Multistakeholder approach and human rights in Internet Governance

Andrey A. Shcherbovich
Lecturer, Department of the Constitutional and Administrative Law
National Research University Higher School of Economics
Address: 20, Myasnitskaya Street, Moscow, 101000, Russian Federation
E-mail: ashcherbovich@hse.ru

Abstract

The decision-making system in international organizations is still very conservative. The composition of international forums that can generate significant international instruments has not changed for centuries. Only diplomats and representatives of international organizations whose credentials have been confirmed in a certain way are admitted to international decision-making. The Internet Governance Forum (IGF), under the auspices of the UN, UNESCO and the International Telecommunication Union, was established in 2006 on the basis of the World Summit on the Information Society, which is today the world's most authoritative international discussion forum on Internet governance, though its potential to achieve the best regulation of international Internet governance processes is not fully used. The basis for this regulation is the multistakeholder approach, which consists in a multiplicity of categories of the decision-making mechanism, including, in addition to the traditional representatives of states and international organizations, civil society, business, the academic and technical community, the media, and other interested stakeholders.

This research is expected to provide guidance for improving the global Internet governance arrangements, taking into account the interests of all categories of participants, as well as to establish procedural rules for decision-making based on the multistakeholder approach in Internet governance to give the Internet Governance Forum the opportunity to adopt international "soft law" instruments. An example of this is the Draft Charter of Rights and Principles on the Internet, developed by the Dynamic Coalition on Human Rights and the principles of the Internet Governance Forum – something comparable to the Universal Declaration of Human Rights with regard to the Internet. The need to bring human rights instruments to the Internet determines the direction of the development of programs and policies in global Internet governance and the role of the Internet Governance Forum in these processes.

Key words: Internet Governance, Internet Governance Forum (IGF), multistakeholderism, human rights, International Labor Organization (ILO), United Nations.

Citation: Shcherbovich A.A. (2017) Multistakeholder approach and human rights in Internet Governance. *Business Informatics*, no. 1 (39), pp. 7–13. DOI: 10.17323/1998-0663.2017.1.7.13.

Introduction

Multistakeholderism is a quite new idea of governance, but it has roots in the history of international organizations. It is a way of regulation designed to enforce proper Internet Governance on three levels: supranational, national, and self-regulation. The Internet Governance Forum (IGF), celebrating its 10th Anniversary at the 10th Meeting of the Forum on November 2015 in the Brazilian city of João Pessoa, is a platform for expert discussions on different issues within the scope of Internet Governance.

One problem raised is modification and extension of the IGF mandate for the following five or 10-year term. However, another problem is the lack of decision-making capability of the Forum. For example, the Internet needs a system of international instruments to deal with various problems, like proper realization of human rights and the freedoms of Internet users, conflicts of jurisdic-

tions and the questionable issue of "state sovereignty" on the national segments of the Internet or the Internet as a whole.

1. The IGF Mandate and the issue of its extension since 2016

The current Mandate of the IGF, extended once after a five-year term in 2010, was formulated in the Tunis agenda. The mandate of the IGF is set out in paragraphs 72 to 80 of the Tunis Agenda for the Information Society (the "Tunis Agenda"):

"We ask the UN Secretary General, in an open and inclusive process, to convene, by the second quarter of 2006, a meeting of the new forum for multistakeholder policy dialogue called the Internet Governance Forum (IGF). The mandate of the Forum is to:

✦ discuss public policy issues related to key elements of Internet governance in order to foster the sustainability, robustness, security, stability and development of the Internet;

✦ facilitate discourse between bodies dealing with different crosscutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body;

✦ interface with appropriate inter-governmental organizations and other institutions on matters under their purview;

✦ facilitate the exchange of information and best practices, and in this regard make full use of the expertise of the academic, scientific and technical communities;

✦ advise all stakeholders in proposing ways and means to accelerate the availability and affordability of the Internet in the developing world;

✦ strengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries;

✦ identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations;

✦ contribute to capacity building for Internet governance in developing countries, drawing fully on local sources of knowledge and expertise;

✦ promote and assess, on an on-going basis, the embodiment of WSIS principles in Internet governance processes;

✦ discuss, inter alia, issues relating to critical Internet resources;

✦ help to find solutions to the issues arising from the use and misuse of the Internet, of particular concern to everyday users;

✦ publish its proceedings" [1].

The United Nations General Assembly endorsed the Tunis Agenda in its resolution 60/252. The initial mandate of IGF was for five years, from 2006 to 2010. Recognizing the importance of the Forum in fostering the sustainability, robustness, security, stability and development of the Internet, as well as its role in building partnerships among different stakeholders, the United Nations General Assembly requested the Secretary General to examine the desirability of the continuation of the Forum.

Because of the five-year review, the mandate of the Forum was renewed by the General Assembly in its resolution 65/141 in 2010 for a further five years, under the patronage of the Secretary General from 2011 to 2015.

As for next term, the continuation for the IGF mandate will be reviewed by the General Assembly after the 2015 Meeting in Brazil. As stated in the UN General Assembly Resolution 69/204 "Information and communications technologies for development" adopted on 19 December 2014, the General Assembly "welcomes with appreciation the offer made by Mexico to host the meeting of the Internet Governance Forum in 2016, and recommends that the extension of the mandate of the Forum be considered in the context of the overall review in 2015" [2].

Some civil society activists of the IGF community asked for extension of the IGF. They remarked that the revolving five-year term is a barrier to long range planning and investment. Many voices have called for the strengthening of the IGF, but a longer planning horizon is necessary in such a complex, multistakeholder environment. Some initiatives to strengthen the IGF are already taking place. To address the need for sustainable funding, the Internet Governance Forum Support Association was formed at IGF 2014. The goal of this nonprofit is to promote sustainable funding for the IGF.

In order to allow the IGF to reach its full potential, the Internet Governance Forum Support Association recommends an extension of the IGF mandate, which is open-ended, without term limitation. This would ensure the stability of the IGF and support long-range planning for projects that are more comprehensive and to fund initiatives. If this were impossible under given current UN rules and regulations, the Association would recommend a stable ten-year extension, to enable longer-range commitments and financial planning.

2. What is the multistakeholderism?

Multistakeholderism is a major feature of the Internet Governance Forum. The multistakeholder approach facilitates wide participation in decision-making in the international diplomacy of different groups of actors beside governments and international intergovernmental organizations which have been traditionally involved in decision-making. Since the first efforts of governing the world order using the capabilities of multilateral diplomacy, international conferences and organizations, only representatives of governments were able to participate in important international meetings.

J. Kurbalija [3] presents the "variable geometry" approach, which states that Internet governance requires the involvement of a variety of stakeholders who differ in many aspects, including international legal force, interest in particular Internet governance issues and available expertise. Such variety may be accommodated by using the variable geometry approach implied in Article 49 of the WSIS Declaration, which specifies the following roles for the main stakeholders:

✧ states – "policy authority for Internet-related public policy issues" (including international aspects);

✧ the private sector – "development of the Internet, both in the technical and economic fields";

✧ civil society – "important role on Internet matters, especially at the community level";

✧ intergovernmental organizations – "the coordination of Internet-related public policy issues";

✧ international organizations – "development of Internet-related technical standards and relevant policies" [3].

K. Gurumurthy [4] states that the "multistakeholder" format emerged through WSIS as an innovation in global negotiations, going beyond the approach of other UN summits and older forms of consensus-building and comprising practical modalities of participation, including speaking slots in working groups for non-government stakeholders not available in previous UN meetings. The WSIS Tunis agenda urged the "full involvement" 10 of the private sector, civil society and international organizations, in addition to governments, in the "international management" of the internet, asserting the need for an innovative approach to its governance embedded within the fundamental principle of multistakeholderism. This co-option by "private interests" in the WSIS itself was a reflection of the growing role of non-state actors in the UN system.

The significant influence of non-state actors in internet governance also is attributable to the particular origins of new technologies in the scientific and academic communities. Freedom from state control is purported to be an indispensable cause of ICT innovations and, hence, a private role is perceived as vital for the internet's stability and growth. Within this tradition of participation, the IGF has been perceived as a pioneering experiment, paving the way to reconcile political interests through dialogue. Pivoted on the multistakeholder principle, the IGF brings together actors – predominantly seen in their identities as governments, businesses, and civil society organizations – to deliberate on specific policy themes, i.e. access, openness, diversity, security, critical internet resources and emerging issues. A multistakeholder advisory group (MAG) also guides the IGF processes [4].

J. Kulesza [5] believes that the principle of multistakeholderism means the equal involvement of all groups participating in the Internet's evolution: governments (acting on their own behalf or represented through intergovernmental organizations), civil society (representing the users) and the business sector (on behalf of not only telecommunications, but also every other market segment). This principle gives internet governance a unique character in the international relations field, one that directly determines any corresponding legal regulation. For the first time, it is not only the national authorities that need to find a working international consensus for their joint cooperation – they need to seek compromise with 'the governed' (civil society and the business sector), who usually play a subordinate role in national legal affairs. Since the Internet is a network of peers, it is only through their common consensus that the network may work perfectly [5].

There are three levels on which Internet Governance: supranational, national, and community level or self-regulation. Those three levels could not be self-sufficient, and they should be interconnected in a special way in order to make relevant Internet Governance, in order to make a model of IG policy in the realization of human rights.

Therefore, each level of Internet Governance has its positive and negative effect. None can be self-sufficient. The supranational level is like a multistakeholder approach of the IGF and other forums and open discussion spaces provided by the United Nations, by the regional Internet Governance Forums and other organizations. It is also a participatory approach, whereby everyone can participate in the discussion, and everyone has stock for decision-making. It is also an open-minded and complete scientific analysis of the problems of the Internet Governance, and the Internet Governance

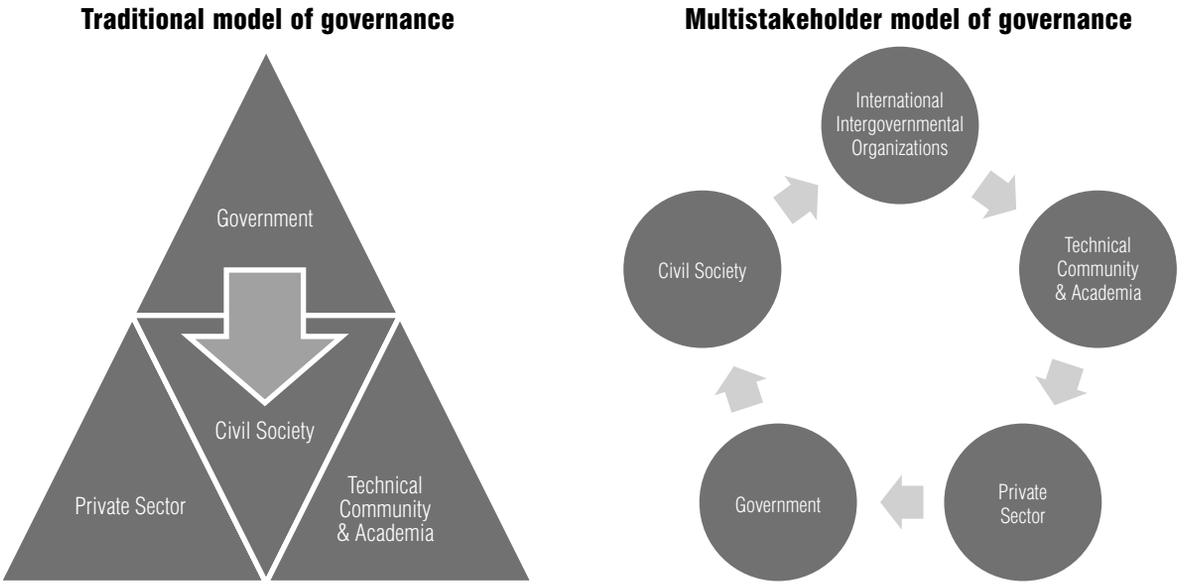

Fig. 1. Comparison of the 'traditional' and multistakeholder governance models

itself better reflects on the international level the supranational nature of the Internet itself. By the way, this supranational level on its own could have negative aspects, because it is only a discussion space which has no official decision-making power to make international treaties with mandatory force. Also, not all the national jurisdictions perceive their jurisdiction in the same way, so this recommendation could be recognized in different ways in different countries. In addition, most of the decisions and proposals made by such a discussion space are on the basis that has just an ethical or non-legal nature.

Some scholars question the potential of such governance strategies. They argue that multistakeholder approaches face a substantial number of challenges, including inadequate participation among all actors due to time constraints or conflicts of interest, difficulties in achieving consensus on key decisions, power and capability imbalances across stakeholder groups, and a lack of broader social and political legitimacy. One recent critique concludes that multistakeholder groups may be used 'as a means of promoting dialogue and building consensus, not as the locus of policy implementation and oversight'.

Counter-perspectives suggest that in several cases multistakeholder engagement has actually proved to be a more effective strategy than traditional legislative measures, resulting in enhanced standards of corporate conduct, new certification procedures, and new monitoring mechanisms, as well as in greater public awareness of corporate activities and influence. These taken together have changed the landscape and discourse concerning the roles and responsibilities of the private sector in an increasingly global economy [6].

J. Malcolm questioned at the Workshop "Human rights on the Internet: legal frameworks and technological implications", organized by the National Research University Higher School of Economics on IGF 2012 in Baku, how we regulate the Internet in a way that respects human rights if we cannot rely on governments, corporations or civil society to do so? The best answer we have is that we should do so by combining the strengths and weaknesses of all those stakeholders in a multistakeholder policy development process intended to explain common principles or guidelines upon which governments, the private sector and civil society can agree as a basis for their respective actions: passing legislation, or concluding treaties, moderating online services containing user-generated content, and share norms of online behavior [7].

The Internet Governance Forum can be a good place to start developing global policies for human rights online, particularly in areas, where there are no other global forums that have responsibility for particular issues, such as, for example, privacy and cloud services. However, the IGF, as it is currently constituted, is not quite up to the task. Its mandate calls on it to develop recommendations on emerging issues that can be transmitted to decision-makers through appropriate high-level interfaces, but it has not yet developed the capability to do that. In addition, the agenda, furthermore, calls for a parallel policy to enhance co-operation on Internet policies involving all stakeholders in their respective

roles and led by governments. So we have some more work to do to improve the processes at the global level, and we also have to make sure that similar forums exist at the regional and national levels too. In this context, it was good to hear at this Internet Governance Forum that there will be another attempt to convene a Working Group on enhanced co-operation under the auspices of the Commission on Science & Technology for Development. The ultimate outcome that we should be aiming for is to ensure that we have the means to address at all levels, supranational, national and local, the means to work towards a multistakeholder consensus on the appropriate principles to be applied by all stakeholders in their respective roles that will address online policy problems, while upholding human rights [7].

3. Procedural issues and the ILO case

Usually UN specialized agencies, like all international intergovernmental organizations, with some exceptions, have a similar structure, consisting of at least three elements: plenary bodies, executive bodies and secretariats. The same applies to all intergovernmental conferences with decision-making capacity.

The plenary body (the Assembly, the General Conference, etc.) is composed of delegates from all member states of the organization.

Executive functions are performed by the Board – a body more limited in composition.

There is also a specialized agency and the Secretariat (the Secretariat itself or the International Bureau) – the body responsible for current production in the organization, preparation of documents, as well as performing the depositary functions on concluded treaties. The highest executive officer, usually called the Secretary General, heads the Secretariat.

In a number of institutions there are subsidiary bodies designed to ensure that they function in a number of specific issues. The composition of these bodies is not typical and varies from institution to institution.

The order of the plenary, the executive and the subsidiary bodies comes under the rules of procedure – an internal document which may have different names depending on the organization, but commonly it is the rules of procedure.

The rules of procedure usually govern matters such as the procedure for regular and special sessions, adoption of the agenda, check on the credentials of delegates, the rights and responsibilities of delegates as well as officials of the body. The rules of procedure also deal with the minutes-keeping of meetings, official and working languages; the procedure of voting and elections, as well as the order of participation of members and observers, as well as procedures for making amendments and additions to the rules of procedure.

This structure comprising bodies and rules of procedure is crucial to deliver decision-making capability to the particular international organization or conference. We should mention that the IGF has almost everything to enjoy that capability. The IGF has its permanent Secretariat based in Geneva; it has an 'executive' body, the Multistakeholder Advisory Group performing executive functions for the Forum. The IGF itself could act as the plenary body. Each meeting of the IGF constitutes real plenaries on different main topics: critical internet resources, emerging issues, etc.

As we can see from the current Mandate, the IGF was created for policy dialogue but has no decision-making capacity. However, the history provides an example of a body which is multistakeholder by nature, but has official decision-making capacity. This is the International Labor Organization established in 1919.

International Labor Conference, plenary body of the International Labor Organization (ILO) is in some ways unique [8]. It includes all member states of the ILO. Each member of the ILO sends four representatives, two of whom are representatives of the Government, and the other two must be delegates representing respectively the employers and employees of each of the members of the ILO. Each government approves all delegates, but two so-called non-governmental delegates should be chosen by agreement with the trade union of employers and workers. This structure reflects the "tripartite" nature of the ILO and in fact, it is multistakeholder by nature.

The Conference of the ILO itself decides which delegates should have the right to vote, that is the "voting section". Excluded delegates have the right to appeal to a special committee consisting of independent members appointed by the Governing Body. The Commission may add to the "voting section" no more than two delegates, and its decision is final and not subject to discussion or appeal.

The major problem is the issuance and presentation of credentials. Common rules applied to this issue are expected to lead to considerable administrative savings, both for States and for the Organization, through three related but independent proposals for the modification relating to the present routine requirement for the submission and examination of credentials. These proposals would:

(a) Require the presentation of credentials only for certain treaty-making conferences, while eliminating this requirement for other types of conferences; the practice of requiring credentials, which originated at a time when long-range communications were such that it was not always possible to check whether a person appearing at an intergovernmental conference actually represented the authority that allegedly dispatched him, no longer has much relevance in an era of instant worldwide communications;

(b) Eliminate the need to establish a Credentials Committee, by transferring the most critical function of such a body – the examination of challenged credentials – to the General Committee while abolishing the function of routinely examining unchallenged credentials;

(c) Abolish the requirement for the automatic examination of all credentials, which frequently introduces an unnecessarily contentious element into a non-political conference, while retaining the possibility of challenging the participation of any delegation.

The unique tripartite composition of the ILO International Labor Conference causes special problems relating to approval of credentials. The claim has frequently been raised that certain Worker or Employer delegations are not representative. At the 2004 session, the International Labor Conference broadened the mandate of the credentials committee, on an interim basis, with a view to ensuring that delegations were independent and representative [9]. The Internet Governance Forum has no voting rights, but in case of extension of the mandate of the Forum, this issue seems to be timely.

Conclusion

In conclusion, we need to stress three points for consideration.

First, the multistakeholder approach reflects the same essence of the Internet as a network of networks. The three levels of Internet Governance and their interconnection demonstrate that the Internet is supranational. This principally differs from the traditional model of governance, where all stakeholders acting on the Internet are subordinated to national governments, as it is demonstrated on Figure 1.

Second, the ILO case shows us respective and effective decision-making of an international body under the auspices of the United Nations which is composed not only of governmental delegates. The same model could be applied to the Internet Governance Forum in case its mandate is extended in 2016. The IGF has most of features of an international organization, such as secretariat, the MAG as an executive body, and the Forum itself as quasi-plenary body.

Third, we need to have a universal instrument regulating human rights on the Internet. The brightest example is the charter of human rights and principles on the Internet drafted by the Internet Rights & Principles Coalition on the IGF. It has the potential to be the online equivalent of the Universal Declaration of Human Rights but it is not acting even as a soft-law instrument because of the absence of decision-making capability of the Forum. In addition, different national legislations and the issue of jurisdiction could prove that we are in the great need of different international instruments in the sphere of internet governance. ■

References

1. World Summit on the Information Society (2005) *Tunis agenda for the information society*, WSIS-05/TUNIS/DOC/6(Rev. 1)-E (18 November 2005).
2. United Nations (2004) *Information and communications technologies for development,* A/RES/69/204 (19 December 2014).
3. Kurbalija J. (2014) *An introduction to Internet Governance*. DiploFoundation.
4. Gurumurthy G.K. (2008) Internet Governance and development agenda. *Economic and Political Weekly*, vol. 43, no. 14, pp. 19–23.
5. Kulesza J. (2012) International Internet law. *Global Change, Peace & Security*, vol. 24, no. 3, pp. 351–364.
6. Jerbi S. (2012) Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda. *International Review of the Red Cross*, vol. 94, no. 887, pp. 1027–1046.
7. Maclolm J. (2013) Human rights on the Internet: Legal frames and technological implications. Statement on the workshop *Human rights on the Internet: Legal frames and technological implications*, issue 2 (eds. S.V. Maltseva, M.M. Komarov, A.A. Shcherbovich). Moscow: HSE, pp. 4–59.
8. Bowett D.W. (1982). *The law of international institutions*. 4th ed. London: Stevens & Sons.
9. Sabel R. (2006) *Procedure at international conferences. A study of the rules of procedure at the UN and at inter-governmental conferences*. 2nd ed. Cambridge: Cambridge University Press.

Сущность и процессуальные аспекты мультистейкхолдер-подхода в управлении Интернетом

А.А. Щербович
кандидат юридических наук
преподаватель кафедры конституционного и административного права
Национальный исследовательский университет «Высшая школа экономики»
Адрес: 101000, г. Москва, ул. Мясницкая, д. 20
E-mail: ashcherbovich@hse.ru

Аннотация

Система принятия решений в международных организациях по-прежнему весьма консервативна. Состав международных форумов, которые могут создавать значимые международные документы, не меняется на протяжении веков. Только дипломаты и представители международных организаций могут принимать юридически обязывающие решения на международном уровне. Форум по управлению Интернетом (Internet Governance Forum, IGF), созданный в 2006 году решением Всемирного саммита по информационному обществу, который является одним из наиболее авторитетных международных форумов по данному вопросу, не полностью использует свой потенциал для регулирования международных процессов управления Интернетом. Основой этого регулирования является мультистейкхолдер-подход, который состоит в множественности субъектов принятия решений, который включает в себя, в дополнение к традиционным категориям участников в лице государств и международных организаций, представителей гражданского общества, бизнеса, академического и технического сообществ, средств массовой информации и других заинтересованных сторон.

Данное исследование, как ожидается, может внести свой вклад в усовершенствование глобальных механизмов управления Интернетом, принимая во внимание интересы всех категорий участников, а также выработку правил процедуры принятия решений на основе мультистейкхолдер-подхода в управлении Интернетом, что позволило бы Форуму по управлению Интернетом принимать международные акты «мягкого права». Примером таких актов является проект Хартии прав и принципов в Интернете, разработанный Динамической коалицией IGF по правам человека и принципам в Интернете. Эта хартия – своего рода аналог Всеобщей декларации прав человека в отношении Интернета. Необходимость принятия документов по правам человека в Интернете определяет направление развития программ и политики глобального управления Интернетом и роли Форума по управлению Интернетом в этих процессах.

Ключевые слова: управление Интернетом, Форум по управлению Интернетом, мультистейкхолдеризм, права человека, Международная организация труда (МОТ), Организации Объединенных Наций.

Цитирование: Shcherbovich A.A. Multistakeholder approach and human rights in Internet Governance // Business Informatics. 2017. No. 1 (39). P. 7–13. DOI: 10.17323/1998-0663.2017.1.7.13.

Литература

1. Tunis agenda for the information society. WSIS-05/TUNIS/DOC/6(Rev. 1)-E (18 November 2005). World Summit on the Information Society, 2005.
2. Information and communications technologies for development. A/RES/69/204 (19 December 2014). United Nations, 2004.
3. Kurbalija J. An introduction to Internet Governance. DiploFoundation, 2014.
4. Gurumurthy G.K. Internet Governance and development agenda // Economic and Political Weekly. 2008. Vol. 43. No. 14. P. 19–23.
5. Kulesza J. International Internet law // Global Change, Peace & Security. 2012. Vol. 24. No. 3. P. 351–364.
6. 6. Jerbi S. Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda // International Review of the Red Cross. 2012. Vol. 94. No. 887. P. 1027–1046.
7. Maclolm J. Human rights on the Internet: Legal frames and technological implications (statement on the workshop) // Human rights on the Internet: Legal frames and technological implications. Issue 2 / Ed. by S.V. Maltseva, M.M. Komarov, A.A. Shcherbovich. Moscow: HSE, 2013. P. 4–59.
8. Bowett D.W. The law of international institutions. 4th ed. London: Stevens & Sons, 1982.
9. Sabel R. Procedure at international conferences. A study of the rules of procedure at the UN and at inter-governmental conferences. 2nd ed. Cambridge: Cambridge University Press, 2006.