

# DUTY OF CO-OPERATION AS NEW CYBERGOVERNANCE CONCEPT

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**Abstract:** *Cybergovernance attempts at protecting information and data as well as the related assets and infrastructure. By way of overcoming a strict national sovereignty approach and of developing globally acceptable principles for the Internet, new substantive concepts for behavioural norms need to be developed. A promising approach consists in the implementation of a broadly interpreted duty of co-operation between the States as a general legal standard. Such an approach appears to be suitable for contributing to a cosmopolitan understanding of common interests leading to an improved cybergovernance and a higher level of Internet integrity.*

## 1. Foundations of Cybergovernance

The term “governance” can be traced back to the Greek word “*kybernetes*”, the “steersman”, leading through the Latin word “*gubernator*” to the English notion “governor” (i.e. to aspects of steering and governing behaviour).<sup>1</sup> As a consequence, cybergovernance encompasses the measures taken by the concerned actors with the objective to protect information and data as well as the underlying assets and infrastructure.

Originally, the term “Internet governance” was used to describe the administration and design of the technologies that keep the Internet operational and allow the enactment of policies around these technologies. Even if there is no ideal taxonomy for the manifold aspects of design, coordination, and control mechanisms, some important functions are usually concretized as follows:<sup>2</sup> (i) administration of critical Internet resources such as names and numbers; (ii) establishment of Internet technical standards (e.g. protocol, routing, authentication); (iii) coordination of access and interconnection (e.g. IXPs, net neutrality), (iv) cybersecurity governance, (v) policy-making role of private information intermediaries, and (vi) architecture-based intellectual property rights enforcement.

Over time, it has become increasingly clear that the technical design and coordination of the Internet is a part of public policy and that the most important global “infrastructure” crossing borders impacts the Nation-state jurisdiction and (in connection with the upholding of its integrity) the national Internet security. In such an environment, international law, with all its perplexities, should be effectively and coherently applied. In order to cover all potential infrastructures, particularly the distributed ledger technologies (amongst others blockchain as the most well-known infrastructure), the notion of Internet governance has been broadened to the concept of a normative cyberspace framework<sup>3</sup> and to cybergovernance.

The discussions about the substantive principles enshrining cybergovernance have addressed many important aspects such as transparency, accountability, and participation of the involved actors.<sup>4</sup> Equally, the application of general legal principles is considered. This contribution attempts to shed light on a concept that has not

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<sup>1</sup> WEBER, 2009, p. 2.

<sup>2</sup> DENARDIS, 2020, p. 3 with further references.

<sup>3</sup> WEBER, 2014, pp. 99 et seq.

<sup>4</sup> For a general overview see WEBER, 2009, pp. 121 et seq.

been at the forefront so far, namely the duty of co-operation. The following considerations envisage showing that this concept can be reasonably made fruitful in the cybergovernance context.

The contribution is structured as follows: Chapter 2 lays the ground by outlining the basic objectives of cyberspace integrity and stability requiring a co-operation between States. Chapter 3 discusses in detail the contents of a duty of co-operation by assessing existing legal instruments being partly in place already for decades and by analysing the nature and characteristics of such obligation (incl. by drawing from the insights gained in other legal segments). Chapter 4 widens the perspective and discusses the embedment of a duty of co-operation into the concept of common interests as a cosmopolitan approach. The contribution concludes with an outlook.

## 2. Cyberspace Integrity and Stability as Underlying Objectives

Cybergovernance has – as mentioned – the objective to protect information and data as well as the related assets and infrastructure. This protection is reflected in terms such as security, stability, robustness or resilience of cyberspace.<sup>5</sup> In the meantime, the notion of cyberspace integrity gained importance since it appears to have the broadest scope of application.<sup>6</sup>

The integrity of cyberspace depends on the proper functioning of the infrastructure roles without technical interference and (unjustified) governmental intervention. The IT setting must ensure that data (information) is real, accurate and safeguarded from unauthorized modification. Apart from the technical vulnerability, the aspects of organizational vulnerability also need to be taken into account.<sup>7</sup> The principle of cyberspace integrity (or stability) could equally help to overcome the deadlocks occurred in connection with the manifold efforts trying to combat cybersecurity problems.<sup>8</sup>

So far, five United Nations Groups of Governmental Experts (UNGGE) have published reports on the harmonization of regulatory standards mainly in the field of cybersecurity prevention, without being able to agree on binding principles.<sup>9</sup> Even if two new expert groups have again been appointed and charged with the delivery of their reports in the second half of 2021, it remains uncertain whether much progress will be achieved. But the fourth UNGGE looking beyond new (multilateral) legal instruments rightfully pointed to the importance of generally accepted normative principles of the community: „Obligations under international law are applicable to State use of ICTs and States must comply with their obligations to respect and protect human rights and fundamental freedoms“.<sup>10</sup>

These obligations derived from international law merit further attention. The realization of cyberspace integrity requires the implementation of basic regulatory principles governing the technical infrastructure as well as a functioning legal system. As outlined by Kettemann, the integrity of cyberspace is relevant for human rights, human security, and human development.<sup>11</sup> In addition, the importance of access to the Internet infrastructure as well as to the data (information, content), is echoed in academic voices.<sup>12</sup> The aspect of the human development was acknowledged by the UN General Assembly Resolution 67/195 of 21 December 2012 on “Information and communications technologies for development”;<sup>13</sup> even if ICTs are not identical to the Internet or to cyberspace, relevant social benefits can be harvested from their driving elements.<sup>14</sup>

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<sup>5</sup> See Global Commission on the Stability of Cyberspace, 2019.

<sup>6</sup> See WEBER, 2021.

<sup>7</sup> KETTEMANN, 2020, p. 26.

<sup>8</sup> For a general overview see WEBER, 2020a, pp. 284 et seq.

<sup>9</sup> KULESZA/WEBER, 2021.

<sup>10</sup> UN Doc. A/70/174.

<sup>11</sup> KETTEMANN, 2020, pp. 36 et seq.

<sup>12</sup> WEBER, 2020b, pp. 75 et seq.

<sup>13</sup> UN Doc. A/RES/67/195 of 5 February 2013.

<sup>14</sup> For further details see KETTEMANN, 2020, pp. 37–42.

### 3. Duty of Co-operation

Cybergovernance might be reasonably warranted if the international community is ready to accept some basic and common legal standards being applicable around the globe.<sup>15</sup> As Koskenniemi noted, international law contributes to „global governance” aiming at a “cosmopolitan future, a united humanity governed by a global law”.<sup>16</sup> This objective should be condensed in widely accepted global normative concepts (not coinciding with the „international legal principles“, contained in the Statute of the International Court of Justice<sup>17</sup>). Several emanations such as the concept of global public goods, the concept of shared spaces and the concept of State responsibility are discussed.<sup>18</sup> This contribution addresses a concept that was not yet in the focus of the cybergovernance debates, namely the duty of co-operation. So far, the term “co-operation” has not been clearly defined by an international treaty or a resolution of an international organization; but its notion is part of many international legal instruments as outlined hereinafter.

#### 3.1. Traces in Declarations and Court Practice

Article 1(1) and (3) of the UN Charter already commit the organization and its members to effective co-operation. The objective is to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character...”. Article 11(1) of the UN Charter refers to the “general principles of co-operation in the maintenance of international peace and security”. Chapter IV of the UN Charter is dedicated to “international economic and social co-operation”; in particular, Article 55 refers to the “creation of conditions of stability and well-being”. Even if these provisions cannot be qualified as formal legal obligations, the aim of the co-operation appears to be clear; efforts of States to accomplish an objective by joint action are more desirable than individual actions of a single State.

The United Nations Covenant on Economic and Social Rights (ICESCR) of 1966<sup>19</sup> expresses the moral commitment for international co-operation in the development context (Articles 2, 3 and 16) but does not impose legal obligations.<sup>20</sup> The Declaration on the Right to Development of 1986 also calls for international co-operation to address global problems;<sup>21</sup> in particular, Article 3 of the Declaration articulates the key obligations of States in the creation of a forward-looking social environment. In 2015, the international community agreed to the 2030 Agenda for Sustainable Development encompassing 17 goals and requiring a higher degree of co-operation.<sup>22</sup> At the occasion of the 30<sup>th</sup> anniversary of the Right to Development Declaration (2016) the UN Human Rights Office of the High Commissioner has put its activities under the heading “Moving Forward: The commitment to co-operate must be operationalized”.<sup>23</sup>

In addition, the following emanations in respect of a co-operation duty can be found in the political arena:<sup>24</sup> (i) On the global level, a duty of co-operation is stated in the now fifty years old UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970.<sup>25</sup> Further, co-operation undertakings are foreseen if spaces beyond national jurisdiction (“shared spaces”) are to be regulated between States. The main examples are the Treaty on Principles Governing the Activities of States in the Exploration and Use of

<sup>15</sup> Already 15 years ago, SEGURA-SERRANO, 2006, p. 271, called on international law „to take a normative stance” in respect of the Internet’s future.

<sup>16</sup> KOSKENNIEMI, 2017, p. 199.

<sup>17</sup> See for example Article 38 of the Statute, <https://www.icj-cij.org/en/statute>.

<sup>18</sup> WEBER, 2021.

<sup>19</sup> 993 UNTS 3.

<sup>20</sup> See also KAUFMANN, 2018, pp. 308 et seq.

<sup>21</sup> Adopted by the General Assembly Resolution 41/128 of 4 December 1986.

<sup>22</sup> Adopted by the General Assembly Resolution 70/1 of 25 September 2015.

<sup>23</sup> Information Note, available at [https://www.ohchr.org/Documents/Issues/RtD/RTD\\_InternationalCooperation.pdf](https://www.ohchr.org/Documents/Issues/RtD/RTD_InternationalCooperation.pdf).

<sup>24</sup> For a general overview see also WOLFRUM, 2010, paras. 13 et seq.

<sup>25</sup> UN General Assembly Resolution of October 1970, Res. 2625 (xxv).

Outer Space, Including the Moon and Other Celestial Bodies of 27 January 1967<sup>26</sup> and the Law of the Sea of 10 December 1982.<sup>27</sup> (ii) On a regional level, the Helsinki Final Act of the Conference for Security and Co-operation in Europe of 1975 confirms that “participating States will develop their co-operation with one another and with all States ... improve[ing] the well-being of people and contribut[ing] to the fulfilment of their aspirations”.<sup>28</sup>

In the Gulf of Maine case (1984), the International Court of Justice (ICJ) identified a „limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community“; these norms exist in parallel to other customary rules being developed as a general standard inferred from practice (*opinio juris*).<sup>29</sup> The ICJ considers the rules related to ensuring „vital co-operation“ as central in the context of an equitable solution.<sup>30</sup> Following this assessment, the question arises: „Can co-operation with a view to ensuring the integrity of the Internet be established as a ‘vital’ duty or does it concern non-vital issues of co-operation?”<sup>31</sup> The answer to this question appears to be obvious: Co-operation in respect of a global infrastructure is vital as outlined hereinafter.

### 3.2. Nature and Characteristics

The duty of co-operation enshrines the undertaking to enter into co-ordinated actions in order to achieve the desired result. Already in 1758, de Vattel expressed the following idea: “The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations”.<sup>32</sup> According to Wolfrum, the recognition of a co-operation obligation would have three consequences for international law:<sup>33</sup> (i) Law must be normatively reoriented toward promoting certain communal values (to be pursued through co-operation); thereby, international law would be transformed from a set of rules to preserve the present state of the existing relations into a regime oriented to fulfil a certain mission, namely the promotion of international social justice. (ii) The management of the “common international spaces” needs to become a “common concern for all States”; in this respect, the efficient and responsible use of resources such as global infrastructures would become a common concern for all States. (iii) The significance of international organizations would increase (over time).

These developments cannot only be seen in several (partly mentioned) international instruments that have been entered into by States but also in the increased importance of globally accepted normative standards on the top of the general legal principles contained in the ICJ Statute. The communal values and the common concerns (interests) call for a co-ordinated approach in tackling the global challenges. This appreciation is particularly relevant in the context of an infrastructure (such as the Internet) that should be accessible and usable around the globe. Co-operation in regard of shared spaces and global interest issues needs to be based on the conviction that certain common goals cannot be achieved through unco-ordinated action of Nation-states, but require reasonable co-operation.<sup>34</sup> In addition, a desirable harmonization of law must be supported by intensified co-operation.<sup>35</sup> Standards developed in the international sphere encompass the good faith principle and the due diligence obligation in a cosmopolitan understanding.<sup>36</sup>

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<sup>26</sup> 610 UNTS 205.

<sup>27</sup> 1833 UNTS 397.

<sup>28</sup> Final Act of the Conference for Security and Co-operation in Europe, 1 August 1975.

<sup>29</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), 1984 ICJ Rep. 246 (Judgment of 24 February 1984), reprinted in 23 ILM 1197 (1984).

<sup>30</sup> For further details see ICJ Judgment (note 29), no. 111.

<sup>31</sup> KETTEMANN, 2020, p. 90.

<sup>32</sup> See DE VATTEL, 1758, p. 6.

<sup>33</sup> WOLFRUM, 2010, paras. 10–12.

<sup>34</sup> DELBRÜCK, 2011, pp. 1 et seq.

<sup>35</sup> See also MERON, 2014, for the humanization issue.

<sup>36</sup> See below Chapter 4.2.

The recognized characteristics of the co-operation duty coincide with the concept of “shared spaces”; this concept means that the defined shared spaces are to be used by all States in a uniform, non-harmful way. Many global areas, constituting a “law on international spaces”,<sup>37</sup> have been developed with common features such as the obligation of peaceful use of resources and the principle of equal rights of all States.<sup>38</sup> Typical examples are the long-time existing international treaties governing the law of the sea or the law of the air and (outer) space.<sup>39</sup> Therefore, it can be said that “recent international agreements for the use of common spaces and concerning issues in the interest of the international community” evidence the normative strengthening of the co-operation principle.<sup>40</sup>

### 3.3. Fields of Application

As already mentioned, the UNGGE Report of 2015 highlighted the importance of co-operation. Even if critical infrastructure vulnerabilities from a cybersecurity perspective were addressed, the facilitation of cross-border co-operation by way of introducing confidence-building measures can be applied on a broader scale, also including the element of cyberspace integrity.<sup>41</sup> In order to realize a purpose-oriented understanding of the duty of co-operation, the respective directions for actions must be embedded into a common interest framework.

Co-operation also plays a decisive role in the (social) development context. The promotion of joint interests strengthens the well-being of the involved actors and States. The efforts to achieve redistributive effects have so far often failed to meet the necessary acceptability in all groups of States.<sup>42</sup> Nevertheless, as some mentioned legal instruments show, at least a moral undertaking is assumed and the legalization of the respective expressions of intent often becomes a matter of time. Co-operation understood in such a way would coincide with the solidarity principle as an expression of readiness to jointly proceed with a view to fostering common interests or shared values.<sup>43</sup>

The duty of co-operation equally is an important standard in many other legal segments. At first instance, this concept can be found in contract law; for example, Article 5.1.3 of the UNIDROIT Principles reads as follows: “Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations”.<sup>44</sup> In the meantime, this principle is even seen as a standard being part of the *lex mercatoria*; contract parties have to do all things necessary to facilitate the performance of the contract and to enable the other party to have the benefit of the contract.<sup>45</sup> Similar standards equally apply in company law between the legal entity and the employees and directors. Finally, a duty of co-operation also governs the conduct of civil proceedings; for example, Section 20 of the Civil Procedure Act 2010 of Victoria (Australia) obliges a person to co-operate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.<sup>46</sup>

The principles developed in contract law and in related legal segments can be made fruitful for the international relations between States, i.e. an analogous application appears to be justified. The use of a global infrastructure is facilitated if no unilateral interference is occurring and the performance of its functions is ameliorated if each State is enabled to get access to its benefits. The co-operation may even increase the value of the shared resources. Therefore, cybergovernance should encompass collective efforts enabling the concerned States and civil society to identify, understand, and address global challenges going beyond the capacity of individual States to solve.<sup>47</sup>

<sup>37</sup> KISH, 1973.

<sup>38</sup> KULESZA/WEBER, 2017, p. 88.

<sup>39</sup> See above Chapter 3.1.

<sup>40</sup> WOLFRUM, 2010, para. 25.

<sup>41</sup> See also KETTEMANN, 2020, p. 92.

<sup>42</sup> See also WOLFRUM, 2010, para. 40.

<sup>43</sup> WOLFRUM, 2010, para. 3.

<sup>44</sup> UNIDROIT, Principles of International Commercial Contracts 2016, Rome 2016.

<sup>45</sup> See [https://www.trans-lex.org/936000/\\_/duty-to-notify-to-cooperate/](https://www.trans-lex.org/936000/_/duty-to-notify-to-cooperate/).

<sup>46</sup> See <https://www.legislation.vic.gov.au/in-force/acts/civil-procedure-act-2010/020>.

<sup>47</sup> WEBER, 2015, p. 781.

## 4. Protection of Common Interests as Cosmopolitan Approach

Cybergovernance touches upon aspects that have a common quality character. Examples are the security, stability and resilience of the Internet; equally, the integrity of the data/information transfer is of utmost importance for the survival of the Internet. Looking from this perspective, the appreciation comes close to the well-known notion of global public goods. Their recognition as international concept can be assessed as a “common interest” principle in international law.

### 4.1. From Co-existence to Co-operation

Such kind of “common interest” understanding is not new at all.<sup>48</sup> Already at the infancy stage of the Internet, in 1998, UNESCO-experts asked the question of whether the “United Nations General Assembly [could] affirm the principle of regarding cyberspace as the common heritage” in view of better safeguarding the functions of the infrastructure.<sup>49</sup> This idea has not been concretely pursued in the following years but the common interest process driven by the international actors remains a future-oriented avenue.

Since there is no limited number of global common interests, the development of international legal protection regimes has progressed over time, mainly in the German literature referring to the two normative poles of “Staatsraison” and “Gemeinschaftsbindung”.<sup>50</sup> Indeed, pursuing common interests or a normatively relevant orientation toward common goods<sup>51</sup> can be seen as a consequence of the “Staatsraison”. Consequently, States by observing the duty of co-operation reduce their unilateral impacts as actors in the international community. Looking at the growing number of regulatory challenges migrating to the realm of international law, a right to democratic governance is emerging as Franck pointed out already 30 years ago.<sup>52</sup> “Common interests” may not any longer be narrowly interpreted as national interests but rather be seen as a general obligation of States owed to the citizens and the international community.<sup>53</sup> Such a perception reflects the fundamental change, diagnosed by Friedmann already in 1974, from co-existence to co-operation.<sup>54</sup>

### 4.2. Move to Cosmopolitanism

From “common interests” concepts an easy way is leading to “common responsibilities” and “common concerns of humanity”.<sup>55</sup> Therefore, a normative framework for cyberspace is needed. Already in 2006 Segura-Serrano pleaded for the creation of a “centralized, democratically structured international regime [...] in order to achieve a legitimate representation” in the process of managing the common interests (as system of common management).<sup>56</sup>

As Kettemann points out, the general concepts (and principles) of international law can offer substantial protection of cyberspace even if some of them have not reached the status of customs.<sup>57</sup> Standards such as the requirement of prevention and due diligence, the no harm objective and the principle of good faith go along with the duty of co-operation as progressive emanation of international law. Indeed, political philosophy is

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<sup>48</sup> See also KETTEMANN, 2014, pp. 167 et seq.

<sup>49</sup> UNESCO, Report of the Experts’ Meeting on Cyberspace Law, 29/30 September 1998, <http://unesdoc.unesco.org/images/0011/001163/116300e.pdf>, para. 9.

<sup>50</sup> KETTEMANN, 2020, p. 33.

<sup>51</sup> DICKENSEN, 2017, pp. 135 et seq.

<sup>52</sup> FRANCK, 1992, p. 46.

<sup>53</sup> KETTEMANN, 2020, p. 34.

<sup>54</sup> FRIEDMANN, 1974.

<sup>55</sup> See also BENEDEK/DE FEYTER/KETTEMANN/VOIGTDE, 2014, p. 10.

<sup>56</sup> SEGURA-SERRANO, 2006, pp. 257/8.

<sup>57</sup> KETTEMANN, 2020, p. 128.

increasingly focusing on how a State should treat its own citizens by developing universal moral values as well as principles of civil and political justice.<sup>58</sup>

Taking into account the globalization of (inter-)governmental relations and governance in the attempt of addressing universal values, political theory refers to the notion of “cosmopolitanism”, embracing three elements defined by Pogge as follows:<sup>59</sup> (i) ‘Individualism’: The ultimate units of concern are human beings or persons, rather than ethnic, cultural, or religious communities, nations or States, being units of concern only indirectly, in virtue of their individual members or citizens. (ii) ‘Universality’: The status of an alternate unit of concern is attached to every person being equal, not merely to some subjects of persons, such as men, whites, etc. (iii) ‘Generality’: Persons are ultimate units of concern for everyone, not only for some, such as compatriots or fellow religionists.<sup>60</sup>

Consequently, guiding principles for humanity do have a global nature, even if influenced by smaller entities. In particular, the values that motivate democratic and effective governance at a domestic level can also motivate some form of democratic and effective global governance.<sup>61</sup> Democratic iterations will make interconnectedness and interdependence deeper and wider; this development does not undermine democracy but shows the emergence of new political configurations.<sup>62</sup> Limiting discretion in the exercise of State power can contribute to better cross-border understandings.<sup>63</sup> Therefore, the traditional understanding of political structures as command by a specific body which allocates to the law-makers or rule-makers the incentive of inducing people to execute certain actions in the sense that people think about what to choose and what to do should be replaced by a more inclusive approach, namely the co-operation concept.<sup>64</sup>

## 5. Outlook

The regulation and governance of cyberspace (incl. the Internet) as well as the subsequent cosmopolitanism of its normative structures is an issue of global common concern. The protection of cyberspace integrity is necessary for safeguarding its functioning in the interest of the States and civil society. Due to the lack of multilateral treaties realizing an appropriate legal framework, globally acceptable normative standards need to be implemented.

Following the well-known concept of shared spaces, a broadly understood duty of co-operation among States could strengthen the stability and resilience of the available policy concepts and infrastructures. In addition, mutual co-operative efforts in solving occurring problems and in developing new cross-border understandings help to transform the present situation into a better and improved environment guaranteeing appropriate cybergovernance policies.

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<sup>58</sup> CANEY, 2006, p. 1.

<sup>59</sup> POGGE, 1994, pp. 89/90.

<sup>60</sup> See also WEBER, 2015, p. 780.

<sup>61</sup> CANEY, 2006, p. 266.

<sup>62</sup> BENHABIB, 2006, p. 74.

<sup>63</sup> See also FUKUYAMA, 2004, pp. 98/99.

<sup>64</sup> WEBER, 2015, p. 780.



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