditional State-centric standpoints and encouraging answers such as deregulation and privatization.

### 2.1. SOFT-LAW AS A FAMILIAR PHENOMENON IN INTERNATIONAL LAW

The issue of soft-law has been a recurrent theme in international academia, as this debate carries with it all the deep conundrums surrounding the discipline of International Law. The differentiation between legal and non-legal norms, as the demarcation between law and policy, has often been criticized.<sup>1</sup> Accordingly, it is said that International Law is not a monolithic *corpus iuris* made up only of legally binding rules, whether in the form of international treaties or clear-cut customary rules.<sup>2</sup>

There is a slight distinction introduced in previous analyses on the soft-law question. First, it is generally agreed that there are soft-law instruments, that is, international agreements whose result is presented in such a way that there is conformity as to their non-binding legal force. This was the case of the Helsinki Final Act of 1975, which explicitly stated its non-binding legal force, which in turn was the subject of much examination.<sup>3</sup> This is in accordance with the

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<sup>1</sup> See McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 137, 144 (1953-I) (asserting that the distinction between law and policy is unreal); Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 305 (1993) (insisting more recently on soft law as an appropriate mechanism through which politics can enter into the realm of law).

<sup>2</sup> See Richard R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L. Q. 549 (1980).

<sup>3</sup> See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L., 296 (1977); Michael Bothe, *Legal and Non-legal Norms-A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65 (1980); Pieter van Dijk, *The Final Act of Helsinki-Basis for a Pan-European System?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 97 (1980); Baxter, *supra* note 2, at 557.

accepted view regarding international agreements as legally binding only if the intention of the parties is to create legal rights and obligations or to establish international relations governed by International Law.<sup>4</sup> However, international agreements do not normally assert their non binding legal force, so that the soft-law character has to be derived from the language of the instrument, i.e., the lack of precision and the generality of the terms, together with the context or circumstances surrounding its conclusion and adoption.<sup>5</sup> These are commonly referred to as political agreements or gentlemen's agreements, very early on identified from international practice in a wide variety of types.<sup>6</sup> Other ways in which States may escape the form or intention of legally-binding agreements are memoranda of understanding, joint communiqués, minutes, etc.<sup>7</sup>

Secondly, it is possible to find international agreements where some of the rules incorporated are not that straightforward and, therefore, their binding legal force cannot be asserted. It could then be assumed that some norms established in international instruments, or most of them for that matter, can be divided into two boxes, one incorporating legal or binding norms, and the other integrating not so binding, i.e., soft-law rules. The various degrees of cogency, persuasiveness and consensus attached to different norms of an agreement only reproduce the wide spectrum regarding the acceptance, precision and relevance of customary international law rules. In other words, the fact that an international agreement "may contain both provisions creating precise legal obligations and norms of such a vague and general character that it is clear that they were not intended to be enforced" is just the normal consequence of the "infinite variety" of International Law. Differences would then be quantitative, not qualitative, so that international norms have a variety of different impacts and legal effects.<sup>8</sup> The categories of soft-law commonly used in State practice, according to Baxter,

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<sup>4</sup> See MALCOLM N. SHAW, INTERNATIONAL LAW 812-13 (5<sup>th</sup> ed. 2003).

<sup>5</sup> Cf. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414-415 (1983) (stating that the term "soft-law" should not be used to convey the sublegal value of some non-normative acts like the Helsinki Final Act, since legal obligations contained therein are neither "soft-law" nor "hard-law", they are just not law at all; the term "soft-law" should be reserved for rules that are imprecise or not really compelling).

<sup>6</sup> See Pierre M. Eisemann, *Le gentlemen's agreement comme source du droit international [The Gentlemen's Agreement as a source of international law]*, 106 JOURNAL DE DROIT INTERNATIONAL 326 (1979); J.E.S. Fawcett, *The Legal Character of International Agreements*, 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 381 (1953).

<sup>7</sup> See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 26 (Dinah Shelton ed. 2000).

<sup>8</sup> See Baxter, *supra* note 2, at 549-550, 563.

are the *pactum de contrahendo*, the non self-executing article inserted in a treaty needing a new instrument in order to implement it and the hortatory provision.<sup>9</sup>

Of course, critics of this characterization of International Law normativity have warned against the possibility of a sliding scale effect. The acceptance of the concept of soft-law may weaken the objectives of stability and certainty and even the entire international rule of law.<sup>10</sup> To be sure, if one is to assume that international norms may fall into different categories within a continuum from binding legal rules or hard-law to non-legal rules in the softer form, then there is a chance that “weak”, “fragile” or “soft-law” adds to the structural weaknesses of the international normative system.<sup>11</sup> Despite those structural weaknesses, there is supposed to be a clear difference between legal and non-legal norms in terms of enforcement and sanction.

Klabbers has argued for the redundancy of the idea of soft-law or even its undesirability. In his opinion, the assumptions upon which the soft-law argument is built are twofold. The first consists of the existence of various complete or self-contained international orders,<sup>12</sup> which in turn raises important questions regarding legal consequences in general flowing from soft-law. “The self-contained nature of the soft legal order [...] is not just a by-product of the soft law thesis, but is one of its essential foundations. For, if it could be claimed that soft-law leads, in its application, to either hard law (hard responsibility, hard sanctions) or to non-law (no responsibility and no sanctions), soft law loses its distinctiveness, and therewith its reason of existence”.<sup>13</sup> The second assumption is based on a subjectivist conception of law-making in general. However, in Klabbers reasoning, neither State nor judicial practice can be invoked as supporting the acceptance or application of soft-law. What they show is rather the willingness to recast soft-law instruments into the traditional positivist sources of international law.<sup>14</sup> Soft-law is redundant because the category of law is nuanced and is capable of reflecting various shades

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<sup>9</sup> See *id.*, at 554.

<sup>10</sup> See GENNADII M. DANILENKO, *LAW MAKING IN THE INTERNATIONAL COMMUNITY* (1993).

<sup>11</sup> See Weil, *supra* note 5, at 413-414.

<sup>12</sup> See Ryuichi Ida, *Formation des normes internationales dans un monde en mutation. Critique de la notion de soft law [International norm formation in a mutating world. Critique of the soft law notion]*, in *LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY* 333, 338 (D. Bardonnnet *et al.* eds. 1991).

<sup>13</sup> Jan Klabbers, *The Redundancy of Soft Law*, 65 *NORDIC JOURNAL OF INTERNATIONAL LAW* 167, 169 (1996).

<sup>14</sup> See *id.*, at 173 (referring to Professor’s Dupuy approach in the *Texaco* case, where he reintroduced the soft law thesis, while finally falling back on the concept of custom). See Dupuy’s argument in René-Jean Dupuy, *Droit déclaratoire et droit programmatore: de la coutume sauvage a la “soft law” [Declaratory law and programmatic law: from revolutionary custom to “soft law”]*, *L’ÉLABORATION DU DROIT INTERNATIONAL PUBLIC, COLLOQUE DE TOULOUSE* 133 (SFDI ed. 1975).

of grey without losing its binary character. In other words, “[o]ur binary law is well capable of handling all kinds of subtleties and sensitivities; within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding”.<sup>15</sup> Subsequently, Klabbers argued against soft-law altogether because “it attempts to create so much subtlety that we can no longer handle it”.<sup>16</sup>

Nevertheless, as a compromise between sovereignty and order,<sup>17</sup> the soft-law path may be useful when States are not ready to assume legal obligations but wish to undertake some kind of commitment short of a legally binding one. By giving some form and shape to the understanding reached by the parties, it may enhance the certainty of States’ shared expectations, as actual compliance with it may demonstrate.<sup>18</sup> Further, the soft-law norm may be the short-term course chosen in order to prepare the consensus necessary until a hard-law rule may emerge in the long run, whether in the form of a new legally binding agreement<sup>19</sup> or a customary law rule derived from State practice.<sup>20</sup>

International economic law is one of the fields in which soft-law has developed in a relevant manner,<sup>21</sup> be it in the case of monetary relations,<sup>22</sup> trade<sup>23</sup> or the regulation of multinational corporations,<sup>24</sup> to a large extent due to the fact that State interests were so

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<sup>15</sup> See Klabbers, *supra* note 13, at 181.

<sup>16</sup> Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC JOURNAL OF INTERNATIONAL LAW 381, 387 (1998).

<sup>17</sup> See F. Roessler, *Law, De Facto Agreements and Declaration of Principle in International Economic Relations*, 21 GERMAN YEARBOOK OF INTERNATIONAL LAW 27, 41 (1978).

<sup>18</sup> See Bothe, *supra* note 3, at 91.

<sup>19</sup> See A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L.Q. 901 (1999).

<sup>20</sup> See Georges Abi-Saab, *Cours Général de Droit International Public*, 207 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 160, 161 (1987) (identifying three significant criteria for determining whether this process has taken place regarding General Assembly Resolutions); Willem Riphagen, *From Soft Law to Jus Cogens and Back*, 17 VICT. U.W.L. REV. 81 (1987); Chritine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 856 (1989).

<sup>21</sup> See Ignaz Seidl-Hohenveldern, *International Economic “Soft Law”*, 163 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 165 (1979-II).

<sup>22</sup> See Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT’L L. 443 (1983).

<sup>23</sup> See Frieder Roessler, *GATT and Access to Supplies*, 9 JOURNAL OF WORLD TRADE 25, 39 (1975); Gram, *The US Generalized System of Preferences for Developing Countries: International Innovation and the Art of Possible*, 72 AM. J. INT’L L. 513, 519 (1978).

<sup>24</sup> See Francesco Francioni, *International Codes of Conduct for Multinational Enterprises: an Alternative Approach*, 3 ITALIAN YEARBOOK OF INTERNATIONAL LAW 143 (1977); Nelli Feroci, *Società multinazionali: verso un codice di condotta [Multinational Corporation: Towards a Code of Conduct]*, 33 LA COMUNITÀ INTERNAZIONALE 356 (1978); Hans Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, 22 GERMAN YEARBOOK OF INTERNATIONAL LAW, 11, 29 (1979).

confronted at the time of decolonization that the only way to reach some agreement was in the form of a soft-law outcome.

## 2.2. THE NEW IMPULSE FOR SOFT-LAW: PRIVATIZATION AND SELF-REGULATION

The soft-law phenomenon observed by scholars has been about for quite some time and therefore is not new. Traditionally, authors have focused then on the process by which this soft-law emerges, the reasons that underlie its creation and the advantages it may have compared with hard-law obligations.<sup>25</sup> They have simply described a phenomenon. According to Shelton, the current preference of soft-law over hard law may be based on several factors such as: the choice of international institutions for deformed law; respect for hard-law; the intention to pressure non-consenting states to conform; the maturity of the international system; the uncertainty surrounding the issue to be regulated; the possibility of more active participation of non-state actors, and finally speed in adoption.<sup>26</sup> However, there is a recent trend led by a group of scholars that focuses on soft-law not just as a fact that has to be dealt with and somehow integrated within the normative theory, but which favors soft-law as the mechanism to create international norms best adapted to the new realities of international society.

First, there has been a debate about the role of soft-law in modern international law. It is suggested that international law is not made up of treaties and customs alone, as the product of traditional methods of international law-making. “Universal” international law conveys the idea of a new international law which is the result of global multilateral forums.<sup>27</sup> Similarly, “declarative” international law is the law declared by a majority of states, although devoid of enforcement, or practiced and accepted as law by a minority of States.<sup>28</sup> It is also submitted that compliance with international norms would not necessarily depend on enforcement and sanctions<sup>29</sup> and that international institutions and bureaucracies help resolve indeterminacy or

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<sup>25</sup> See Charles Lipson, *Why are some international agreements informal?*, 45 INT’L ORG. 495, 501 (1991) (identifying the basic reasons for choosing informal agreements).

<sup>26</sup> See Dinah Shelton, *Introduction*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 1, 12-13 (Dinah Shelton ed. 2000).

<sup>27</sup> See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 543 (1993).

<sup>28</sup> See Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEXAS INT’L L.J. 87, 89 (1991).

<sup>29</sup> See ABRAM CHAYES AND ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); ORAM YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE*

ambiguity of norms, through technical assistance, and finally induce conforming behavior.<sup>30</sup> The inference that could be made is that those elements theoretically differentiating between legal norms and non-legal norms are devoid of significance and would make soft norms as effective.

Even though it may be true that the line between law and non law appears increasingly blurred, in the sense that international agreements incorporate more and more soft obligations, while soft-law texts include supervisory mechanisms of the kind established in hard-law instruments, it is also true that both state representatives and non-governmental actors still agree in giving a stronger weight to legal obligations taking into account their legal consequences.<sup>31</sup>

Secondly, there exists the new liberal theory of international relations which, in its adaptation to International Law, has assumed soft-law as the basic method of law-making. In the opinion of transnationalists, with increasing globalization, there is a whole “brave new world” where “transnational actors, sources of law, allocation of decision function and modes of regulation have all mutated into fascinating hybrid forms. International Law now comprises a complex blend of customary, positive, declarative and «soft» law.”<sup>32</sup> To begin with, globalization has changed everything, and so too International Law, so that traditional methods of international law-making, i.e. treaties and custom, are less suitable to shape the relationships of the different actors which interact in the globalization era. In other words, classical methods of law-making in International Law are no longer useful in the new global environment. As Reinicke and Witte put it, non-State actors and soft-law are just “critical catalysts for and constituent elements of successful transnational cooperation and the creation of international norms that are crucial for a further development of a true international/transnational society” and that is why non-binding international legal accords are proposed as a substitute for the old methods just mentioned.<sup>33</sup> This approach is mostly applicable to Internet regulation, the

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ENVIRONMENT IN A STATELESS SOCIETY (1994). *Contra* George W. Downs *et al.*, *Is the good news about compliance good news about cooperation?*, 50 INT’L ORG. 379 (1996).

<sup>30</sup> See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989).

<sup>31</sup> See Shelton, *supra* note 26, at 10.

<sup>32</sup> Harold H. Koh, *A World Transformed*, 20 YALE J. INT’L L. ix (1995); *see also* Harold H. Koh, *Transnational Legal Process*, 75 NEBRASKA L. REV. 181 (1996); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Anne-Marie Slaughter, *The Real New World Order*, 76 FOR. AFF. 183, 184 (1997).

<sup>33</sup> Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 76 (Dinah Shelton ed. 2000).

quintessential example of the new globalized law-making process.<sup>34</sup> There is only one caveat in this transnational argument, identified by its very proponents, which lies in the fact that it is not always, indeed not even often, possible for all the parties with an interest in the issue at stake to have access to the law-making process. If that is the case, it will not be easy to avoid a particular policy agenda being captured by dominant private interest groups,<sup>35</sup> which are mostly non-accountable as well.<sup>36</sup> Paradoxically, this might support the conclusion that nowadays the State is the only actor which legitimately represents all stake holders internally and internationally, and that it is still difficult to think of a truly transnational society if it is not in the form of a “cosmopolitan democracy”.<sup>37</sup>

But the liberal project has also disaggregated the State and State sovereignty. Drawing from the liberal theory of international relations,<sup>38</sup> and taking into account the descriptive rather than normative distinction between liberal and non-liberal states,<sup>39</sup> liberal international lawyers like Slaughter assume that the primary actors in the international system are individuals and groups and that State preferences, as the aggregation of the preferences of those groups, will determine the outcome of State relations.<sup>40</sup> International Law norms are then the result of three law-making levels, i.e., the voluntary law of individuals and groups in transnational society (voluntary codes of conduct facilitated by the State),<sup>41</sup> the law of transnational governmental institutions (the State disaggregated in a transjudicial, legislative or executive dialogue), and the classical law of inter-State relations (Public International Law).<sup>42</sup> As argued from this new liberal theory, the first level of law is the most important and effective as it regulates the primary actors

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<sup>34</sup> See Mary E. O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 100, 110 (Dinah Shelton ed. 2000).

<sup>35</sup> See Reinicke & Witte, *supra* note 33, at 98.

<sup>36</sup> See Jessica T. Mathews, *Power Shift*, 76 FOR. AFF. 50, 64 (1997).

<sup>37</sup> See DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); David Held & Anthony McGrew, *Introduction*, in GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 1 (D. Held & A. McGrew eds. 2002); Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, 25 INT.ORG. 706 (1971).

<sup>38</sup> See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L. L. 205, 226 (1993); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L. L. 513 (1997).

<sup>39</sup> See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503, 510 (1995).

<sup>40</sup> See *id.* at 508.

<sup>41</sup> See VIRGINIA HAUFLE, *INTERNATIONAL BUSINESS SELF-REGULATION: THE INTERSECTION OF PRIVATE AND PUBLIC INTERESTS* (2000).

<sup>42</sup> See Slaughter, *supra* note 39, at 516. See also Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law*, 18 LEIDEN JOURNAL OF INTERNATIONAL LAW 1 (2005).

in the international system without intermediation. Privatization and self-regulation are then the logical consequences of this theory, and soft-law, in the form of codes of conduct, is the format in which most international rules should be construed. In this regard, the concept of “legalization” has been chosen by neoliberal institutionalists to show the relationship between hard and soft-law. Depending on three dimensions, i.e. obligation, precision and delegation, international norms run from very hard legalization to soft forms, which incidentally comprise the bulk of international law.<sup>43</sup>

In sum, the approach taken by the new liberal agenda consists of the transformation of a descriptive argument into a normative argument. A world of liberal and disaggregated States is not just what International Law has to work with, but what International Law should be framed for: “a-if not *the*-primary function of public international law is [...] *to influence and improve the functioning of domestic institutions*”.<sup>44</sup> But we believe that the concept of soft-law has been importantly modified through this recent scholarship and that it is now used to carry a different meaning and to bring about a relevant transformation in the normative process which demands a more careful examination. It is one thing to accept the usefulness of soft-law as the best choice to surmount a deadlock in relations between States,<sup>45</sup> and it is quite another thing to propose the utilization of soft-law as an alternative to traditional international law creation, i.e., as a substitute for State consent. Even if it is an important step in international law-making to recognize the relevant role of non-State actors as proponents or targets of soft-law,<sup>46</sup> it is quite a different thing to try to circumvent altogether the legitimacy of governments within the process of elaboration of international rules in a course that, by way of its soft-form, seek to modify the normative process. Last but not least, “embedded internationalism” may be a good alternative approach to try to find effective forms of international regulation, but this should not lead us “to lose sight of the continuing significance of power”.<sup>47</sup>

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<sup>43</sup> See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, *The Concept of Legalization*, 54 INT. ORG. 401 (2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT. ORG. 421 (2000).

<sup>44</sup> Anne-Marie Slaughter, *A Liberal Theory of International Law*, 93 ASIL PROCEEDINGS 240, 246 (2000).

<sup>45</sup> See Seidl-Hohenveldern, *supra* note 21, at 193.

<sup>46</sup> See Chinkin, *supra* note 7, at 34-37.

<sup>47</sup> José E. Álvarez, *Interliberal Law: Comment*, 93 ASIL PROCEEDINGS 249, 250-51 (2000). See also José E. Álvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183 (2001).

### 3. INTERNET REGULATION AS A CASE-STUDY OF SOFT-LAW

In this section we will analyze several issues in which it is generally accepted that there is room for the application of International Law to the Internet field, whether in its soft-law or hard-law form, although the extension of this application is rather predetermined by private interests. First, the protection of data privacy against illegitimate uses on the part of companies operating through the Internet has prompted agreement in a soft form between the main antagonists in this regard, i.e. the USA and the European Union (“the EU”). Second, there is the question of the protection of intellectual property rights. Copyright and other intellectual property rights seem to be massively violated by existing software which allows the free distribution of copyrighted material. In this case, international legal instruments have been used by States desiring to combat this ever-growing activity. Thirdly, the willingness on the part of some States, especially European countries, to control and eliminate harmful content within the Internet has collided with the firm and constitutionally protected right of freedom of expression in the USA. Questions of jurisdiction and choice of law between sovereigns have attracted much attention in this regard. They have been primarily managed by the judiciaries.

#### 3.1 PRIVACY: A SOFT-LAW AGREEMENT

Large scale processing of personal data was initially reserved to institutions with centralized databases. The advent of the personal computer (PC) and the Internet has changed that situation, and now there are many more participants using personal information. Almost anyone with a PC and access to the Internet may collect and process personal information, which has led to a dramatic change with regard to the privacy issue.<sup>48</sup> Specially, profiling and data mining activities on the part of marketing companies have been the focus of attention by privacy scholars for some time now.<sup>49</sup> Therefore, the protection of personal data and privacy in the

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<sup>48</sup> See Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 557-61 (1998) (commenting on the quantitative and qualitative change in privacy).

<sup>49</sup> See e.g. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1238-41 (1998); Joel R. Reidenberg, *Setting Standards for Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 530 (1995).

Internet era has become a critical public policy concern,<sup>50</sup> and States have started to realize how important this question is in itself for democracy,<sup>51</sup> let alone its role in fostering e-commerce. The World Summit on the Information Society has just recalled how vital this issue is for the development of the Internet.<sup>52</sup>

The protection of personal information is not the same in every country but varies prominently between different States, and this disparity is striking when we compare the approaches taken by the USA and the EU.<sup>53</sup> Although the USA was probably the first country regulating privacy,<sup>54</sup> the protection afforded to personal information here has always been based on a market-dominated policy<sup>55</sup> coupled with the strong influence of First Amendment principles that favor the free flow of information.<sup>56</sup> Within this model, the role of the State is limited: legal rules and statutory rights are aimed at protecting narrowly defined sectors so that privacy protection is mainly to be achieved by industry self-regulation and codes of conduct.<sup>57</sup>

This has been highly criticized by some scholars<sup>58</sup> who have seen international and, especially, European regulation, as formula to be followed. Schwartz and Reidenberg have persistently repeated that the European, as opposed to the U.S., approach regarding privacy is the

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<sup>50</sup> See Robert Gellman, *Conflict and Overlap in Privacy Regulation: National, International, and Private*, in BORDERS IN CYBERSPACE, INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 255 (Brian Kahin & Charles Nesson eds., 1997); Joel R. Reidenberg & Françoise Gamet-Pol, *The Fundamental Role of Privacy and Confidence in the Network*, 30 WAKE FOREST L. REV. 105, 106 (1995).

<sup>51</sup> See Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 557 (1995).

<sup>52</sup> See Declaration of Principles, Building the Information Society: a Global Challenge in the New Millennium, World Summit on the Information Society, Geneva 2003-Tunis 2005, December 12, 2003, at 5, Doc. WSIS-03/GENEVA/DOC/4-E, available at [http://www.itu.int/dms\\_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf), whose principle number 5 states that “[s]trengthening the trust framework, including information security and network security, authentication, privacy and consumer protection, is a prerequisite for the development of the Information Society and for building confidence among users of ICTs [...] it is important to enhance security and to ensure the protection of data and privacy, while enhancing access and trade”.

<sup>53</sup> See Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1319 (2000).

<sup>54</sup> See Gellman, *supra* note 50, at 255.

<sup>55</sup> See Reidenberg, *supra* note 53, at 1318; Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751, 770-773 (1999); DANIEL J. SOLOVE, THE DIGITAL PERSON, TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 91 (2004) (arguing that the market currently fails to provide mechanisms to enable individuals to exercise informed meaningful choices).

<sup>56</sup> See PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 153 (1998).

<sup>57</sup> See Reidenberg, *supra* note 53, at 1331.

<sup>58</sup> See Joel R. Reidenberg, *Restoring Americans' Privacy in Electronic Commerce*, 14 BERKELEY TECH. L.J. 771 (1999).

most appropriate because it rightly considers data protection as a civil rights issue.<sup>59</sup> They highlight the normative role of privacy in democratic governance,<sup>60</sup> arguing that a model based in self-regulation and the market may harmfully affect deliberative democracy.<sup>61</sup> Nevertheless, U.S. information culture may be changing.<sup>62</sup> To some extent, there is a growing concern among the American population with the extensive use of information technologies to build profiles of individuals.<sup>63</sup> That concern explains why the Federal Trade Commission (FTC) and the U.S. Congress have tried to improve the substantive and procedural rights of individuals regarding their right to privacy,<sup>64</sup> although it is true that this regulation is still limited by its sector-based approach.<sup>65</sup>

The other predominant approach, the European approach (which is also the model existing in countries such as Canada, Australia, New Zealand and Hong Kong),<sup>66</sup> consists of a comprehensive data protection law.<sup>67</sup> In this model, a kind of omnibus legislation creates a wide-ranging set of rights and obligations for the processing of personal information and, as opposed to a market-based policy, is based upon a human rights perspective where users are not “consumers” but “citizens”.<sup>68</sup>

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<sup>59</sup> Cf. PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* 39-42 (1996).

<sup>60</sup> See Reidenberg, *supra* note 53, at 1340.

<sup>61</sup> See Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1615 (1999) (considering that no other option but the imposition of standards through law will serve to the aim of developing effective privacy norms); Paul M. Schwartz, *Internet Privacy and the State*, CONN. L. REV. 815 (2000) (analyzing the flaws in the dominant rhetoric that favors the market, bottom-up regulation, and industry self-regulation); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) (arguing that both legal and technological tools will foster data privacy protection).

<sup>62</sup> See Samuelson, *supra* note 55, at 770.

<sup>63</sup> See Kang, *supra* note 49, at 1196-97.

<sup>64</sup> Even those who consider the traditional U.S. approach to privacy regulation as appropriate, have conceded that there is a movement in this country towards a more intense protection in this field, see Fred H. Cate, *Privacy Protection and the Quest for Information Control*, in WHO RULES THE NET? 311 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003) (stating that the recent U.S. enactments “reflect a much broader concept of privacy protection than previously recognized by U.S. law”).

<sup>65</sup> See SOLOVE, *supra* note 55, at 67; Rachel K. Zimmerman, *The Way the “Cookies” Crumble: Internet Privacy and Data Protection in the Twenty-first Century*, 4 N.Y.U.J. LEGIS. & PUB. POL’Y 439, 452-453 (2000-01).

<sup>66</sup> Beth Givens, *Privacy Expectations in a High Tech World*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 348 (2000).

<sup>67</sup> See Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REVIEW 471 (1995) (exploring the content of substantive European standards).

<sup>68</sup> See Reidenberg, *supra* note 53, at 1331.

As a result of being party to the European Convention of Human Rights (ECHR) and other international agreements,<sup>69</sup> countries in the European region are under certain obligations, such as ensuring the respect for private and family life, home and correspondence (Art 8 ECHR).<sup>70</sup> Specifically, in the digital context, there exist several international instruments relating to privacy and data protection with undeniable European origin or flavor. The 1980 Organization for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data<sup>71</sup> have been followed by the Ottawa Ministerial Declaration on the Protection of Privacy on Global Networks held in 1998.<sup>72</sup> The latter reaffirms the objectives set forth in the 1980 Privacy Guidelines and “the commitment to the protection of privacy on global networks in order to ensure the respect of important rights,” and both texts come to set what has been called “technological neutral principles” for the protection of personal data at the international level.<sup>73</sup> The OECD, however, continues to stress the economic implications of data protection; that is, it focuses on individuals as “users” and “consumers” instead of treating them as “citizens”.<sup>74</sup> A slightly different approach is found within the Council of Europe in which two important legal texts have been adopted: the 1980 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data<sup>75</sup> and the 1999 Guidelines for the Protection of Individuals with Regard to the Collection and Processing of Personal Data on the Information Highways.<sup>76</sup>

Finally, the 1995 European Community (EC) Directive on the protection of personal data<sup>77</sup> is the “world’s most ambitious and far-reaching data privacy initiative of the high-

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<sup>69</sup> See KLAUS W. GREWLICH, GOVERNANCE IN “CYBERSPACE”, ACCESS AND PUBLIC INTEREST IN GLOBAL COMMUNICATIONS, 280 (1999).

<sup>70</sup> See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Oct. 4, 1950, Art 8, 5 E.T.S. 5.

<sup>71</sup> Organization for Economic Cooperation and Development (OECD), Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, Sep. 23, 1980, 20 *I.L.M.* 422 (1981), available at [http://www.oecd.org/document/18/0,2340,en\\_2649\\_34223\\_1815186\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/18/0,2340,en_2649_34223_1815186_1_1_1_1.00.html).

<sup>72</sup> See OECD, Ministerial Declaration on The Protection of Privacy on Global Networks, Oct. 7-9, 1998, Doc. DSTI/ICCP/REG(98)10/FINAL, available at <http://www.oecd.org/dataoecd/39/13/1840065.pdf>.

<sup>73</sup> See MARCUS FRANDA, GOVERNING THE INTERNET, THE EMERGENCE OF AN INTERNATIONAL REGIME 165 (2001).

<sup>74</sup> See Reidenberg, *supra* note 53, at 1353.

<sup>75</sup> See Council of Europe, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, 108 E.T.S. Nevertheless, the U.S. is not a signatory of the Council of Europe Treaty.

<sup>76</sup> See Council of Europe, Committee of Ministers, Recommendation No. R (99) 5 of the Committee of Ministers to Member States for the Protection of Privacy on the Internet, Guidelines for the Protection of Individuals with Regard to the Collection and Processing of Personal Data on the Information Highways, 660<sup>th</sup> mtg., Feb. 23, 1999, available at <http://cm.coe.int/ta/rec/1999/99r5.htm>.

<sup>77</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L

technology era”.<sup>78</sup> One distinctive feature of this piece of legislation is its extraterritorial effect, made effective through the data transfer ban of Art 25, that prohibits the transfer of data to States that do not provide “an adequate level of protection” of personal information.<sup>79</sup> This was clearly a threat to data flows coming from the EU to the U.S., because European officials deemed the U.S. legislation not to be sufficiently protective of personal data. With this Directive on Data Protection, the EU has set both the international standard and the agenda in this field for years to come.

Some kind of understanding between the U.S. and the EU was therefore necessary in order to avoid disrupting data flows, and that is how the major international cooperation effort<sup>80</sup> to date with real effects in this area has been achieved by a *Safe Harbor* Agreement between the U.S. and the EU.<sup>81</sup> As the EC Directive on Data Protection became effective in 1998 and its data transfer ban was immediately applicable, the Department of Commerce and the European Commission tried to reach some kind of common understanding on data protection. The U.S. proposal for a *Safe Harbor* Agreement was finally accepted, after two years of negotiations, by the European Commission in July 2000. This *Safe Harbor* Agreement establishes core data privacy principles for the industry to follow. Those companies joining the *Safe Harbor* principles on privacy protection would be placed by the Department of Commerce on its web site list of certifying firms and, conversely, EC Member States would not challenge them or otherwise condition any data transfers to them.<sup>82</sup> Although some scholars consider this *Safe Harbor*

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281) 31, which has been partially superseded by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), O.J. (L 201) 37. See Aparna Viswanathan, *On Cookies That Don't Crumble: Will the Electronic Privacy Directive 2002 Make Cyberspace Safe?*, COMPUTER & TELECOMMUNICATIONS LAW REVIEW 63 (2003).

<sup>78</sup> Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT'L L. 655 (2002). See also Julia M. Fromholz, *The European Union Data Privacy Directive*, 15 BERKELEY TECH. L. J. 461 (2000) (stating that EU governments have moved aggressively to regulate the use of personal data).

<sup>79</sup> See Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 50-51 (2000) (arguing that the ban would have prevailed should the U.S. had challenged this measure within the WTO Dispute Settlement System under the GATS).

<sup>80</sup> See Reidenberg, *supra* note 53, at 1359-62 (arguing that a General Agreement on Information Privacy would be the best solution to attain international cooperation and harmonization in data protection. This treaty would need an institutional setting strong enough and the WTO would offer the best choice in that regard).

<sup>81</sup> See Commission Decision 2000/520/EC, of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the U.S. Department of Commerce, 2000 O.J. (L 215) 7.

<sup>82</sup> See US Department of Commerce, *Safe Harbor*, available at <http://www.export.gov/safeharbor>.

Agreement as insufficient<sup>83</sup> or even a surrender act on the part of the EU,<sup>84</sup> it is nevertheless regarded as a “compromise through institutional development pursuant to which free transatlantic information flows may be preserved while satisfying legitimate EC concerns”.<sup>85</sup> It seems, however, that this kind of negotiated settlement is not likely to serve as a permanent solution to the disparity between U.S. and European data privacy protection.<sup>86</sup>

From an International Law perspective, the *Safe Harbor* agreement is clearly not an International Treaty. It has not been signed nor ratified by the parties, and so it is not subject to the Vienna Convention on the Law of Treaties. At most, it could be maintained that it is a “Gentlemen’s Agreement,” or political agreement, but not even an “Executive Agreement”.<sup>87</sup> Some scholars consider it as an example of a new kind of international regulation.<sup>88</sup> This *Safe Harbor* agreement would then be an example of a “soft-law”, as opposed to a “hard-law” instrument, although regarding its effects it may very well achieve a *de facto* harmonization of data privacy protection. Compared to the intellectual property protection afforded by hard-law, i.e. International Treaties, it is again striking that Internet regulation in this area of data privacy rights has only been achieved by a soft-law instrument. It may however be not surprising. Vigorous international cooperation in this field is necessary, but when business interests within the USA are at stake,<sup>89</sup> even in light of support from the population, international legal texts with more teeth are difficult to achieve. So it would be fair to describe this *Safe Harbor* agreement as an informal agreement of the kind advanced by liberal scholars.<sup>90</sup>

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<sup>83</sup> See Joann M. Wakana, *The Future of Online Privacy: A Proposal for International Legislation*, 26 LOY. L.A. INT’L & COMP. L. REV. 151, 168 and 176 (2003) (stating that the *Safe Harbor* does not weigh consumer privacy concerns heavily enough and demanding a more active role for the U.S. government).

<sup>84</sup> See Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 744 (2001) (arguing that the *Safe Harbor* poses a weakening of European standards) ; Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 33 VAND. J. TRANSNAT’L L. 655, 681 (2000) (wondering whether the U.S. is making real concessions with the *Safe Harbor* Agreement).

<sup>85</sup> See Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 58 (2002).

<sup>86</sup> See Fromholz, *supra* note 78, at 483.

<sup>87</sup> See ANTONIO CASSESE, *INTERNATIONAL LAW* 172 (2<sup>nd</sup> ed. 2005) (describing executive agreements).

<sup>88</sup> See Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 940 (1999-2000) (referring to this agreement as an example of international hybrid regimes involving public and self-regulation).

<sup>89</sup> See Gellman, *supra* note 50, at 274 (arguing that there is no support in the U.S. business community to standardize privacy regulation).

<sup>90</sup> See Slaughter, *supra* note 39, at 530.

### 3.2 INTELLECTUAL PROPERTY: NORMS SOUGHT BY PRIVATE ENTITIES

With the coming on of the Internet, the protection of intellectual property rights has been challenged by new technologies and software (like MP3 and Napster)<sup>91</sup> allowing the free distribution of copyrighted digital works. These technologies permit Internet users to download perfect copies of songs, movies and other works<sup>92</sup> previously protected by existing national laws and international treaties.<sup>93</sup> This problem has only been aggravated by the advent of peer-to-peer (P2P) technologies,<sup>94</sup> a new type of software which allows Internet users to download files between individual hard drives without a central server doing any job.<sup>95</sup> Apparently, these kinds of Internet technologies have paved the way for massive piracy, with the ensuing losses for authors and the industry in general. The responses to this new situation have been twofold.

On the one hand, after the first efforts were carried out by the U.S. Commerce Department in 1995 with the aim of restoring the “balance” in intellectual property law,<sup>96</sup> the immediate legal answer has been new national laws seeking to reinforce the protection afforded by traditional copyright laws. In the USA, the No Electronic Theft Act (NET Act) in 1997 and the Digital Millennium Copyright Act of 1998 (DMCA),<sup>97</sup> in 1998 were passed to that end, although the DMCA has been accused of shifting the balance in favor of private entities.<sup>98</sup> Similarly, the Copyright Directive has been adopted in the EU.<sup>99</sup> National courts have also made

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<sup>91</sup> Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-line Copyright Enforcement*, N.Y.L. SCH. L. REV. 279 (2002-2003).

<sup>92</sup> See NICHOLAS NEGROPONTE, *BEING DIGITAL*, 58 (1995).

<sup>93</sup> See Grewlich, *supra* note 69, at 219 (introducing a short history on the legal protection of intellectual property).

<sup>94</sup> Scholars have recently proposed some solutions to the yet unsolvable question of P2P technologies, instead of suing users or facilitators of these technologies, see Mark A. Lemley and R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-To-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

<sup>95</sup> See STUART BIEGEL, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE*, 287 (2001) (commenting on the prominent examples of this kind of file sharing such as *Gnutella* and *Freenet*).

<sup>96</sup> See U.S. Department of Commerce, Task Force – Working Group on Intellectual Property Rights, “Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights”, available at <http://www.uspto.gov/web/offices/com/doc/ipnii>.

<sup>97</sup> 18 U.S.C. § 2311 (Supp. 2005) (NET Act); 17 U.S.C. §§ 512, 1201-1205, 1301-1332 (2005); 28 U.S.C. § 4001 (Supp. 2005) (DMCA).

<sup>98</sup> See Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C.L. REV. 359, 371 (2003).

<sup>99</sup> Council Directive 2001/29/EC of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, modified by the Corrigendum to Directive 2001/29/EC, 2002 O.J. (L 6) 70. See Thomas Hoeren, *The European Union Commission and Recent Trends in European Information Law*, RUTGERS COMPUTER & TECH. L.J. 1 (2003).

a great effort to deal with the question of how to protect copyright and to what extent, in order not to excessively limit the information available in the public domain, with the results tilting in favor of copyright protection.<sup>100</sup>

On the other hand, the answer (allowed by national laws) has also been technical, because the industry (subsidized by government)<sup>101</sup> has used technology as well to create copyright management schemes called “trusted systems”, that is software that makes it easier for information providers to control access to and the use of copyrighted content. In this way, enforcement by the code is “ex-ante”, free from legal scrutiny and efficient to a degree that does not exist in the non-virtual world.<sup>102</sup> This technical response, which substitutes private empowerment for public law,<sup>103</sup> has led to an important criticism on the part of authors, because this perfect control carried out by private companies providing internet content may have consequences with respect to the right to privacy and freedom of expression, which in turn concerns other issues like fair use and public domain doctrines.<sup>104</sup>

Efforts to craft international regulation in the intellectual property field have led to the World Intellectual Property Organization (WIPO) Copyright Treaties, i.e. the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>105</sup> It may be said that these agreements are the only indisputable example of international treaty-based, top-down, development of legal norms regarding the Internet.<sup>106</sup> These recent WIPO Treaties have been added to the existing and already longstanding international treaties, i.e. the Paris Convention for

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<sup>100</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 125 S. Ct. 2764 (2005); *Eldred v. Ashcroft* 537 U.S. 186 (2003); *A & M Records, Inc. v. Napster, Inc.* 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F. 3d 1004 (9th Cir. 2001); *Universal City Studios, Inc. v. Corley* 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom.*; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

<sup>101</sup> See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, 126 (1999).

<sup>102</sup> See Niva Elkin-Koren, *Copyright in Cyberspace: The Rule of the Law and the Rule of the Code*, in *LAW, INFORMATION AND INFORMATION TECHNOLOGY* 135-136 (Eli Lederman & Ron Shapira, eds. 2001).

<sup>103</sup> See LESSIG, *supra* note 101, at 135.

<sup>104</sup> See e.g. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Julie E. Cohen, *A Right to Read Anonimously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981 (1996) and *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1995); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1999); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 4-16 (2001); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); *But see* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003).

<sup>105</sup> WIPO Copyright Treaty, adopted Dec. 20, 1996, T.Doc. 105-17, 2186 U.N.T.S. 152; WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, T.Doc. 105-17, 2186 U.N.T.S. 245.

<sup>106</sup> See Hughes, *supra* note 98, at 373-374.

the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works,<sup>107</sup> with the stated aim of strengthening the protection afforded to copyright owners. There is some controversy as to the results achieved by these new treaties. Whereas for some it is not at all clear whether these treaties have really developed the protection previously existing,<sup>108</sup> for others the WIPO treaties may be regarded as a positive outcome, even if the “high-protectionist” negotiating agenda of the USA did not succeed.<sup>109</sup> It would also be good to note here that the EU agenda in this regard was not less protectionist.<sup>110</sup> Nevertheless, it seems that national implementation of these treaties has gone far beyond what they require,<sup>111</sup> and what they require is no less contentious.<sup>112</sup>

Furthermore, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>113</sup> entered into force in 1995 has been a benchmark international agreement for the protection of copyright globally,<sup>114</sup> and it may very well be so in the Internet field. This agreement not only sets out minimum rules and standards of protection and harmonizes domestic procedures and remedies for the enforcement of intellectual property rights, but above all, it extends the dispute settlement mechanism of the WTO to this particular field.<sup>115</sup> This extension was meant to improve the enforcement mechanisms applicable

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<sup>107</sup> Paris Convention for the Protection of Industrial Property, opened for signature Mar. 20, 1883, as revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, T.Doc. 99-27, 828 U.N.T.S. 221.

<sup>108</sup> See Franda, *supra* note 73, at 126 (describing the recent WIPO treaties as conservative).

<sup>109</sup> See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 435 (1997).

<sup>110</sup> See Grewlich, *supra* note 69, at 238 and 244 (noting that the EU wanted to have protected the ephemeral copies or temporary reproductions, together with a copyright on databases).

<sup>111</sup> See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 521 (1999); Grewlich, *supra* note 69, at 257 and 261.

<sup>112</sup> These treaties require signatories to provide “effective legal remedies against the circumvention of effective technological measures that are used by authors” in the exercise of their copyrights (Art 11 of the WIPO Copyright Treaty and Art 18 of the WIPO Performances and Phonograms Treaty), that is, States must take legislative measures to safeguard “technical protection systems” adopted by copyright owners. See Elkin-Koren, *supra* note 102, at 141 (noting that this kind of anti-circumvention legislation may lead to the privatization of information policy in cyberspace).

<sup>113</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, adopted Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

<sup>114</sup> It was not at all a cherished agreement for developing countries, which accepted it as a part of the Uruguay Round package deal, see MICHAEL TREBILCOCK AND ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 320-321 (2<sup>nd</sup> ed., 1999).

<sup>115</sup> On the significance of this Dispute Settlement System see MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION, LAW, PRACTICE AND POLICY* 18 (2003).

to copyright violations that were almost absent before the coming of the TRIPS.<sup>116</sup> The benefits internationally of this treaty are now being coupled with other national benefits; that is, some representatives of copyright industries have already advanced the idea of using the TRIPS agreement to dispute existing exceptions to national copyright laws.<sup>117</sup>

As we see, International Law has played and will likely continue to play a very important role in the protection of intellectual property rights in the Internet field. It is not only that there is some regulation, but that this regulation is also of the best kind. International treaties and agreements, that is, “hard law” as opposed to “soft law”, are used here by the States in order to cooperate and establish minimum standards, mandate the setting up of domestic enforcement mechanisms, and use a system to settle international disputes arising in this context. Why is it that we find this strong approach here, but only here?<sup>118</sup> The convergence of interests between nation-states and copyright holders with vast intellectual property assets has made it possible for International Law to play an important role in the regulation of this specific area of the Internet. So it seems that only if International Law completely fulfils the expectations of business within the Internet field will it be a preferred tool for States to regulate this area of human activity. Hard-law adopted by States in order to protect intellectual property in the internet field seems then to correspond to the kind of agreement envisioned by the liberal agenda, which only aims to achieve this type of international cooperation where there is a need to reach “specific problem-solving agreements, in which a large number of private individual a group actors already have an interest”.<sup>119</sup>

In this regard, it seems quite difficult to implement one of the action lines of the World Summit on the Information Society sponsored by the U.N. and the I.T.U., which provides for the “development and promotion of public domain information as an important instrument

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<sup>116</sup> In fact, the TRIPS has not been fully effective yet, as non-violation complaints were agreed not to be brought under it until 2000 (TRIPS Agreement Art 64.2 and 3), and then the Doha Ministerial Conference has delayed it to the following ministerial conferences in Cancun and Hong-Kong (which failed to reach any agreement), see WTO, Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, *Implementation-Related Issues and Concerns*, WT/MIN (01)/DEC/17, 20 November 2001, para. 11.1.

<sup>117</sup> See Samuelson, *supra* note 104, at 332.

<sup>118</sup> It is true that the persecution of crime in cyberspace has also led to another international treaty, the Cybercrime Treaty (European Convention on Cybercrime, adopted Nov. 23, 2001, 185 E.T.S.). However, the effort displayed to achieve and implement this treaty’s goals has not been so muscular, see e.g. Sara L. Marler, *The Convention on Cybercrime: Should the United States Ratify?*, 37 NEW ENG. L. REV. 183 (2002); Shannon L. Hopkins, *Cybercrime Convention: A Positive Beginning to a Long Road Ahead* 2 J. HIGH TECH L. 101 (2003); Amalie M. Weber, *The Council of Europe’s Convention on Cybercrime*, 18 BERKELEY TECH. L.J. 425 (2003).

<sup>119</sup> Slaughter, *supra* note 39, at 530.

promoting public access to information”.<sup>120</sup> The question remains whether the U.N. is as effective an international structure as, say, the WTO in attempting to regulate this field of human activity and in implementing that regulation.

### 3.3. HARMFUL CONTENT: A CONVERSATION BETWEEN JUDICIARIES

One of the most compelling issues related to the Internet is the protection of free speech versus the restriction of harmful content. Whereas in the USA there is a strong sentiment, constitutionally protected, favoring freedom of speech, we see that European countries and Australia are more favorable in this balance towards controlling the distribution of harmful content. The *Compu Serve* and *Yahoo! France* cases demonstrate the European approach followed by Germany and France on this issue. International Law has a major role to play with respect to this substantive problem because this is also a jurisdictional issue. Regulatory conflicts in cyberspace are now frequently linked to the interplay between the worldwide availability on the web of data perceived to be harmful or offensive to fundamental values in the regulating State, and the constitutional protections for freedom of expression existing in the State in which the data is made accessible, i.e. the USA, where many of content providers are located.

The *CompuServe* case<sup>121</sup> was one the first and best known of cases concerning a “true” regulatory conflict.<sup>122</sup> The alleged offence to German law, the Criminal Code, consisted of the provision by CompuServe Deutschland (a 100% subsidiary of CompuServe USA) of access to publicly available violence, child pornography and bestiality. The content was stored on CompuServe USA’s newsgroups servers. After blocking access worldwide to that content, CompuServe made available parental control software to its subscribers and unblocked the

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<sup>120</sup> See World Summit on the Information Society, Geneva 2003-Tunis 2005, Plan of Action, December 12, 2003, para. 10 (a) at 4, Doc. WSIS-03/GENEVA/DOC/5-E, available at [http://www.itu.int/dms\\_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf). The Plan of Action states that the action lines are aimed “to advance the achievement of the internationally-agreed development goals, including those in the Millennium Declaration, the Monterrey Consensus and the Johannesburg Declaration and Plan of Implementation, by promoting the use of ICT-based products, networks, services and applications, and to help countries overcome the digital divide”, *id.* para. 1 at 1.

<sup>121</sup> Amtsgericht München (Munich Court of First Instance), NJW, 51 (1998), 2836, translated in <http://www.kuner.com/data/reg/somm.html>.

<sup>122</sup> See Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT’L L. 673, 676 (2003) (“Typically, an assertion of freedom of expression in the State in which the website is located clashes with restrictive legislation in the receiving State, designed to protect such values as the right of privacy, to restrict hate speech or libel, or to prohibit indecency or pornography. The free availability of information collides with the negative right of the receiving State to protect itself against outside interference”).

newsgroups. Nevertheless, a sentence was imposed by the Munich court on Felix Somm, managing director of CompuServe Deutschland.<sup>123</sup> Although the case was later overturned by a German higher court,<sup>124</sup> this sentence attracted much criticism, particularly in the USA.

Such criticism has been scant, however, compared to the almost universal condemnation received by the *Yahoo!* case in the USA. This case arose when two French public interest groups, *La Ligue Contre le Racisme et L'antisémitisme* (LICRA) and *L'union des Etudiants Juifs de France* (UEFJ), sued *Yahoo! Inc.*, a Delaware corporation located in California. The alleged criminal offence was the offering for sale of Nazi memorabilia by the Yahoo! auction website accessible in France, which was deemed illegal under French law. Indeed, French legislation, along with many other nations' laws, may be considered to be in accordance with the Convention on the Elimination of All Forms of Racial Discrimination (IECRD).<sup>125</sup> The plaintiffs sought an order prohibiting Yahoo! from displaying the memorabilia in France. The French court, which found it had personal jurisdiction because the harm was caused in France, sought an expert opinion on the possibility for Yahoo! to block access to French users, instead of completely eliminating the website content worldwide. After being advised that this could be achieved with a 90 % success rate (besides, French users were greeted by the website with advertisements in French, which meant some kind of geographical identification was already available), it ordered Yahoo! "to take all measures at their availability, to dissuade and render impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects".<sup>126</sup> After that, Yahoo! sought a declaratory judgment that the French decision could not be recognized in the USA. Besides finding it had jurisdiction,<sup>127</sup> the U.S. District Court granted summary judgment on the merits in favor of Yahoo!<sup>128</sup> Nevertheless, the U.S. Court of Appeals has recently reversed that

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<sup>123</sup> See Gareth Grainger, *Freedom of Expression and Regulation of Information in Cyberspace: Issues concerning Potential International Cooperation Principles*, in THE INTERNATIONAL DIMENSIONS OF CYBERSPACE LAW 90-91 (Teresa Fuentes Camacho ed., 2000).

<sup>124</sup> LG München (Munich Court of Appeals), NJW, 53 (2000), 1051. Apparently, most commentators agree that the judge in the *CompuServe* trial simply did not apply the Internet legislation properly to the case, see Lothar Determann, *Case Update: German CompuServe Director Acquitted on Appeal*, 23 HASTINGS INT'L & COMP. L. REV. 109, 112 (1999-2000).

<sup>125</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

<sup>126</sup> See LICRA & UEFJ v. Yahoo! Inc., T.G.I. Paris, May 22, 2000, D. 2000, inf. rap. 172, translated in <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm>, reprinted in LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 851-53 (5<sup>th</sup> ed. 2002).

<sup>127</sup> Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

<sup>128</sup> Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

decision,<sup>129</sup> and held that the California Court had no personal jurisdiction over the French parties and that France had every right to hold Yahoo! accountable in France.<sup>130</sup>

Despite the overwhelming criticism that the French ruling received in the USA,<sup>131</sup> the *Yahoo!* case has shown that traditional conflict of laws instruments may apply to cyberspace, and that France was thus entitled to apply its national law because the harmful effects had occurred in its territory.<sup>132</sup> The case has also confirmed that in trans-boundary disputes in which issues of freedom of speech arise,<sup>133</sup> it is not the place of the country of the information provider but the place of the country of the recipient that governs the situation.<sup>134</sup> The *Gutnick* case, decided by the Australian Supreme Court,<sup>135</sup> has recently come to corroborate this approach, and reflects therefore the emerging majority opinion.<sup>136</sup> The German, French and Australian democracies have chosen rules for free expression that are consistent with international human rights but that do not mirror the protection afforded by the First Amendment to the United States Constitution.<sup>137</sup>

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<sup>129</sup> *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 379 F. 3d 1120, 1126 (9<sup>th</sup> Cir. 2004).

<sup>130</sup> See Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1952 (2005).

<sup>131</sup> See Ben Laurie, *An Expert's Apology* (Nov. 21, 2000), available at <http://www.apache-ssl.org/apology.html> (describing the solution imposed by the French ruling as “half-assed and trivially avoidable”).

<sup>132</sup> Reidenberg has been a *rara avis* in the USA when he has sided with the French ruling in several articles, see e. g. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 264 and 266 (2002) (stating that “no one could seriously challenge that France has jurisdiction to prescribe rules for activities within French territory. Yahoo, however, thought it was above the law”; “[t]he Internet does not, however, displace the well-established principle in international law that allows states to exercise prescriptive jurisdiction of conduct having effects occurring within the national territory”). See also the delightful account of the *Yahoo!* case offered in JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS World 1* (2006).

<sup>133</sup> There has been however self-criticism in the USA about the failure to explain the “differences between promulgation of speech-restrictive rules and mere enforcement of them” and “why speech directed abroad necessarily deserves First Amendment protection”, see Molly S. Van Houwelling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. Licra*, 24 MICH. J. INT'L L. 697, 698 (2003).

<sup>134</sup> Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT'L L. 663, 667-668 (2003).

<sup>135</sup> See *Dow Jones & Company Inc. v. Gutnick* (2002) 210 CLR 575, available at [http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html) (the Australian Supreme Court has found jurisdiction in a libel case brought by an Australian plaintiff against Dow Jones & Co. on the basis of an article published in New Jersey but accessible and downloaded in Australia). This decision has been nevertheless criticized see Uta Kohl, *Defamation on the Internet—Nice Decision, Shame about the Reasoning: Dow Jones & Co. Inc. v. Gutnick*, 52 INT'L & COMP. L. Q. 1049 (2003); Nathan W. Garnett, *Dow Jones & Co. v. Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?*, 13 PAC. RIM. L. & POL'Y J. 61 (2004); Shawn A. Bone, *Private Hars in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.*, 62 WASH. & LEE L. REV. 279 (2005).

<sup>136</sup> See Jonathan Zittrain, *Be Careful What You Ask For: Reconciling a Global Internet and Local Law*, in *WHO RULES THE NET?* 19 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003).

<sup>137</sup> See Declaration of Principles of the World Summit on the Information Society, *supra* note 52, para. 5 at 2 (stating, taking into account Art 29 of the Universal Declaration of Human Rights, that “in the exercise of their

It may be said that this kind of solution ultimately goes against the basic freedom of speech and freedom of information in cyberspace, but, as leading scholars like Lessig have demonstrated, the fact that the Internet has been developed as a free place does not say anything about how it *should be*.<sup>138</sup> The technological designs developed by code writers, the web architecture, carries a sort of ideological or philosophical choice, very much reflecting the values expressed in the First Amendment.<sup>139</sup> Code is law, but this kind of *lex informatica*<sup>140</sup> need not entail normative implications for solutions of regulatory conflicts. The Internet is what we make of it; there is nothing essentially given and unchangeable. Technological innovation is now empowering sovereign States to assert their rules on Internet activity.<sup>141</sup> Filtering and zoning technologies allow for location, and claims of the ubiquity of information on the web no longer hold.<sup>142</sup> The *Yahoo!* case has just shifted the rule-making power from technologists back to political representatives.<sup>143</sup> When considering regulatory conflicts in the international arena, then, “there is no reason that the interests of the society in which the harmful effects of free-flowing data are suffered should subordinate themselves to the ideological claim that the use of a borderless medium in some way modifies accountability for activities conducted through it. Analysis of such a claim has shown that it reverses the proper relationship between law and technology. Technology being purely manmade, and thus subject to ideological choice, should not dictate the way in which law manages conflicting interests arising through its medium”.<sup>144</sup>

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rights and freedoms, everyone shall be subject only to the such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”).

<sup>138</sup> See LESSIG, *supra* note 101, at 207-208.

<sup>139</sup> See Reidenberg, *supra* note 132, at 262-63 (confirming that the so called “separatist” philosophy “derives largely from the American value placed on the unfettered flow of information”; but noting also that “the American position is becoming a minority view”).

<sup>140</sup> Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, TEX. L. REV. 553 (1998).

<sup>141</sup> See Reidenberg, *supra* note 130, at 1960. Some authors have nevertheless expressed caveats with respect to the possibility that technology becomes the means of transmitting and implementing the values of the regulating nation, see Yochai Benkler, *Internet Regulation: A Case Study in the Problem of Unilateralism*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 178 (2000).

<sup>142</sup> But see Robert Corn-Revere, *Caught in the Seamless Web: Does the Internet's Global Reach Justify Less Freedom of Speech?* in WHO RULES THE NET? 225-226 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2003) (stating that the Internet can not be carefully calibrated by using technology to keep information out of restrictive jurisdictions).

<sup>143</sup> See Reidenberg, *supra* note 132, at 272.

<sup>144</sup> Muir Watt, *supra* note 122, at 695. See also Reidenberg, *supra* note 130, at 1970-72 (maintaining that “when technologies exist and are deployed for commercial purposes, they are typically not configured to support public policies [...] States have, as a result, a normative incentive to assert the supremacy of law over technological determinism”).

Extraterritoriality and jurisdiction in cyberspace have then been the focus of an intense debate, and the dichotomy between freedom of speech and the protection against harmful content has simply been the issue articulating this conflict, despite the existence of other kinds of extraterritoriality cases within the Internet, i.e. when the USA has required compliance with its copyright laws abroad.<sup>145</sup> As Goldsmith maintains, extraterritorial regulation within the internet field is justified on the basis that cyberspace is not functionally different from transnational activities carried out through other means and because every State has the right to regulate those extraterritorial acts that may produce harm or other local effects within the national jurisdiction. This kind of approach is commonplace in national legal systems and is legitimate until a nation has acquiesced to an international law rule that specifies otherwise.<sup>146</sup>

It can be said then that extraterritorial regulation in the Internet field is feasible, although it need not be perfect in order to be effective.<sup>147</sup> Also, choice of law rules do work within the Internet realm as much as within other real world fields.<sup>148</sup> The *CompuServe*, *Yahoo!* and *Gutnick* cases just show us that International Law and doctrines like prescriptive jurisdiction, effects-based jurisdiction, and the technical solution of filtering and zoning are helping to solve transnational disputes in a fair way until there is a solution based on international harmonization or otherwise.<sup>149</sup> If international harmonization is difficult to achieve,<sup>150</sup> it may be the time for the U.S. to take some steps in order to avoid being the so-called hate speech haven.<sup>151</sup>

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<sup>145</sup> A very well known case was *Twenty Century Fox Film Corp. v. iCraveTV.com*, 53 U.S.P.Q. 2d (BNA) 1831 (W.D.Pa. 2000), where the US district court applies an analysis similar to the French *Yahoo!* decision. See Cherie Dawson, *Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction*, 44 VA. J. INT'L L. 637, 657 (2004). See Reidenberg, *supra* note 132, at 274 (stating that “[t]he U.S. values are inconsistent by favoring the free flow of information against data privacy and speech restrictions, but not against intellectual property”).

<sup>146</sup> See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1239-40 (1998).

<sup>147</sup> Indeed, the contrary appears to be true, because zoning and filtering technologies may make prescription and enforcement to coincide, ensuring perfect compliance, see Muir Watt, *supra* note 122, at 688-689.

<sup>148</sup> See Goldsmith, *supra* note 146, at 1223 and 1233-34, respectively.

<sup>149</sup> See Mark F. Kightlinger, *A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law*, 24 MICH. J. INT'L L. 719 (2003) (stating that the EC E-Commerce Directive and its “country of origin” and “home country control” rules would be a good starting point for an international agreement on internet content which would ease transnational disputes); Viktor Mayer-Schonberger & Terec E. Foster, *A Regulatory Web: Free Speech and the Global Information Infrastructure*, in BORDERS IN CYBERSPACE, INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 244 (Brian Kahin & Charles Nesson eds., 1997) (arguing that the international concept of *ius cogens* might provide a basis for regulating speech content on the Net).

<sup>150</sup> On the impossibility of developing universally accepted Internet content regulation, see Julie L. Henn, *Targeting Transnational Internet Content Regulation*, 21 B.U. INT'L L.J. 157, 172 (2003).

<sup>151</sup> See Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven* 62 WASH. & LEE L. REV. 781, 826 (2005).

In any case, the current state of affairs in this field of content regulation fare well with respect to what liberals would call a transjudicial dialogue between the courts of liberal States.<sup>152</sup>

#### 4. INTERNET GOVERNANCE: AN ALTERNATIVE CONCEPTUAL PROPOSAL

##### 4.1 INTRODUCTION

The history of the Internet is an American history. Invented, funded and developed in the U.S.,<sup>153</sup> the Internet has an unquestionable American flavor when it comes to analyzing its features. As we have seen, freedom of information and free flows of data, as part of the First Amendment culture, are profoundly rooted characteristics of the Internet. They are part of its code. They are in fact the law of the Internet. Although there are recent efforts that try to change this state of things, as the judicial decisions reviewed above demonstrate,<sup>154</sup> it is still difficult to modify the current functioning of the Internet where there is a country, i.e. the U.S., that bluntly plays the major role in its governance. In this regard, special attention has to be paid to the technical body called the Internet Corporation for Assigned Names and Numbers (ICANN). The ICANN is responsible for the control of the domain name system, the distribution of IP addresses, the establishment of standards for Internet protocols and the organization of the root-server-system.<sup>155</sup> As has been pointed out, the importance of root governance goes well beyond the face value of the market for names and addresses.<sup>156</sup> Although the ICANN pretends to be a model of mixed or hybrid regulation,<sup>157</sup> in other words, a model of soft-law, which should take into account the interests of all stakeholders, the truth is that the ICANN is an American private non-profit organization incorporated under Californian law, subject to U.S.' jurisdiction and

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<sup>152</sup> See Slaughter, *supra* note 39, at 524.

<sup>153</sup> See Benkler, *supra* note 141, at 172 (noting that these factors should not be overlooked).

<sup>154</sup> See *supra* note 122 and the parallel discussion in the main text.

<sup>155</sup> See Franz C. Mayer, *The Internet and Public International law – Worlds Apart?*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 617, 621 (2001) (noting the fact that the ICANN is recognized as the final authority on matters of domain names by WIPO, which in turn shows a situation where an international organization defers to a corporation subject to US jurisdiction); Franz A. Mayer, *Europe and the Internet: The Old World and the New Medium*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 149, 165 (2000).

<sup>156</sup> See MILTON L. MUELLER, RULING THE ROOT, INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 10 (2002) (noting that “[c]entralization of control at the root [including names and addresses] does create levers for the intrusion of politics, policy, and regulation”).

<sup>157</sup> See Wolfgang Kleinwoechter, *From Self-governance to Public-private Partnership: The Changing Role of Governments in the Management of the Internet’s Core Resources*, 36 LOY. L.A. L. REV. 1103 (2003).

authority, where commercial interests have a leading role,<sup>158</sup> but which on the other hand may violate fundamental U.S. policies.<sup>159</sup> Furthermore, all of the six major Network Access Points through which Internet access is provided are located within the USA. This overwhelming U.S. control of Internet's core resources lets this country to set up provisions like the Digital Trademark Right provision of the Anticybersquatting Consumer Protection Act (ACPA) that allows a U.S. court to transfer a foreign registrant's domain name to the U.S. trademark owner despite of the Uniform Domain Name Dispute Resolution Policy (UDRP) of the ICANN.<sup>160</sup>

Given this situation, we could pose the question of what would happen if some day the USA decided on its own to shut down the whole Internet for alleged national security reasons, if only because it has the ability to do so. What would be the grounds to contest that kind of decision? Is there any answer or any theory that could be opposed to such an act on the part of the U.S.? We may try here to develop a new way of thinking about the Internet provided by an international institution that has been left almost to oblivion for many years now by developed States, the Common Heritage of Mankind (CHM) concept. In this effort, we do not share the new liberal agenda and its consequences regarding the internet field, as examined in the previous sections. To be sure, as mentioned in the first section, the State remains the only entity able to legitimately represent all stakeholders internally and internationally, and International Law cannot afford yet to modify the normative theory and distinguish between States or look within them.<sup>161</sup>

In order to assess the applicability of this CHM concept to Internet's core resources, it would be good to analyze the origin and the elements that define this institution in International Law.

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<sup>158</sup> See Jochen von Bernstorff, *Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony*, 9 EUROPEAN LAW JOURNAL 511, 522 (2003).

<sup>159</sup> See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 27 (2000) (engaging in a thorough critical assessment of the creation of ICANN by the Department of Commerce).

<sup>160</sup> 15 U.S.C. § 1129 (Supp. 2005) (ACPA). See Xuan-Thao N. Nguyen, *The Digital Trademark Right: A Troubling New Extraterritorial Reach of United States Law*, 81 N.C.L. Rev. 483, 547 (stating that “[p]otentially, if an ICANN panel ruled in favor of a foreign domain name registrant, the foreign nation will accept the panel’s decision. On the other hand, if the trademark holder complainant in that case decided, after the unfavorable UDRP decision, to bring an ACPA action against the domain name, U.S. courts are not bound by the UDRP decision and could rule in favor of the trademark holder complainant”).

<sup>161</sup> Cf. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 68 (1989).

## 4.2 BRIEF HISTORY

As far back as in 1898 the concept of “common heritage” was applied by a scholar to the legal status of the sea.<sup>162</sup> The CHM concept, however, first arose in the XX Century in relation to the Law of the Sea. This concept is generally attributed to Ambassador Arvid Pardo, Malta’s U.N. representative, who proposed that the General Assembly declare the seabed and the ocean floor and its resources a “common heritage of mankind” and take the necessary steps to embody this basic principle in an internationally binding document.<sup>163</sup> Pardo’s ideas were taken up by Part XI of the 1982 Law of the Sea Convention (LOS),<sup>164</sup> which provided in Art 136 that the International Seabed Area “and its resources are the common heritage of mankind” and established an international regime (with an International Seabed Authority) to administer the access to and exploitation of the Seabed Area.<sup>165</sup>

As some scholars have pointed out, however, this concept had already appeared in the field of Outer Space and in the Antarctic Treaty.<sup>166</sup> The General Assembly’s “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space”<sup>167</sup>, which referred to the “common interest of all mankind,” was followed by the 1967 Outer Space Treaty,<sup>168</sup> which stated that exploration and use of outer space shall be “the province of all mankind” (Art I). Later, the 1979 Moon Treaty,<sup>169</sup> adopted by a General Assembly Resolution,<sup>170</sup> became the first treaty in force to give effect to the CHM principle,<sup>171</sup> as it went

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<sup>162</sup> See A.G. Lapradelle, *Le droit de l’Etat sur la mer territoriale [The Right of the State over the Territorial Sea]*, REVUE GENERALE DU DROIT INTERNATIONAL PUBLIC, 283 (1898).

<sup>163</sup> See Reservation Exclusively for Peaceful Purposes of the Sea-bed and of the Ocean Floor, and the Subsoil thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind, U.N. GAOR 1<sup>st</sup> Comm., 22<sup>nd</sup> Sess., 1515<sup>th</sup> mtg., at 1, U.N. Doc. A/6695; A/C.1/952 (1967).

<sup>164</sup> United Nations Convention on the Law of the Sea, December 10, 1982, 1834 U.N.T.S. 4.

<sup>165</sup> See W. Michael Reisman, *The Common Heritage of Mankind: Success or Failure on International Regulation?*, CANADIAN COUNCIL OF INTERNATIONAL LAW 228, 233 (1985) (stating that “the Seabed Authority provisions of the Law of the Sea Treaty represent the most complete effort at implementing the core of Pardo’s common heritage”).

<sup>166</sup> See Stephen Gorove, *The Concept of “Common Heritage of Mankind”: A Political, Moral or Legal Innovation?* 9 SAN DIEGO L. REV. 390, 391 (1971-1972); Mary Victoria White, *The Common Heritage of Mankind: An Assessment*, 14 CASE W. RES. J. INT’L L. 509, 510 (1982) (presenting an account of the history of this principle).

<sup>167</sup> G.A. Res. 1962, U.N. GAOR, 18<sup>th</sup> Sess., Supp. No. 15, at 15, U.N. Doc. A/5515 (1963).

<sup>168</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

<sup>169</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 21.

<sup>170</sup> G.A. Res. 34/68, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, U.N. Doc. A/34/664 (1979).

into effect on July 11, 1984. Art 11(1) of this treaty proclaims that “(t)he moon and its natural resources are the common heritage of mankind.” The Antarctic Treaty<sup>172</sup> dates back to 1959, and although it does not refer expressly to the CHM, it has been widely seen as an international regime in which CHM elements are found,<sup>173</sup> at least with respect to its substantial normative content.<sup>174</sup> Other examples where the CHM is deemed to be applicable are cultural and natural resources,<sup>175</sup> the environment,<sup>176</sup> although in this latter field the concept of common concern of mankind is preferred,<sup>177</sup> genetic resources<sup>178</sup> and sustainable development,<sup>179</sup> and world’s food resources.<sup>180</sup>

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<sup>171</sup> See Harminderpal Singh Rana, *The “Common Heritage of Mankind” & the Final Frontier: A Revaluation of Values Constituting the International Legal Regime for Outer Space Activities*, 26 RUTGERS L.J. 225, 247 (1994).

<sup>172</sup> See Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

<sup>173</sup> See Eric Suy, *Antarctica: Common Heritage of Mankind?*, in THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW 93, 96 (Verhoeven, Sands & Bruce eds. 1992); Colin Diehl, *Antarctica: An International Laboratory*, 18 B.C. ENVTL. AFF. L. REV. 423 (1991).

<sup>174</sup> See Francesco Francioni, *La conservation et la gestion des ressources de l’Antarctique [Preservation and Management of the Antarctic Resources]*, 260 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 239, 266 (1996) (noting that the institutional side of the CHM to be applied to the Antarctic would have to be regulated by way of conventional rules).

<sup>175</sup> See Alexander-Charles Kiss, *La Notion de Patrimoine Commun de l’Humanité [The Notion of Common Heritage of Mankind]*, 175 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 99, 171 (1982) (asserting that the 1972 UNESCO Convention establishes the CHM principle for cultural goods and natural resources even though they are located within a given State and therefore under its sovereignty).

<sup>176</sup> See e.g. Pemmaraju Sreenivasa Rao, *Environment as a Common Heritage of Mankind: a Policy Perspective*, in INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY, VIEWS FROM THE INTERNATIONAL LAW COMMISSION 201 (United Nations ed. 1997).

<sup>177</sup> See e.g. PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT, 144 (2002); Franck Biermann, “Common Concern of Humankind”: *The Emergence of a New Concept of International Environmental Law*, 34 ARCHIV DES VÖLKERRECHTS 426 (1996).

<sup>178</sup> See Cyrille de Klemm, *Le patrimoine naturel de l’humanité [Natural Heritage of Humankind]*, THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT, 117, 138 (1985) (quoting the FAO International Understanding on Phylogenetic Resources, Resolution 8/83 of the General Conference, Nov. 23, 1983, where the term common heritage is used).

<sup>179</sup> See Elisabeth Mann Borgese, *The Common Heritage of Mankind: From Non-Living to Living Resources and Beyond*, LIBER AMICORUM JUDGE SHIGERU ODA, vol. 2, 1313, 1326 and 1332 (Ando, McWhinney & Wolfrum eds. 2002).

<sup>180</sup> See Mohammed Bedjaoui, *Le droit au développement [The Right to Development]*, DROIT INTERNATIONAL, BILAN ET PERSPECTIVES, 1247, 1268 (Bedjaoui ed. 1991); *Propos libres sur le droit au développement*, INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION, ESSAYS IN HONOUR OF ROBERTO AGO, vol. II, 15, 40 (1987); *Are the World’s Food Resources the Common Heritage of Mankind?*, 24 THE INDIAN JOURNAL OF INTERNATIONAL LAW, 459, 461 (1984) (asserting that “this innovatory concept is undoubtedly able to give fruitful expression to universal solidarity. I may show itself particularly rich in possibilities for the future of world relations and give rise to possible applications not only in and under oceans, but also in space [...] not only on earth but in the air, in the environment, in the climate; on *inner matter*, but also on *living matter*, such as the genetic heritage, both animal and vegetable, whose richness and variety must be preserved for future generations. It can also open perspectives and suggest attractive solutions for questions such as the cultural and artistic achievements of humanity, as it can and should likewise be applied in the first place to human beings, the *primary* common heritage of mankind, and to humanity itself—as a new subject of international law and the primary heritage to be preserved from wholesale destruction”).

Initially, the USA was willing to apply the CHM principle to the deep seabed.<sup>181</sup> Also, because the result of the space race between the USA and the Soviet Union was uncertain, the USA wanted to have CHM elements inserted in the Outer Space Treaty.<sup>182</sup> Soon, however, this CHM was associated with a “socialist” type of claim on the part of developing States, and opposition from developed countries emerged.<sup>183</sup> Developed States pressed hard in order to reach a new agreement on Part XI of the LOS Convention, which was arrived at in 1994,<sup>184</sup> and introduced some important changes in the exploitation system previously devised (decision-making process and financial requirements), watering down the CHM features of the 1982 LOS Convention.<sup>185</sup>

### 4.3 STATUS AND ELEMENTS OF THE CHM

Regarding the legal status of the CHM, it is initially difficult to ascertain whether the CHM constitutes a principle of International Law, a theory, a doctrine, or just a political or philosophical concept. There has been much debate, about the legal standing of the CHM, with many of the International Law writers concluding, on the one hand, that it may only be taken as a political challenge from developing countries so that “the CHM as a legal concept is dead”<sup>186</sup> or just a flexible label<sup>187</sup> and therefore “belongs to the realm of politics, philosophy or morality”.<sup>188</sup> On the other hand, it is undeniable that the CHM is written in applicable international treaties<sup>189</sup> which have effectively prevented private enterprise from developed countries from starting to

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<sup>181</sup> See LOUIS HENKIN, *LAW FOR THE SEA’S MINERAL RESOURCES* 52 (1968).

<sup>182</sup> See BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 156 (1997); Stacey L. Lowder, *A State’s International Legal Role: From the Earth to the Moon*, 7 *TULSA J. COMP. & INT’L L.* 253, 268 (1999); Julie A. Jiru, *Star Wars and Space Malls: When the Paint Chips Off a Treaty’s Golden Handcuffs*, 42 *S. TEXAS L. REV.* 155, 162 (2000).

<sup>183</sup> See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 381 (1986).

<sup>184</sup> Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, GA Res. 48/263, U.N. GAOR, 48<sup>th</sup> Sess., Supp. 49A, at 7, U.N. Doc. A/48/49/Add. 1 (1994). See D.H. Anderson, *Legal Implications of the Entry into force of the Convention on the Law of the Sea: A Redistribution of Competences between States and International Organizations in Relation to the Management of the International Commons*, 44 *INT’L & COMP. L.Q.* 313 (1995).

<sup>185</sup> See CASSESE, *supra* note 87, at 94.

<sup>186</sup> Bradley Larschan & Bonnie C. Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 *COLUM. J. TRANSNAT’L L.* 305, 336 (1982).

<sup>187</sup> See Carl August Fleischer, *Fisheries and Biological Resources*, A *HANDBOOK ON THE NEW LAW OF THE SEA*, 989, 1125 (Dupuy & Vignes eds. 1991).

<sup>188</sup> See Gorove, *supra* note 166, at 402.

<sup>189</sup> See Aldo Arnaldo Cocca, *The Common Heritage of Mankind: Doctrine and Principle of Space Law*, in 29 *PROC. COLL. LAW OUTER SPACE* 17, (1986) (speaking of positive international law).

exploit CHM spaces until now.<sup>190</sup> But it is not settled whether the CHM constitutes a principle of customary International Law,<sup>191</sup> or it is rather a concept though some of the elements of the CHM have become principles themselves.<sup>192</sup> Its legal status nowadays is far from clear, because if in the 1980's it was progressively gaining momentum,<sup>193</sup> it has been severely questioned since the 1990's.<sup>194</sup> It may be too early to predict the success or failure of the CHM,<sup>195</sup> but it is our opinion that the CHM may be a principle, a legal regime and a concept, depending on the context in which it is used. It is a principle of International Law introduced by General Assembly resolutions, which may even have reached the legal standing of a *ius cogens* principle. It is also the legal regime set forth in Part XI of the LOS Convention to regulate the Seabed Area. Furthermore, it is a concept applicable to the governance of the post-material global commons and, in this regard, it seems appropriate for our purposes to extend it to the Internet field.

#### 4.3.1 CHM as a Principle

General Assembly Resolution 2574 was the first step in the process of building-up the CHM principle.<sup>196</sup> This resolution sought to introduce a moratorium in relation to the exploitation activities and sovereign claims over the Seabed Area until an agreed international regime was reached. It was followed by General Assembly Resolution 2749,<sup>197</sup> also known as the Declaration of Principles of 1970, which established fifteen principles, all of them flowing from the very first one, the CHM principle.<sup>198</sup> This resolution in fact anticipated the parameters

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<sup>190</sup> Cf. Brian M. Hoffstadt, *Moving the Heavens: Lunar Mining and the "Common Heritage of Mankind" in the Moon Treaty*, 42 UCLA L. REV. 575, 620-621 (1994).

<sup>191</sup> See Rüdiger Wolfrum, *Common Heritage of Mankind*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 65, 68 (Berhardt dir. 1989).

<sup>192</sup> See KEMAL BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW*, 2-3 (1998).

<sup>193</sup> See Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L. & COMP. L.Q. 190, 199 (1986) (noting that the CHM could be considered an "emergent principle of international law").

<sup>194</sup> See Stephan Hobe, *ILA Resolution 1/2002 with regard to the Common Heritage of Mankind Principle in the Moon Agreement*, 47 PROC. COLL. LAW OUTER SPACE 536 (2004) (arguing that, in the new international context of growing commercialization and privatization of space activities together with the 1994 amendment to the LOS Convention, the interpretation of the CHM has been modified and its equitable sharing element has been abandoned).

<sup>195</sup> See SHAW, *supra* note 4, at 454.

<sup>196</sup> G.A. Res. 2574, U.N. GAOR, 24<sup>th</sup> Sess., Supp. No. 30, at 11, U.N. Doc. A/7834 (1969).

<sup>197</sup> Declaration of Principles Governing the Seabed and the Ocean Floor, and Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 28, U.N. Doc. A/8028 (1970).

<sup>198</sup> See Kiss, *supra* note 175, at 205.

of the future conventional regime,<sup>199</sup> as it provided for the principles of non appropriation, peaceful use, universal participation in its management and exploitation, equitable sharing in the benefits flowing from the exploitation of the Seabed (specially benefiting developing countries), scientific cooperation and protection of the environment.<sup>200</sup> The CHM principle was also taken by Chapter III, Art 29, of the General Assembly resolution 3281 establishing the Charter of Economic Rights and Duties of States.<sup>201</sup> The legal status of the CHM principle, especially as stated in the Declaration of Principles of 1970, was not at all clear, due to the transactionist character of the Resolution.

From the very beginning of the negotiations, there was a gap between developed and developing countries regarding the interpretation of the CHM. Developing countries wanted to introduce a communitarian CHM. In this regard, CHM should incorporate the key elements of non appropriation and equitable sharing. To the contrary, developed countries preferred a liberal concept of the CHM, therefore a CHM understood as a *res communis* mirroring the freedom of access and use of the high seas.<sup>202</sup> The Declaration of Principles of 1970 was purportedly vague because it was a compromise between both interpretations.<sup>203</sup> Nevertheless, the main elements of a communitarian reading of the CHM were present. Developing countries thus achieved a symbolic victory in their effort to transform the international community according to the New International Economic Order (NIEO).<sup>204</sup>

The legal status of the CHM in the Declaration of Principles was then ambiguous. It was understood as a *lex ferenda* proposition,<sup>205</sup> because of its programmatic character.<sup>206</sup> On the other

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<sup>199</sup> See JOSÉ MANUEL PUREZA, EL PATRIMONIO COMÚN DE LA HUMANIDAD, ¿HACIA UN DERECHO INTERNACIONAL DE LA SOLIDARIDAD? [THE COMMON HERITAGE OF MANKIND, TOWARDS AN INTERNATIONAL LAW OF SOLIDARITY?], 257 (2002).

<sup>200</sup> See Rudolf P. Arnold, *The Common Heritage of Mankind as a Legal Concept*, 9 INT'L LAW. 153, 157 (1975) (affirming that "the essential thrust of the declaration and heritage clause is that all status must share in the resources of the sea").

<sup>201</sup> G.A. Res. 3281, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 31, at 50, U.N. Doc. A/3281 (1974).

<sup>202</sup> See Moragodage C.W. Pinto, "Common Heritage of Mankind": *From Metaphor to Myth, and the Consequences of Constructive Ambiguity*, THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI 249, 255 (Makarczyk ed. 1996).

<sup>203</sup> See R. P. ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES 202 (1976).

<sup>204</sup> See Declaration on Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, Six Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974). See e.g. Elisabeth Mann Borgese, *The New International Economic Order and the Law of the Sea*, 14 SAN DIEGO L. REV. 584 (1976-77).

<sup>205</sup> See Krzysztof Skubiszewski, *La nature juridique de la "Declaration des principes" sur les fonds marins [The Legal Nature of the "Declaration of Principles" Governing the Seabed]*, ANNALES D'ÉTUDES INTERNATIONALES, 242 (1973).

<sup>206</sup> See ESTHER SALAMANCA AGUADO, LA ZONA INTERNACIONAL DE LOS FONDOS MARINOS, PATRIMONIO COMÚN DE LA HUMANIDAD [THE INTERNATIONAL SEABED AREA, COMMON HERITAGE OF MANKIND], 295 (2003).

hand, it was stated that the CHM had achieved full binding force, either as an instant custom<sup>207</sup> or even as a *ius cogens* norm.<sup>208</sup> We believe that, in any event, the Declaration of Principles created some rights through the estoppels mechanism<sup>209</sup> and defined new and emergent values in the then ongoing process of law-making.<sup>210</sup>

In Art 136 of the LOS Convention the CHM principle was written the same way as in the Declaration of Principles. However, regardless of the LOS Convention the CHM principle, in its general aspects, has attained the legal status of customary International Law, as has been demonstrated.<sup>211</sup> The question arises whether Art 311, paragraph 6 of the Convention, which prohibits any amendment of this principle, could be used, together with the circumstances surrounding the Convention's adoption, as an argument to defend the *ius cogens* nature of the mentioned principle.<sup>212</sup> It may be suggested that even the U.S., the major objector to Part XI, never expressly denied the legal nature of the Area, yet if it was against the system of exploitation and the institutional arrangement.<sup>213</sup> State practice and the 1994 Agreement on the Implementation of Part XI seems to have reaffirmed thereafter the CHM as a customary principle of International Law of a *ius cogens* character.<sup>214</sup> The consensus existent at the time of the 1994

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<sup>207</sup> See ANAND, *supra* note 203, at 203.

<sup>208</sup> See SALAMANCA AGUADO, *supra* note 206, at 298 (referring to the statements made by some developing countries during the 70's regarding the *ius cogens* nature of the CHM principle).

<sup>209</sup> See ANAND, *supra* note 203, at 204; PUREZA, *supra* note 264, at 261.

<sup>210</sup> See Kiss, *supra* note 175, at 207; E.D. Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 SAN DIEGO L. REV. 521, 545 (1982-83) (stating that the Declaration of Principles did not create binding rules, but provided a significant basis for the generation of legally binding rules through a broader law-creating process).

<sup>211</sup> See Rudiger Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT, 312, 333-34 (1983) (asserting that the preconditions that have to be met for a new principle of customary international law to emerge, that is, a distinct content and state practice, accompanied by *opinio iuris*, generally accepted, can be found regarding the CHM principle).

<sup>212</sup> See José Antonio Pastor Ridruejo, *La zona internacional de los fondos marinos como patrimonio común de la humanidad: alcance real del principio [The International Seabed Area as Common Heritage of Mankind: Real Significance of the Principle]*, PENSAMIENTO JURÍDICO Y SOCIEDAD INTERNACIONAL. LIBRO-HOMENAJE AL PROFESOR D. ANTONIO TRUYOL Y SERRA, vol. 2, 921, 923 (1986); Sompong Sucharitkul, *Évolution continue d'une notion nouvelle: le patrimoine commun de l'humanité [Continuous Evolution of a New Notion: The Common Heritage of Mankind]*, INTERNATIONAL LAW AT A TIME OF PERPLEXITY. ESSAYS IN HONOUR OF SHABTAI ROSENNE 887, 903 (Dinstein & Tabory eds. 1989); *But see* Tullio Treves, *Problemas generales del Derecho internacional a la luz de la Convención de las Naciones Unidas sobre el Derecho del Mar [General Problems of International Law in the light of the United Nations Convention on the Law of the Sea]*, CURSOS DE DERECHO INTERNACIONAL DE VITORIA-GASTEIZ, 17, 62 (1984).

<sup>213</sup> See SALAMANCA AGUADO, *supra* note 206, at 300.

<sup>214</sup> See NICOLÁS NAVARRO BATISTA, FONDOS MARINOS Y PATRIMONIO COMÚN DE LA HUMANIDAD [SEABED AND COMMON HERITAGE OF MANKIND], 49 (2000); *but see* Vladimir-Djuro Degan, *The Common Heritage of Mankind in the Present Law of the Sea*, LIBER AMICORUM JUDGE SHIGERU ODA, vol. 2, 1263, 1374-75 (Ando, McWhinney & Wolfrum eds. 2002) (noting that "[t]here is little doubt that the Hague Court would at that time [in the 1970's] have ascribed the character of *ius cogens* to the rules and legal régime of the Area [but] [t]he 1994 Agreement has proved

Agreement reinforces the idea that the LOS Convention, and the CHM within its framework, has nowadays attained the status of an objective regime.<sup>215</sup>

#### 4.3.2 CHM as a Legal Regime

The opposition in the interpretation of the CHM by developing and developed states since it came up continued throughout the negotiations of the Third United Nations Conference on the Law of the Sea as a new form of the classic antagonism between developing and industrialized states.<sup>216</sup> This antagonism was translated into the normative and institutional facets of the negotiations, as we will see. If in the first phase of those negotiations Third World proposals were on the rise,<sup>217</sup> the second phase showed the radicalization of the developed countries' positions.<sup>218</sup> The LOS Convention, approved on April 30, 1982, was the crystallization of the political compromise reached by both schools of thought. Nevertheless, Part XI of the LOS Convention defined and regulated the Seabed as the CHM, a fact that by itself was interpreted as a major landmark and an important departure from traditional liberal International Law.<sup>219</sup>

On the *normative* side, the CHM legal regime applicable to the Seabed by the LOS Convention was made of four principles:

A) The absence of any claim or exercise of sovereignty over the Area or its resources and any right of appropriation thereof (Art 137). This is the first and foremost important corollary of the CHM principle and it must be understood as a non appropriation in the broadest sense.<sup>220</sup>

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the fact that as the result of a shift in *opinio juris* within the "States whose interests were specially affected", an actual rule of *jus cogens* can vanish").

<sup>215</sup> See Felipe H. Paolillo, *The Institutional Arrangements for the International Sea-Bed and their Impact on the Evolution of International Organizations*, 188 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 135, 187 (1986); cf. Wolfrum, *supra* note 211, at 337.

<sup>216</sup> See J. Beer-Gabel, *L'exploitation du fond des mers dans l'intérêt de l'humanité: chimère ou réalité? [The Exploitation of the Seabed in Mankind Interest: Illusion or Reality?]*, 81 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC, 167, 170 (1977).

<sup>217</sup> See PUREZA, *supra* note 199, at 268.

<sup>218</sup> See GLORIA ALBIOL BIOSCA, EL RÉGIMEN JURÍDICO DE LOS FONDOS MARINOS INTERNACIONALES [THE LEGAL REGIME OF THE INTERNATIONAL SEABED] 57 (1984).

<sup>219</sup> See Paolillo, *supra* note 215, at 145.

<sup>220</sup> See ANTONIO BLANC ALTEMIR, EL PATRIMONIO COMÚN DE LA HUMANIDAD. HACIA UN RÉGIMEN JURÍDICO INTERNACIONAL PARA SU GESTIÓN [THE COMMON HERITAGE OF MANKIND. TOWARDS AN INTERNATIONAL LEGAL REGIME FOR ITS MANAGEMENT], 69 (1992).

This is also a *erga omnes* obligation<sup>221</sup> although this assertion has to be nuanced in the light of Art 137 paragraph 2, which provides that, once recovered, minerals may be subject to property rights.

B) The duty to exploit the resources in the interest of mankind in such a way as to benefit all, taking into particular consideration the interests and needs of developing countries (Art 140). Although one of the main questions during the negotiations was the interpretation to be given to the term “benefit of mankind”,<sup>222</sup> the Convention finally retained a broad interpretation. On the one hand, it not only means equitable sharing in the benefits flowing from the Area, but also effective participation in its management. On the other, it not only applies to financial benefits, but also to other economic benefits.<sup>223</sup>

The CHM calls therefore for the “equitable sharing” of benefits “taking into particular consideration the interests and needs of developing States”<sup>224</sup> and “peoples who have not attained full independence or other self-governing status”. This is a critical element introduced by developing countries that wanted an obligation framed according to the NIEO and its underlying philosophy. But those benefits will not be limited to financial benefits and will also include other economic benefits<sup>225</sup> such as those derived from the policies related to the activities in the Area (Art 150), scientific and research activities (Art 143) and the transfer of technology (Art 144).<sup>226</sup> The clause “for the benefit of mankind” also requires effectively universal participation in the management of the Area (Art 148), that is, no discrimination and equality among all states in the administration of the activities to be carried out in the Area.<sup>227</sup> Finally, the

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<sup>221</sup> Cf. Tullio Treves, *Les fonds des mers au-delà de la juridiction nationale (L’Autorité Internationale des Fonds Marins) [The Seabed Beyond National Jurisdiction (The International Seabed Authority)]*, A HANDBOOK ON INTERNATIONAL ORGANIZATIONS, 776, 780 (R.-J. Dupuy ed. 1998).

<sup>222</sup> See Wolfrum, *supra* note 211, at 321 (analyzing the compensation and the preferential treatment aspects of this CHM element).

<sup>223</sup> See SALAMANCA AGUADO, *supra* note 206, at 308-9.

<sup>224</sup> See SYLVIE PAQUEROT, *LE STATUT DES RESSOURCES VITALES EN DROIT INTERNATIONAL. ESSAI SUR LE CONCEPT DE PATRIMOINE COMMUN DE L’HUMANITÉ [THE STATUS OF VITAL RESOURCES IN INTERNATIONAL LAW. ESSAY ON THE CONCEPT OF COMMON HERITAGE OF MANKIND]* 43 and 60 (2002) (referring to the principle of *inégalité compensatrice* as one of the founding and hierarchically superior norms of the CHM).

<sup>225</sup> See Report by the Secretary-General on “Possible Methods and Criteria for the Sharing by the International Community of Proceeds and Other Benefits Derived from the Exploitation of the Resources of the Area beyond the Limits of National Jurisdiction”, Doc. A/AC.138/38, quoted in Paolillo, *supra* note 215, at 209.

<sup>226</sup> Jacques Reverdin, *Le régime juridique des grands fonds marins [The Legal Regime of the Deep Seabed]*, 39 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALS RECHT, 105, 120 (1983) (noting that this obligation of transfer of technology became a deep concern for industrialized countries, because it may be used as a precedent and a first step towards the acceptance of technology as a common heritage of mankind).

<sup>227</sup> See PAQUEROT, *supra* note 224, at 63 (underscoring that the legitimate representation of a humanity made of equal human beings is another central element of the CHM).

mentioned clause also entails the protection of developing countries from adverse effects caused by activities in the Area (Art 150 (h)).

Therefore, the CHM principle as provided by the LOS Convention called for a *de facto* equality among developing and developed countries and was legally recognized through formal discrimination<sup>228</sup> in a transformative way that sought to reverse the state of things as resulting from competition based on technical capacity and economic power of states.<sup>229</sup> These aspects of the CHM principle have been downgraded to a large extent by the 1994 Agreement though<sup>230</sup> as it was felt that the preferential treatment aspect of the CHM principle was overemphasized in the Convention to the detriment of the idea of simple compensation.<sup>231</sup>

C) The obligation to explore and exploit the Area for peaceful purposes only (Art 141). This peaceful use obligation can be interpreted either as requiring merely a non aggressive use or alternatively as a broad ban of any kind of military use, the latter being closer to the spirit of the CHM concept.<sup>232</sup> According to Art 301 of the LOS Convention the first interpretation, however, has prevailed as Western powers wanted the Convention to allow those military activities compatible with the U.N. Charter. Nevertheless, the addition introduced by Art 141 consists of the complete exclusion of any possible claim of sovereignty or appropriation based on the military activities carried out by states in the Area.<sup>233</sup>

D) The duty to protect and conserve the natural resources and the marine environment (Art 145). According to this principle, the LOS Convention provides for an obligation of *rational management* of the Area's resources (Art 150(1)(b)). In that regard, the Authority is required to adopt appropriate rules, regulations and procedures. The CHM concept is therefore closely related to the concept of sustainable development, specifically provided for oceans and seas in

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<sup>228</sup> See Wolfrum, *supra* note 211, at 327.

<sup>229</sup> See PUREZA, *supra* note 199, at 279.

<sup>230</sup> See NAVARRO BATISTA, *supra* note 214, at 137-38 (stating that “[t]he Agreement has suppressed the *lata* conception of the Convention, which implied the contribution of industrialized States to the effective participation of developing countries in the development of activities in the Area. The Community of 1994 does not seek any more to alter the structures defining in general terms the division of labor in the International Society; it does not constitute any more a changing instrument of economic international relations. The Community of 1994 interprets the concept of benefit in the framework of a Society led by market principles and, therefore, reduces this term to strictly financial benefits” so that the CHM “certainly conveys development aid, in a narrow sense, as it only consists of apportion of money sums”).

<sup>231</sup> See Wolfrum, *supra* note 211, at 332.

<sup>232</sup> See Tullio Treves, *La notion d'utilisation des espaces marins à des fins pacifiques dans le nouveau droit de la mer [The Notion of Peaceful Use of Marine Spaces in the New Law of the Sea]*, 26 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 687, 692-94 (1980) (pointing out that the latter interpretation would lead to the prohibition of all military activities, even those compatible with the U.N. Charter; however, the Convention leaves the question open).

<sup>233</sup> See PUREZA, *supra* note 199, at 277-78.

Chapter 17 of Agenda 21,<sup>234</sup> and implies some kind of intergenerational equity,<sup>235</sup> also incorporated in Principle 3 of the Río Declaration.<sup>236</sup> The precautionary principle has also been incorporated by Regulation 31 (2) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the Authority.<sup>237</sup>

On the *institutional* side, the CHM regime calls for common governance and management of the Area by an international Authority (Art 157).<sup>238</sup> The international regime applicable to the Seabed was devised taking into account a narrow relationship between its normative and institutional facets.<sup>239</sup> The establishment of the Seabed Authority therefore was seen as the vehicle to equal participation by all (“on behalf of mankind”) as stated in Art 153.<sup>240</sup> For this reason, the institutional framework set up by the Convention is based on the universality<sup>241</sup> and supra-nationality principles and is oriented towards the carrying out of the activities directly by the Authority.<sup>242</sup> In other words, the central role of the Authority<sup>243</sup> within

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<sup>234</sup> Agenda 21 is the Program of Action adopted at the Río Conference, available at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=52>.

<sup>235</sup> See EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989); *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 199 (1990); *In Fairness to Future Generations and Sustainable Development*, 8 AM. J. INT’L L. & POL’Y 19 (1992-93) (highlighting that “sustainable development relies on a commitment to equity with future generations”).

<sup>236</sup> The Río Declaration on Environment and Development, United Nations Conference on Environment and Development, adopted June 14, 1992, Doc. A/CONF.151/5/Rev.1, June 13, 1992, reproduced in 31 I.L.M. 876, 877 (1992).

<sup>237</sup> See International Seabed Authority, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Annex), Assembly, Sixth Sess., at 19, Doc. ISBA/6/A/18 (2000); See e.g. DAVID FREESTONE & ELLEN HEY, THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION (1996).

<sup>238</sup> See Paolillo, *supra* note 215, at 171 (stating that “the common heritage of mankind implies the joint administration and management of the Area which can only be done through an international body [...] The internationalization of the Area and its resources implies therefore the institutionalization of the law applicable to them [as] was foreseen and acknowledged in the Declaration of Principles”); Elisabeth Mann-Borgese, *The International Seabed Authority as Prototype for Future International Resource Management Institutions*, THE NEW INTERNATIONAL ECONOMIC ORDER, COMMERCIAL TECHNOLOGICAL AND CULTURAL ASPECTS. THE HAGUE WORKSHOP, 59 (1981) (asserting that, “in the context of an NIEO, there must be some degree of international resource planning and management”); *but see* Wolfrum, *supra* note 211, at 317 (underscoring that the establishment of an international organization is not a necessary consequence of the CHM principle).

<sup>239</sup> See A. Giardina, *L’International Sea-Bed Authority: verso un nuovo esperimento di organizzazione internazionale [The International Seabed Authority: Towards a New Experiment of International Organization]*, 59 RIVISTA DI DIRITTO INTERNAZIONALE, 247, 248 (1976).

<sup>240</sup> See PUREZA, *supra* note 199, at 280.

<sup>241</sup> See Paolillo, *supra* note 215, at 184 (asserting that “the effectiveness of the Authority will depend, therefore, on the broadest possible participation of States and other entities which form part of the international community [...] For this reason, the Authority has been conceived as an intergovernmental organization with a universal vocation, open to participation not only by States but also by entities other than States that represent peoples”).

<sup>242</sup> See PUREZA, *supra* note 199, at 284.

the system made it the warrantor of the International Community's public interest.<sup>244</sup> Although the trustee of mankind's interests, however, the Authority had to give special consideration to developing countries in order to reduce the inequality between states with respect to their capability to take part in the exploitation activities of the Seabed.<sup>245</sup>

Besides the administration of the Area and its resources through the Enterprise as the operative organ,<sup>246</sup> the Authority was moreover endowed with another function, that is, the representation of mankind.<sup>247</sup> Although mankind is not a subject of International Law even within the LOS Convention,<sup>248</sup> and has no real juridical dimension,<sup>249</sup> it has been vested with economic rights (Art 137(2) whose exercise was attributed to the Authority as its representative in all matters concerning the protection and implementation of those rights. Nevertheless, with respect to the institutional dimension the CHM legal regime has also been watered down to a large extent through the 1994 Agreement.<sup>250</sup>

As mentioned, taking together both aspects, normative and institutional, there has been an amendment<sup>251</sup> that modifies the LOS Convention accommodating the objections the U.S. and

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<sup>243</sup> See Tullio Treves, *Continuité et innovation dans les modèles de gestion des ressources minérales des fonds marins internationaux* [*Continuity and Innovation in Mineral Resources' Management of the International Seabed*, THE MANAGEMENT OF HUMANITY'S RESOURCES: THE LAW OF THE SEA, 63, 71 (R.-J. Dupuy ed. 1982) (underscoring that the management scheme of the LOS Convention has reversed the respective roles of states and international organizations because "the management of the system belongs to the organization whereas the function of States appears as subordinated and instrumental")..

<sup>244</sup> Francisco Orrego Vicuña, *Le régime d'exploration et d'exploitation* [*The Exploration and Exploitation Régime*], TRAITÉ DU NOUVEAU DROIT DE LA MER 551, 560 (R.-J. Dupuy & D. Vignes eds. 1985).

<sup>245</sup> See Paolillo, *supra* note 215, at 181 (affirming that "the establishment of the Authority reflects the recognition that solutions to political and economic problems arising from inequalities and underdevelopment are the responsibility of the international community as a whole").

<sup>246</sup> See Felipe H. Paolillo, *Institutional Arrangements*, A HANDBOOK ON THE NEW LAW OF THE SEA, 689, 759 (R.-J. Dupuy & D. Vignes eds. 1991) (stating that the Enterprise is "by far the most interesting institutional innovation introduced by the Convention [as] the first international commercial organization").

<sup>247</sup> See Paolillo, *supra* note 215, at 182 (referring to the Authority as "the incarnation of mankind or, in more technical language, as its juridical expression").

<sup>248</sup> See Wolfrum, *supra* note 211, at 319 (stating that "the participants with respect to the utilization of the common heritage are States and not "mankind" as an independent subject of international law").

<sup>249</sup> See Paolillo, *supra* note 215, at 184 (underscoring that "mankind is a collective entity, lacking true juridical dimension; it is a social, not a legal reality").

<sup>250</sup> See NAVARRO BATISTA, *supra* note 214, at 129 (concluding that "the Convention imposed legal equality, the condition of one State-one vote in the name of a sort of "democracy" in the international field. The 1994 Agreement however imposed the effectiveness principle. It takes into account the inequalities of the International Society, the technological and financial disparities, and translates them into the institutional model. Perpetuation against change, effectiveness against "democracy").

<sup>251</sup> See Jean-Pierre Levy, *Les bons offices du Secrétaire Général des Nations Unies en faveur de l'universalité de la Convention sur le droit de la mer* [*Good Offices of the United Nations Secretary General Towards the Universality of the Law of the Sea Convention*], REVUE GÉNÉRAL DU DROIT INTERNATIONAL PUBLIC, 871, 890 (1994) (stating that the 1994 Agreement is without question, and regardless of its heading, an Amendment Protocol); Tullio Treves,

other industrial States to Part XI.<sup>252</sup> This amendment has been termed as a clear regression in the CHM legal regime applicable to the Seabed Area.<sup>253</sup> On the one hand, the world economic and political context has changed dramatically so that planned economy and public enterprise are not supported any more.<sup>254</sup> On the other hand, developed countries have tried successfully to recover the CHM concept.<sup>255</sup> The end result has brought about a minimization of the CHM legal regime established by the LOS Convention<sup>256</sup> and the dismissal of the solidarity philosophy that underlied it according to the NIEO.<sup>257</sup>

The CHM has also played an important role in the Outer Space legal regime. The *res communis* regime purported by developed countries was contested by developing countries as soon as exploitation of this space became evident. Alternatively the latter insisted on the CHM principle which, suggested in the 1963 Declaration<sup>258</sup> and the 1967 Treaty,<sup>259</sup> was eventually taken as a key part of the 1979 Moon Treaty.<sup>260</sup> Indeed, General Assembly Resolution 34/68 was surprisingly approved by consensus despite of the existing divergences<sup>261</sup> and the Moon Treaty introduced an important change in the traditional rules of International Law concerning resources

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*L'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer et les conditions de son universalisme* [The entry into force of the United Nations Convention on the Law of the Sea and the Conditions for its Universalism], 39 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 850, 862 (1993).

<sup>252</sup> See Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AM. J. INT'L L., 687, 695 (1994); Daniel Vignes, *La Convention sur le droit de la mer répond-elle à l'attente?* [Does the Law of the Sea Convention Respond to the Expectations?], 47 STUDIA DIPLOMATICA, 29, 34 (1994).

<sup>253</sup> See José Antonio Pastor Ridruejo, *Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs. Cours général de droit international public* [International Law on the Verge of Twenty-first Century: Norms, Facts and Values. General Course of Public International Law], 279 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 264 (1998).

<sup>254</sup> See Levy, *supra* note 251, at 875.

<sup>255</sup> See M. A. Bekkouche, *La récupération du concept de patrimoine commun de l'humanité par les pays industriels* [The Recuperation of the Common Heritage of Mankind Concept by the Industrial Countries], REVUE BELGE DE DROIT INTERNATIONAL, 124 (1987).

<sup>256</sup> See PUREZA, *supra* note 199, at 301.

<sup>257</sup> See Ignacio Forcada Varona, *La evolución de los principios jurídicos que rigen la explotación de los recursos económicos de los fondos marinos y del alta mar: Retorno a la soberanía* [The Evolution of the Legal Principles Ruling the Exploitation of the Seabed and the High Seas' Economic Resources: Back to Sovereignty] 14 ANUARIO DE DERECHO INTERNACIONAL 53, 80 and 105 (1998); Pinto, *supra* note 202, at 263.

<sup>258</sup> See Manfred Lachs, *The International Law of Outer Space*, 113 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 97 (1964); Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 INDIAN JOURNAL OF INTERNATIONAL LAW, 36 (1965).

<sup>259</sup> See Jacqueline Dutheil de la Rochere, *La Convention sur l'internationalisation de l'espace* [The Convention on the Internationalization of Space] 13 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 625 (1967); D. Goedhuis, *The Changing Legal Regime of Air and Outer Space*, 27 INT'L & COMP. L.Q. 576, 582 (1978).

<sup>260</sup> See Carl Q. Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 14 INT'L LAW. 429, 434 (1980).

<sup>261</sup> See ARMAND D. ROTH, *LA PROHIBITION DE L'APPROPRIATION ET LES RÉGIMES D'ACCÈS AUX ESPACES EXTRA-TERRESTRES* [THE PROHIBITION OF APPROPRIATION AND ACCESS REGIMES TO EXTRA-TERRESTRIAL SPACES], 143 (1992).

from Outer Space.<sup>262</sup> Therefore, roughly speaking, we find in the Outer Space regime the same features already mentioned regarding Part XI of the LOS Convention,<sup>263</sup> specifically: prohibition of occupation or appropriation (Art 11(2) of the Moon Treaty);<sup>264</sup> utilization of the moon and its resources for the benefit of mankind (Arts 4 and 11);<sup>265</sup> peaceful use (Art 3)<sup>266</sup> and protection of the environment (Art 7); and common administration through the setting up of institutional machinery (Art 11(5)).<sup>267</sup> The question arises whether or not the Moon Treaty imposes a moratorium until the establishment of the foreseen international regime. Although there is not a clear-cut answer, the indefinite legal situation has to date prevented commercial exploitation.<sup>268</sup>

The most specific facets of the CHM regime applicable to Outer Space, namely, the common management through an international regime and the equitable sharing are only generally stated and therefore it is difficult to ascertain what the precise conventional obligations for States Parties are. The real problem however rests on the willingness of the space powers to accept the CHM provision.<sup>269</sup>

#### 4.3.3 CHM as a Concept

The CHM concept was launched in the 1960's and used to symbolize a new conception of the function of International Law. The emphasis was put on a new kind of international relations based on active cooperation among states rather than on mutual national interest and self-restraint. Moreover, the CHM concept emerged as a major legal feature of the NIEO and so

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<sup>262</sup> See Sylvia M. Williams, *The Law of Outer Space and Natural Resources*, 36 INT'L & COMP. L.Q. 142, 146-48 (1987) (asserting that the CHM provision of the Moon Treaty extends the non appropriation rule to the fruits and natural resources of the moon and other celestial bodies).

<sup>263</sup> See Wolfrum, *supra* note 211, at 333-34.

<sup>264</sup> But see ROTH, *supra* note 261, at 169 (noting that this prohibition only applies to resources *in situ*, not to resources already extracted by way of scientific research activities).

<sup>265</sup> But see Christol, *supra* note 260, at 478 (endorsing the interpretation of Western countries that this "cannot be treated as a device to eliminate the profits earned through the taking of risks under the free-enterprise system").

<sup>266</sup> See Nancy L. Griffin, *Americans and the Moon Treaty*, 46 J. AIR L. & COMM. 729, 737 (1981) (stressing that this feature of the CHM has been reinforced through Art 3 of the Moon Treaty).

<sup>267</sup> But see ROTH, *supra* note 261, at 150 (underscoring the fact that the commitment to establish an international regime is no more than a *pactum de negotiando*).

<sup>268</sup> See Hoffstadt, *supra* note 190, at 620-621.

<sup>269</sup> See Scott Ervin, *Law in a Vacuum: The Common Heritage Doctrine in Outer Space Law*, 7 B. C. INT'L & COMP. L. REV. 403, 422 (1984); Griffin, *supra* note 266, at 731 (noting that the U.S. was an active participant in the Moon Treaty but did not finally sign due to strong opposition from domestic interest groups); see also B. Leger, *La Lune: patrimoine commun de l'Humanité [The Moon: Common Heritage of Mankind]*, THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 290 (1979).

as an essential economic goal.<sup>270</sup> International Law could therefore be used, not only as the instrument to regulate and control social order in the international community through conciliation processes on the basis of reciprocity.<sup>271</sup> It could also serve to carry out distributive functions.<sup>272</sup> In other words, The LOS Convention and the CHM concept were to be understood, not only as one of the farthest-reaching steps for the progressive development of International Law,<sup>273</sup> but also for the progressive social development.<sup>274</sup>

From a conceptual point of view, the CHM has two aspects.<sup>275</sup> First, it has a trans-spatial dimension. It regroups all current peoples and has a universalistic and egalitarian function, in other words, on the one hand it entails collective property and no discrimination and, on the other hand, it promotes integration and common management. Secondly, the CHM concept has a trans-temporal dimension. It compels present generations to take into account the interests and needs of future generations so that the former are only the managers and responsible *vis à vis* the latter.

In this regard, the CHM concept flowing from this new International Law is ultimately opposed to the sovereignty principle<sup>276</sup> as framed by liberal International Law.

The CHM concept, as embodied in the LOS Convention is one of the most advanced frameworks ever articulated with the aim of achieving the equitable sharing of resources among States and peoples.<sup>277</sup> Nevertheless, from a doctrinal point of view, the *de facto* equal participation and preferential treatment elements of regime applicable to the Seabed Area are entrenched in a different background, that is, whereas the former is based on the CHM concept, the latter is founded in the development aid thinking.<sup>278</sup> The 1994 Agreement, however, has

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<sup>270</sup> See Treves, *supra* note 243, at 70; PUREZA, *supra* note 199, at 343.

<sup>271</sup> See Pierre-Marie Dupuy, *Humanité, communauté, et efficacité du droit [Humanity, Community and Law Effectiveness]*, HUMANITÉ ET DROIT INTERNATIONAL. MÉLANGES RENE-JEAN DUPUY, 133, 136 (1991) (stating that the emergence of mankind in the field of international law reinforces the tendency towards the extension of those norms whose application is not subject to the reciprocity condition).

<sup>272</sup> See Paolillo, *supra* note 215, at 149.

<sup>273</sup> See Fernando Zegers Santa Cruz, *Deep Sea-bed Mining Beyond National Jurisdiction in the 1982 UN Convention on the Law of the Sea: Description and Prospects*, 31 GERMAN YEARBOOK OF INTERNATIONAL LAW, 107, 108 (1988).

<sup>274</sup> See Philip Allot, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764, 785 (1992).

<sup>275</sup> See René-Jean Dupuy, *La notion de patrimoine commun de l'humanité appliquée aux fonds marins [The Notion of Common Heritage of Mankind Applied to the Seabed]*, DROIT ET LIBERTÉS A LA FIN DU XXE SIÈCLE, INFLUENCE DES DONNES ECONOMIQUES ET TECHNOLOGIQUES. ETUDES OFFERTES A CLAUDE-ALBERT COLLIARD 197, 199 (1984).

<sup>276</sup> See Wolfrum, *supra* note 191, at 68 (stating that this principle “conflicts with the principle of sovereignty as it raises the ideas of international public utility and the obligation to cooperate”).

<sup>277</sup> See Paolillo, *supra* note 215, at 149.

<sup>278</sup> See Wolfrum, *supra* note 211, at 323.

downgraded or even removed the preferential treatment aspect so that the customary CHM concept may have experienced a modification by way of conventional law. The current CHM concept has therefore lost much of its economic dimension.

The CHM concept has recently experienced a process of expansion in its sphere of application as well. As an equitable and rational system to manage economic resources, it has been proposed to regulate post-material global commons often located within national jurisdictions.<sup>279</sup> First, it has been invoked in the field of culture. Although there are traces in Art 1(a) of the 1954 UNESCO Convention,<sup>280</sup> the obligation towards the protection afforded to cultural heritage of mankind is incorporated in general International Law as of the 1972 UNESCO Convention.<sup>281</sup> Within the framework established by the 1972 Convention, UNESCO on behalf of the international community will cooperate with the national State in order to protect that cultural heritage. Institutional and financial mechanisms are articulated to that end. The 1972 Convention therefore does not have the effect of superseding national sovereignty over cultural goods located within the State jurisdiction. According to the Convention, however, the national State is not only the first competent to protect, but also the first obliged to do so, which means that State sovereignty is limited by the interest of the international community.<sup>282</sup> Under this approach, the State is not the owner of the cultural heritage but the trustee of mankind,<sup>283</sup> an idea most welcomed by industrialized countries.<sup>284</sup>

Second, the CHM concept has also been retained in the field of natural resources<sup>285</sup> (natural heritage) and the environment under a very similar approach.<sup>286</sup> The growing damage

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<sup>279</sup> See PUREZA, *supra* note 199, at 343.

<sup>280</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

<sup>281</sup> Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

<sup>282</sup> See Annaliese Monden & Geert Wils, *Art Objects as Common Heritage of Mankind*, 19 REVUE BELGE DE DROIT INTERNATIONAL 327, 336 (1986) (stating also that “cultural heritage of mankind is qualitatively different from the mere sum of national heritages, and is more consistent with common heritage of mankind as applied to the deep seabed, the celestial bodies and the environment”); *but see* Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT’L & COMP. L.Q. 859, 860 (1991).

<sup>283</sup> See Monden & Wils, *supra* note 347, at 336.

<sup>284</sup> See BASLAR, *supra* note 192, at 296 (noting that “Ironically [...] the Common Heritage of Mankind language was largely welcomed by the prosperous, art importing nations which argued that artifacts representing universal human culture should be located where they will be best cared for”).

<sup>285</sup> See PAQUEROT, *supra* note 224, at 15 (limiting the concept of CHM to those natural resources so vital as the air, water, the sun and biological diversity).

<sup>286</sup> See Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GERMAN YEARBOOK OF INTERNATIONAL LAW, 308, 322 (1990).

caused to the natural environment has created the need for international action. *The greening of international law* conveys the idea of the special responsibility this discipline has in meeting that need.<sup>287</sup> The concept of CHM arises then as a useful tool to create international obligations and machinery for the protection of the environment. Concerning the exploitation of natural resources, the term “common interest” and the preservation of the environment for future generations have been incorporated in international texts,<sup>288</sup> such as the Whaling Convention,<sup>289</sup> the 1952 Tokyo Convention,<sup>290</sup> the 1968 African Convention,<sup>291</sup> the 1979 Bonn Convention,<sup>292</sup> the Natural Habitats Convention,<sup>293</sup> and the World Charter for Nature.<sup>294</sup> In this field, however, the concept of “common concern of mankind” has been preferred over the CHM, as expressed by General Assembly Resolutions.<sup>295</sup> Other international agreements that incorporate the concept of common concern of mankind are the Climate Change Convention<sup>296</sup> and the 1992 Convention on Biological Diversity.<sup>297</sup> There are slight differences that distinguish this concept of common concern of mankind from the CHM concept already examined: a) it focuses on global problems for the international community as a whole, but from a public order point of view and far from any appropriation’s approach; b) environmental protection implies, not only states, but all societies and communities from within these societies; c) the equitable sharing element refers to responsibilities.<sup>298</sup> There is however controversy regarding the legal status of the common concern of mankind concept.<sup>299</sup>

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<sup>287</sup> See Oscar Schachter, *The Greening of International Law*, HUMANITÉ ET DROIT INTERNATIONAL. MÉLANGES RENE-JEAN DUPUY, 271 (1991).

<sup>288</sup> See ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW, 19 (3<sup>rd</sup> ed. 2004).

<sup>289</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 155 L.N.T.S. 349.

<sup>290</sup> International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, available at <http://www.oceanlaw.net/texts/nphs.htm>.

<sup>291</sup> African Convention on the Conservation of Nature and Natural Resources, Sep. 15, 1968, 1001 U.N.T.S. 3.

<sup>292</sup> Bonn Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15 (1980).

<sup>293</sup> Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, 104 E.T.S.

<sup>294</sup> See G.A. Res. 37/7, U.N. GAOR, 37<sup>th</sup> Sess., Supp. No. , at , U.N. Doc. A/37/51 (1982).

<sup>295</sup> See G.A. Res. 43/53, U.N. GAOR, 43<sup>rd</sup> Sess., Supp. No. , at , U.N. Doc. A/RES/43/53 (1988); G.A. Res. 44/207, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. at , U.N. Doc. A/RES/44/207 (1989); G.A. Res. 45/212, U.N. GAOR, 45<sup>th</sup> Sess., Supp. No. , at , U.N. Doc. A/RES/45/212 (1990).

<sup>296</sup> See Framework Convention on Climate Change, United Nations Conference on Environment and Development, done at New York, May 9, 1992, 31 I.L.M. 849, 851 (1992).

<sup>297</sup> See Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, 822 (1992).

<sup>298</sup> See DAVID ATTARD, THE MEETING OF THE GROUP OF LEGAL EXPERTS TO EXAMINE THE CONCEPT OF THE COMMON CONCERN OF MANKIND IN RELATION TO GLOBAL ENVIRONMENT (1991).

<sup>299</sup> See Peter H. Sand, *International Environmental Law After Rio*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW, 377, 382 (1993).

In this context, international regulation is not intended for resources located beyond national jurisdiction, but on the contrary they are situated within State territories.<sup>300</sup> On the other hand, as already mentioned, there is no equitable sharing (trans-spatial element) of benefits flowing from the exploitation of natural resources. The CHM concept therefore needs to be reassessed when applied to global natural resources and the environment.<sup>301</sup> Mankind here is designated, not as the recipient of a natural good to be exploited, but as the holder of a trans-temporal credit towards the international community, thus including future generations.<sup>302</sup> The egalitarian element therefore translates into the “equitable sharing of burdens”, which means there should be more obligations for industrialized countries according to their historic contribution to pollution.<sup>303</sup> This technique of common but differentiated responsibilities has been incorporated in Principle VII of the Río Declaration<sup>304</sup> and other environmental Agreements.<sup>305</sup>

In this framework, the common concern of mankind does not spawn the need of strong institutional machinery.<sup>306</sup> The dichotomy between collective interest of the international community and subjective interest of individual states fades away.<sup>307</sup> Every State is at the same time the beneficiary of environmental protection and the obliged as trustee of the interests and needs of the international community.<sup>308</sup>

#### 4.4 CHM AND THE INTERNET

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<sup>300</sup> See BASLAR, *supra* note 192, at 292-93 (recalling that traditional state sovereignty persistently works against any CHM applied to resources located within national territory).

<sup>301</sup> See PAQUEROT, *supra* note 224, at 126.

<sup>302</sup> See PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC*, 530 (2<sup>nd</sup> ed. 1993).

<sup>303</sup> See Kilaparti Ramakrishna, *North-South Issues, the Heritage of Mankind and Global Environmental Change*, GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL RELATIONS 161 (Rowlands & Green eds. 1992).

<sup>304</sup> See The Río Declaration on Environment and Development, *supra* note 236, at 877.

<sup>305</sup> See Art 4 of the Framework Convention on Climate Change, *supra* note 296, at 855; Art 20 of the Convention on Biological Diversity, *supra* note 297, at 830.

<sup>306</sup> *But see* PAQUEROT, *supra* note 224, at 117 and 227-28 (2002) (critiquing that the concept of common concern of mankind, because it does not entail an institutional machinery, does not help to alter the established international order; as it doesn't have a supranational perspective, it does not offer the utensils needed to set in motion the common interest; for these reasons, it is a *retreat* from the point of view of the CHM concept).

<sup>307</sup> See PUREZA, *supra* note 199, at 374.

<sup>308</sup> See Alexandre-Charles Kiss, *Le droit international de l'environnement, un aspect du droit international de l'avenir? [Environmental International Law, An Aspect of Future International Law?]*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW. THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT, 471, 483 (1985).

Even if there are pessimistic views on the actual possibilities of the CHM in current International Law,<sup>309</sup> it would be good for Internet governance to further at least some of the elements of the CHM. This is not a proposal based on natural-law-type norms,<sup>310</sup> but a *de lege ferenda* proposal which needs to be confirmed by State consent in the form of international treaties or otherwise.

There is clearly a failure in the way the CHM was conceived in the 1960's and 1970's. The use and exploitation of common resources like the Seabed, Outer Space and (perhaps) Antarctica need important economic investments that can only be brought about by private companies. A free market approach combined with a regulatory umbrella may then be a sound solution for the current impasse,<sup>311</sup> with the U.N. playing a central role.<sup>312</sup> The Internet does not need such a push towards a market-oriented approach, because it is already a private-led field. On the contrary, it may be useful to have recourse to some of the traditional CHM elements to try to develop an international regime for common governance of the Internet's core resources. For this purpose, we consider that the CHM is a functional rather than a territorial concept,<sup>313</sup> so that it is theoretically possible to extend it to this particular field. Support for this interpretation may also be found in the 1984 Declaration of Buenos Aires on Transborder Data Flow, where Latin American countries considered informatics as "Mankind's Heritage".<sup>314</sup>

First, the "non-appropriation" principle may not be the most crucial element to be applied to the CHM proposal for the Internet if we consider the decentralized nature of cyberspace. The Internet is nowhere and everywhere, so it may be said that no State has command and control of the Internet. However, we have already seen that the Internet's main infrastructure is run according to U.S.-established parameters, where the private enterprise leads and ultimately the U.S. government can exercise authority over the Internet's technical body called ICANN

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<sup>309</sup> See Carol R. Buxton, *Property in Outer Space: The Common Heritage of Mankind Principle vs. The "First in Time, First in Right" Rule of Property Law*, 69 J. AIR L. & COM. 689, 705-708 (2004); Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 WIS. INT'L L.J. 409, 434 (2003).

<sup>310</sup> But see BASLAR, *supra* note 192, at 8 (stating that the CHM "is a moral philosophical idea acquiring its existence and legal normativity from, above all, natural law rather than State consent and auto-limitation [which] marks the end of positivist Westphalian international law").

<sup>311</sup> See Lynn M. Fountain, *Creating Momentum in Space: Ending the Paralysis produced by the "Common Heritage of Mankind" Doctrine*, 35 CONN. L. REV. 1753, 1774 (2003).

<sup>312</sup> See Rana, *supra* note 171, at 234.

<sup>313</sup> See BASLAR, *supra* note 192, at 91.

<sup>314</sup> See TRANSNATIONAL DATA REPORTING SERVICE, TRANSNATIONAL DATA REPORT 265 (1985).

(thereby controlling the domain name system, the root server system, and the establishment of Internet protocols and standards).

Even if this wasn't true, there would be every reason to try to set up a coordinated system for "international Internet governance".<sup>315</sup> The Declaration of Principles of the World Summit on the Information Society has just called for an "[e]nabling environment" (Principle no. 6) where "[t]he international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations".<sup>316</sup> The Working Group on Internet Governance (WGIG) set up by the Secretary-General of the U.N. according to the aforementioned Declaration of Principles has recently handed out its first report in which it defines Internet governance as "the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet".<sup>317</sup> This group makes it clear that Internet governance not only includes Internet names and addresses, as dealt with by ICANN, but also includes other important policy issues, such as *critical Internet resources*.<sup>318</sup> This report also identifies, as the first group of public policy issues relevant to internet governance, those "relating to the infrastructure and the management of critical Internet resources, including the administration of the domain name system and Internet protocols and addresses (IP addresses), administration of the root server system, [and] technical standards", among the most critical.<sup>319</sup> In this regard, the Tunis Agenda for the Information Society has recently built on the idea expressed in the Geneva Phase that policy authority for Internet-related public policy issues is the sovereign right of all States and has therefore called for the "requisite legitimacy" of Internet governance, "based on the full participation of all stakeholders, from both developed and developing countries".<sup>320</sup> The link between legitimate Internet governance and participation of all States in the management of

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<sup>315</sup> See Declaration of Principles of the World Summit on the Information Society, *supra* note 52, para. 50 at 7.

<sup>316</sup> *Id.* para. 48 at 6.

<sup>317</sup> See Report from the Working Group on Internet Governance, World Summit on the Information Society, Geneva 2003-Tunis 2005, August 3, 2005, para. 10 at 3, Doc. WSIS-II/PC-3/DOC/5-E, available at <http://www.itu.int/wsis/docs2/pc3/off5.pdf>.

<sup>318</sup> See *id.* para. 12 at 3.

<sup>319</sup> See *id.* paras. 13 (a) and 15 at 4 (stating, with respect of the administration of the root zone files and system, that there is at present a unilateral control by the United States Government).

<sup>320</sup> See Tunis Agenda for the Information Society, World Summit on the Information Society, Geneva 2003-Tunis 2005, November 15, 2005, paras. 31 and 35 at 6-7, Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E, available at <http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf>.

critical Internet resources has then been emphasized in very explicit terms in the Tunis Phase of the World Summit on the Information Society.

In the Internet field, therefore, there are vital resources that should be considered, not the property or the invention of a given State (even if it is so for historical reasons), but the common heritage or common concern of mankind. Even if the U.S. does not presently want to give up its current control over these critical Internet resources,<sup>321</sup> as demonstrated in the Tunis Phase of the World Summit on the Information Society, it has nevertheless agreed to discuss the issue of sharing them within the framework of the new Internet Governance Forum<sup>322</sup> and in the long run it may agree to declare the Internet as a CHM resource. Ultimately, the non-appropriation principle does not necessarily have to apply to every CHM resource, as is evident in the cultural<sup>323</sup> and environmental<sup>324</sup> fields, for the concept to be useful and applicable. Declaring Internet's core resources as a common resource would have the advantage of involving the whole international community in its governance.

Second, it follows from the above explanation that the CHM element relative to “common management” is fully applicable to the CHM proposal for the Internet. A centralized, democratically structured international regime is needed in order to achieve a legitimate representation of mankind. The only question would be how to articulate this common management, and what would be the appropriate body or forum, existing or to be construed, for this coordinated governance. The WGIG has proposed four different models, ranging from the creation of a strong international body called Global Internet Council with widespread competences which would take over the functions currently performed by the Department of Commerce of the U.S. Government, to the simple enhancement of the ICANN's Governmental

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<sup>321</sup> See John Markoff, *Overseer of Net Addresses Ends Dispute With Verisign*, N.Y. TIMES, October 25, 2005 at [www.nytimes.com/2005/10/25/technology/25internet.html?th=&emc=th](http://www.nytimes.com/2005/10/25/technology/25internet.html?th=&emc=th) (stating that the US government has recently said that it no longer plans to give over control of ICANN to an international organization or to let it become an independent organization); Tomás Delclós, *EEUU Avisa de que no Cederá el Control Técnico de Internet [The USA Warns that it Will not Give Up its Technical Control Over the Internet]*, EL PAIS, October 29, 2005 at [www.elpais.es/articulo/elpporsoc/20051029elpepisoc\\_7/Tes](http://www.elpais.es/articulo/elpporsoc/20051029elpepisoc_7/Tes).

<sup>322</sup> See Tunis Agenda for the Information Society, *supra* note 320, para. 72 at 11 (mandating the UN Secretary-General to set up a body called the *Internet Governance Forum* to discuss, *inter alia*, issues relating to critical Internet resources).

<sup>323</sup> See Kiss, *supra* note 175, at 231 (distinguishing between CHM by “nature” and CHM by “affectation”, as in the case of cultural goods, the second case implying that the CHM concept applies even if the actual good is under a given State sovereignty).

<sup>324</sup> See BASLAR, *supra* note 192, at 279 and 287 (admitting that, where environmental resources like global commons are located in the territory of one State, this State would be under an obligation of custody, as a trustee, in which case the non-appropriation principle does not apply and so it would be better to talk about the Common Concern of Mankind as an alternative concept).

Advisory Committee.<sup>325</sup> Although the concrete model to be chosen has to be discussed within the Internet Governance Forum, in any case, the WGIG recommends that any such body or forum should be linked to the U.N. and that no single government should have a pre-eminent role.<sup>326</sup> The common management of the Internet's main infrastructure under the umbrella of the U.N. should be not more problematic than the management of other technical issues by organisms like the I.T.U. (which manages the radio frequency spectrum and orbits used by satellites) or the International Standards Organization (ISO), although the latter is a non-treaty organization. In other words, the common management of the Internet's core resources is not a technical, but a political question, which requires a political decision.

The third element, the “benefits sharing” element of the CHM proposal for the Internet may have two interpretations. On the one hand, it could be understood as a principle requiring Internet's common management for the benefit of all mankind. In this regard, it would not add much to the second principle already mentioned. From the point of view of its lighter version, the common concern of mankind, it would mean no more than common management without international institutions. On the other hand, it may be related to the same problem already addressed by the CHM concept that arose in the field of the Law of the Sea and Outer Space Law, that is, development or access to resources by developing countries. In other words, the CHM was devised as an attempt to provide for distributive justice<sup>327</sup> within the utilization regimes created in those fields, certainly in the Law of the Sea Convention.<sup>328</sup> In the Internet field, however, there are no physical resources to be exploited (i.e. minerals), but the benefits from the digital revolution flow from the very existence of an enabling infrastructure and connectivity capacity, which are lacking in many developing countries. In this regard, the CHM applied to the Internet is more related to the concept as retained in the environmental sphere.<sup>329</sup> The World Summit on the Information Society has therefore taken up the “commitment to build a people-centred, inclusive and development-oriented Information Society”.<sup>330</sup> In other words, “the benefits of the information technology revolution are today unevenly distributed between

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<sup>325</sup> See Report from the Working Group on Internet Governance, *supra* note 317, at 12-14.

<sup>326</sup> *Id.* para. 48 at 10.

<sup>327</sup> See Pinto, *supra* note 202, at 253.

<sup>328</sup> See Wolfrum, *supra* note 191, at 68 (asserting that the equal distribution of seabed resources can be attributed to two different approaches, based on the idea of preferences or the idea of compensation).

<sup>329</sup> See Kiss & Shelton, *supra* note 288, at 21 (asserting that the equitable allocation of revenue is not the essential feature of the concept).

<sup>330</sup> See Declaration of Principles of the World Summit on the Information Society, *supra* note 52, para. 1 at 1.

the developed and developing countries,” and so the objective becomes “turning this digital divide into a digital opportunity for all”.<sup>331</sup> In this vein, Principle no. 11 of the Declaration of Principles, named “International and Regional Cooperation,” calls for a commitment to the “Digital Solidarity Agenda” set forth in the Plan of Action and to the goals contained in the Millennium Declaration.<sup>332</sup> This principle of action, however, has not led to the establishment of a transfer mechanism for the benefit of developing countries, except for a voluntary instrument called Digital Solidarity Fund. Such a mechanism could hardly be construed as a legal obligation arising from the CHM concept as well, as this equitable sharing element has been discarded at least in the field of the Law of the Sea. Accordingly, our CHM proposal for the Internet will be limited to the common management of Internet’s main resources for the benefit of all humankind and therefore would not entail the establishment of a mechanism to redistribute the benefits flowing from the digital revolution at large.

The fourth element relative to the “peaceful use” of the CHM also makes sense in the Internet context.<sup>333</sup> Information and telecommunications technologies and Internet infrastructure should serve to promote knowledge, information and communication, education and political participation. These technologies are also “effective tools to promote peace, security and stability, to enhance democracy, social cohesion, good governance and the rule of law”.<sup>334</sup> Governments should therefore cooperate in order to avoid any kind of warfare using critical Internet resources as a possible “battlefield”,<sup>335</sup> and they should also cooperate to prevent criminal and terrorist uses of these resources.<sup>336</sup>

The final element, regarding the “preservation” of the CHM resources may not be applicable to a CHM proposal for the Internet, because the resources are not exhaustible in the same sense they are with the Seabed, Outer Space, Antarctica or environmental resources. It may apply only if we consider the Internet basic network as a precious infrastructure that has to be

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<sup>331</sup> *Id.* para. 10 at 2.

<sup>332</sup> *Id.* para. 61 at 8.

<sup>333</sup> *But see* BASLAR, *supra* note 192, at 106 (asserting that this CHM element is applicable only if a territorial, instead of functional, concept of the CHM is sustained).

<sup>334</sup> Tunis Commitment, World Summit on the Information Society, Geneva 2003- Tunis 2005, November 18, 2005, Doc. WSIS-05/TUNIS/DOC/7-E, available at <http://www.itu.int/wsis/docs2/tunis/off/7.pdf>, para. 15 at 3.

<sup>335</sup> *See* Antonio Segura-Serrano, *Internet Regulation and the Role of International Law*, 10 MAX-PLANCK YEARBOOK OF UNITED NATIONS LAW, 191, 220 (2006).

<sup>336</sup> *See* Declaration of Principles of the World Summit on the Information Society, *supra* note 52, para. 36 at 5 (stating Principle no. 5 on “building confidence and security in the use of ICTs”).

preserved from other kind of dangers, such as attacks or purported blackouts through viruses, but again those are not related to the exhaustion of a given resource.

## 5. CONCLUSIONS

International soft-law is gaining momentum as our examination of the Internet field has demonstrated. While intellectual property rights deserve regulation in the hard-law form, that is, in the form of International Treaties, the protection of privacy has only been achieved at the international level through a soft-law instrument, a *Safe Harbor* Agreement which, contrary to what happens in the intellectual property realm, could barely bring about the setting up of strong obligations and rights to be claimed by citizens and enforced by courts. In the content regulation area, national judiciaries have been able to impose State regulation and jurisdiction on the basis of the effects doctrine, and only an important effort devoted to harmonize this field will, if ever, put an end to this source of regulatory conflicts. In the end, the new liberal theory might prove true in the Internet sphere, as here there is regulation only where there are individuals and groups of citizens with clear interests at stake, and to the extent (form included) desired by those stakeholders. Needless to say, those stakeholders are mostly limited to business, while the Internet consists of much more than e-commerce.

An alternative thorough approach to Internet regulation, above all when it comes to the issue of its governance, could be based on the CHM concept. As we have seen, most of the elements of the CHM concept, as currently interpreted, apply reasonably well to Internet's core resources. The Internet is a global resource that should not be appropriated by any single State, should be subject to a common management system, be managed for the benefit of all mankind (paying due regard to developing countries' needs as a principle of action), and be used for peaceful purposes only. Nevertheless, although this concept provides more justice and democratic legitimacy in the effort to establish a governance system for the Internet, the CHM has not even been mentioned to date by writers or representatives at the World Summit on the Information Society. Perhaps this concept still evokes the socialist type of claims presented in the 1960's and 1970's, so that it would be better not to use it while trying to negotiate with the USA to give up its control over the Internet's main infrastructure. Maybe it is better to talk about the CHM in relation to the Internet once an international Internet governance regime designed

along the lines of the CHM concept is already in place. Needless to say, this approach will need more careful examination in order to be applied to this ever-changing Internet field.